

LABOR CONTRACT REJECTION IN BANKRUPTCY: THE SUPREME COURT'S ATTACK ON LABOR IN *NLRB v. BILDISCO*[†]

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Chapter 11 of the Bankruptcy Code (the "Code") is the major statutory vehicle through which corporate debtors may be able to reorganize and, thus, avoid liquidation.¹ Corporate debtors have increasingly resorted to the Code for this purpose.² One major

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¹ 11 U.S.C. §§ 1101-1174 (1976 & Supp. IV 1981). In sum, Chapter 11 of the Code provides for debtor reorganization and, ideally, ultimate reemergence as a viable business entity. In contrast, Chapter 7 of the Code provides for "straight" bankruptcy and liquidation of assets. In Chapter 7 proceedings, from the debtor's perspective, it is largely an academic question whether labor contract rejection is sought or judicially approved. The debtor will not be revitalized in any event. However, in the Chapter 11 reorganization, rejection of the labor contract is often the pivotal determinant as to whether the business will be successfully reorganized. Therefore virtually all of the significant cases regarding labor contract rejection occur in the context of Chapter 11 reorganization rather than in Chapter 7 liquidation.

² See *supra* note 1. This article deals only with rejection of labor contracts negotiated between unions and employers in private sector labor relations. Further, this article will deal only with the labor contract rejection initiatives of the employer. Labor unions may also file petitions in bankruptcy. *Highway & City, Freight Drivers, Dockmen & Helpers, Local Union No. 600 v. Gordon Transp. Inc.*, 576 F.2d 1285, 1287 (8th Cir. 1978). However, the debtor union's interests are markedly different from those of the debtor employer. The union wants to preserve future dues payments. Labor contract rejection would be anathema; on the contrary, the debtor union would want to preserve the collective bargaining agreement: "... the union's strength lies in its ability to continue serving its members, and maintaining the contract assures employment stability." Note, *Bankruptcy — A Labor Union is a Person who May File a Petition for Voluntary Bankruptcy Under Section 4(A) of the Bankruptcy Act*, 12 CREIGHTON L. REV. 847, 857 (1979) ("The congressional committee reports which preceded the Bankruptcy Reform Act of 1978 reveal that both the House and Senate interpreted the term unincorporated association as specifically intended to include a labor union within the purview of the Act."); Note, *Labor Union Bankruptcy*, 1978 WASH. U.L.Q. 341, 362.

For discussion of rejection of individual employment contracts beyond the unionized employment environment, see Countryman, *Executory Contracts in Bankruptcy Part II*, 58 MINN. L. REV. 479, 484-92 (1974) (pre-1978 Code) [hereinafter cited as Countryman, *Part II*]. For discussion of rejection of public sector labor contracts, see Note, *Executory Labor Contracts and Municipal Bankruptcy*, 85 YALE L.J. 957 (1976).

Rejection of public sector labor contracts has suddenly become especially notorious and controversial. San Jose, one of the largest of California's 1,042 public school districts, filed a petition for bankruptcy on June 30, 1983, making it the first public school district to file such a petition in California since 1943. *A California School District Goes Broke*, NEWSWEEK, July 11, 1983, at 26, col. 3. The district's decision to file for bankruptcy was made in the face of a \$14 million deficit for the 1982-83 year and an expected \$12 million deficit for the 1983-84 year, in addition to an order of a federal mediator to pay the school district's employees over \$3.5 million in back salaries. *Id.*; see also

element in many reorganizations is the rejection of the debtor's current collective bargaining agreements with its employees.³ After satisfying judicial requirements,⁴ section 365(a)⁵ of the Code permits bankruptcy courts to approve rejection of labor contracts by the debtor-employer under certain circumstances. By sanctioning labor contract rejection, the Bankruptcy Code is in fundamental conflict with the federal labor policies enunciated in the National Labor Relations Act⁶ ("NLRA") and in case law interpreting that statute.⁷

Federal labor law accords a near-sacrosanct status to the collective bargaining agreement.⁸ The labor statutes provide complex rules with which the parties to the labor contract must strictly comply prior to any possible contract termination or modification.⁹

Chase, *Seventy of California Schools' Budget Crises Seen in San Jose District Bankruptcy Filing*, Wall St. J., July 14, 1983, at 29, col. 2. In 1981, after an 11-day teacher strike, the San Jose School Board agreed to a 22 percent pay raise over 3 years, despite the fact that the district was already suffering from financial difficulties resulting, many claim, from Proposition 13 tax cuts. *Id.* at cols. 1-2; *San Jose Schools Can Cut Pay U.S. Bankruptcy Court Rules*, N.Y. Times, Aug. 30, 1983, at B8, col. 5 [hereinafter cited as *Schools Can Cut Pay*]. When promised state funding failed to come through, the San Jose School Board closed 14 schools, nullifying the newly negotiated contract and laying off over 500 teachers. *A California School District Goes Broke*, *supra* at 26, col. 3. Federal Bankruptcy Judge Seymour Abrahams, who delivered the decision in the San Jose case, ruled that the district's action in abrogating the teachers' contracts was proper, and also ruled that the teacher's wages be rolled back to 1981-82 levels. *Schools Can Cut Pay*, *supra* at B8, col. 5.

The fiscal problems currently experienced by the San Jose school system are neither unique to that district or to the State of California. *A California District Goes Broke*, *supra* at 26, col. 3. The 100-school Oakland district has recently laid off 232 teachers, dismissed several of its nurses and counselors, and cancelled a number of programs and courses. *Id.* These cutbacks have resulted in a \$300,000 surplus in the schools' budget but, according to Oakland Superintendent David Bowick, the position of the district remains very precarious. "We expect a \$12.8 million deficit, and unless the state comes through with the funds we need, we'll be filing (for bankruptcy) along with San Jose." Chase, *supra*, at 29, col. 2. Similar financial problems are reportedly being experienced in school districts throughout the country, with Houston facing a \$40 million deficit for the 1983-84 school year and Boston needing \$5.2 million to avoid teacher layoffs. *A California School District Goes Broke*, *supra* at 26, col. 3.

³ NLRB v. Bildisco and Bildisco, 104 S. Ct. 1188 (1984) [hereinafter cited as NLRB v. Bildisco].

⁴ *Id.* at 1191.

⁵ 11 U.S.C. § 365(a) provides that "the trustee, subject to the court's approval, may assume or reject any executory contract." There is no specific Code provision expressly characterizing or defining labor contracts. However, collective bargaining agreements are considered to be executory contracts and thus subject to section 365(a) of the Code. In his landmark article, Professor Countryman posited the classic definition of the executory contract: "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Countryman, *Executory Contracts in Bankruptcy Part I*, 57 MINN. L. REV. 439, 460 (1973) [hereinafter cited as Countryman, *Part I*].

⁶ 29 U.S.C. §§ 151-169 (1975).

⁷ Despite "the position of the National Labor Relations Board that there is a direct conflict between the Bankruptcy Act and the National Labor Relations Act," the court in *Kevin Steel* chose to "view the matter in less apocalyptic terms" and purported to "reconcile" the two statutes. *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*, 519 F.2d 698, 700 (2d Cir. 1975). "We do not see any irreconcilable conflict here between the Bankruptcy Act and the National Labor Relations Act." *Id.* at 706.

⁸ See *infra* notes 42-44.

⁹ Section 8(d)(1-4) of the NLRA provides, in pertinent part:

(d) . . . [W]here there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no

Specifically, the failure of either the employer¹⁰ or the union¹¹ to comply with section 8(d) of the NLRA prior to effectuation of any contract alteration is an unfair labor practice.¹² An unfair labor practice is a serious violation of federal labor law and renders the violator subject to the broad remedial authority of the National Labor Relations Board ("NLRB").¹³

This article examines current¹⁴ significant issues surrounding rejection of collective

party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any state or territorial agency established to mediate and conciliate disputes within the state or territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

... the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

¹⁰ Section 8(a) of the NLRA states in pertinent part:

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . .

(5) to refuse to bargain collectively with the representatives of his employees . . .

29 U.S.C. §§ 158(a)(1) and (5) (1982).

¹¹ Section 8(b) enumerates analogous union unfair labor practices:

(b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce employees in the exercise of the rights guaranteed in section 157. . .

(3) to refuse to bargain collectively with an employer . . .

29 U.S.C. §§ 158(b)(1) and (3) (1982).

¹² See *Allied Chemical Workers Union v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159, 185-86 (1971); *NLRB v. Scam Instrument Corp.*, 394 F.2d 884, 887 (7th Cir. 1971), *cert. denied*, 393 U.S. 980 (1968); *C&S Industries, Inc. and U.E. Local 1114*, 158 N.L.R.B. 454, 456-58 (1966).

With the consent of all signatories, the contract can be lawfully modified in mid-term. *Dunham-Bush Inc.*, 265 N.L.R.B. 175 (1982).

¹³ Section 10(c) of the NLRA sets forth the broad remedial authority of the Board, including the ability to issue cease and desist orders and to take other "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

29 U.S.C. § 160(c) (1982).

¹⁴ The recent popular literature attests to the importance and timeliness of the controversy surrounding labor contract rejection in bankruptcy. In the year ending September 30, 1983, 20,837 Chapter 11 petitions were filed. Browning, *Using Bankruptcy to Reject Labor Contracts*, 70 A.B.A.J. 60 (1984) [hereinafter cited as Browning, *Using Bankruptcy*]. The increased tendency of some solvent employers to file petitions for reorganization in the bankruptcy courts so they can repudiate existing labor contracts has led many commentators to question whether such use of the Bankruptcy Code is proper and consistent with the intent of the Congress. See, e.g., Lewin, *Bankruptcy: A Plea Becomes a*

bargaining agreements¹⁵ under the provisions of the Bankruptcy Code.¹⁶ There are major

Strategy, N.Y. Times, Nov. 6, 1983, at E9, col. 1 (quoting New York University Law Professor Lawrence King: "I would hope that the kinds of cases we are seeing now would not encourage lawyers and business to use the bankruptcy law in ways for which it was not intended"); *Chapter 11: No Way to Bargain*, Bus. Wk., Oct. 10, 1983, at 132, col. 1 ("If bankruptcy can be used solely as an escape hatch from high labor costs, where does that leave the extensive body of federal labor law"); Greenberger, *Firms Using Bankruptcy to Fight Labor*, Wall St. J., March 30, 1983, at 29, col. 2 (questioning propriety of financially troubled companies using bankruptcy, or threat of it, to abrogate costly labor contracts).

The airline industry is one of the hardest hit by the recent surge of bankruptcy filings. See *Airlines in Turmoil: Labor Woes, Price Wars, and Bankruptcy Threats Rock the Industry*, Bus. Wk., Oct. 10, 1983, at 3, col. 2 (air carrier unions file motion alleging that management's bankruptcy filing was for an "improper purpose," to abrogate existing contractual obligations, not to improve the debtors' ability to pay existing debts"); *Continental Air Lays Off 1,500, 15% of Employees*, Wall St. J., Jan. 26, 1982, at 8, col. 1 (outlining Continental's management plan to cut expenses by laying off employees and negotiating concessions). "If nothing else Continental's bankruptcy petition highlights the loss of power that the restructuring of the industry means for airline unions." *Airlines in Turmoil*, *supra*, at 102, col. 2. On September 24, 1983, Continental, the nation's eighth largest air carrier filed in Chapter 11, immediately rejected all labor contracts, and temporarily laid off all 12,000 employees. Two days later, it recalled 4,200 employees at less than half their former pay. Frank Borman, Chairman of the Board of Eastern Airlines, threatened that unless employees agreed to a 15% pay cut, Eastern "would either go out of business entirely or have to reorganize under the bankruptcy laws — as Continental is doing." *Id.* at 101, col. 2.

Other industries affected by the recent increase in bankruptcy filings include the asbestos manufacturing industry, with three of its largest manufacturers currently involved in Chapter 11 proceedings. See Lewin, *Bankruptcy as Shield in Job Claims*, N.Y. Times, Apr. 24, 1983, at E10, col. 1; Winter, *Bankruptcies Create Asbestos Case Turmoil*, 68 A.B.A.J. 1361 (1982); *Manville May Drive Congress to Action*, Bus. Wk., Sept. 13, 1982, at 34, col. 3. See also Lewin, *Judge Suggests a Fund for Manville Claimants*, N.Y. Times, Oct. 26, 1983, at D1, col. 1 (federal district judge proposed that a sinking fund be created to pay the future claims against Manville by those persons already exposed to asbestos but who have not yet shown signs of any related illness); Lewin, *Lawyer Aiding Manville Thrives on Bankruptcies*, N.Y. Times, Aug. 30, 1982, at D1, col. 4 (noting the high degree of financial success experienced by the bankruptcy attorney handling the Chapter 11 petition of the Manville Corporation, in addition to other large companies).

Also faced with serious financial difficulties, Wilson Foods Corporation, the nation's largest pork manufacturer and fifth largest meat packer, filed for protection under Chapter 11 of the federal bankruptcy law, repudiating its labor contracts covering 6,000 of its 9,000 employees and reducing wages by 40%-50%. See Sorenson, *Chapter 11 by Wilson Foods Raids Workers' Lives, Tests Law*, Wall St. J., May 23, 1983, § 2, at 29, col. 10. At the time of filing Wilson had an estimated net worth of at least \$67 million. *Id.* Three days later, Wilson negotiated a new \$80 million line of credit with Citibank. *Id.* at 67.

Employees of commercial industries are not the only ones to have had their existing contracts repudiated by bankrupt management. Teachers and other employees of the San Jose School District in California are currently challenging the bankruptcy petition filed by that district in June of 1983. See *supra* note 2.

Faced with a choice between making concessions in existing agreements or having their contracts completely nullified, many labor unions have agreed to pay cuts and other compromises when their employer has threatened bankruptcy. See Greenhouse, *The Corporate Assault on Wages*, N.Y. Times, Oct. 9, 1983, § 3, at 1, col. 2. According to the Greenhouse article, "[b]y threatening plant closings and insolvency and by using new weapons such as going into bankruptcy court to reorganize, management has succeeded in driving union wage increases to their lowest level in years." *Id.*

¹⁵ Throughout both this article and the pertinent cases, the terms labor agreement, labor contract, and collective bargaining agreement will be used interchangeably. They are functionally synonymous.

¹⁶ The Bankruptcy Reform Act of 1978 (the Code) applies to cases filed on and after October 1, 1979. The new Code is found at 11 U.S.C. §§ 101-1330 (1979). The Code supplants the former

differences between the respective pertinent provisions of the Bankruptcy Code and the NLRA. Whether, and to what extent, if any, these fundamental tensions can be reconciled and harmonized will be an important policy concern throughout this article.

This article will begin by presenting an intensive analysis of the bankruptcy and labor statutes. The Bankruptcy Code will be juxtaposed to the special status historically accorded to collective bargaining agreements by federal labor policies, and bolstered by labor law case construction. The article attempts to discern the intent of Congress regarding which statute should be given priority in bankruptcy proceedings. Next, the article focuses on the various standards governing judicially approved rejection of labor contracts under the Bankruptcy Code. The federal circuit courts of appeals that have considered the issue have articulated different tests. Lower federal courts have applied these differing appellate court standards in myriad fashion, engendering further confusion. Particular attention will be devoted to the recent United States Supreme Court decision *NLRB v. Bildisco*,¹⁷ which clarified the standards to be employed by the courts in deciding whether to authorize debtors to reject labor contracts. The article then examines some important ancillary issues which are related to labor contract rejection in bankruptcy, such as the continuing duty to bargain, the union's right to strike, and other jurisdictional conflicts between the bankruptcy courts and the NLRB. Finally, the article submits that these crucial developments are the predictable and ineluctable consequences of an important related line of Supreme Court decisions¹⁸ largely exempting managerial prerogatives from the constraints of federal labor law. Judicial expedition of labor contract rejection in bankruptcy is but the most recent manifestation of a contemporary jurisprudence diametrically opposed to historic federal labor law policies. Ominously, this latest exaltation of entrepreneurial expediency over employees' rights will be purchased at the ultimate expense of any hope of maintaining even rough equilibrium between labor and management.

I. FUNDAMENTAL POLICY TENSIONS BETWEEN FEDERAL LABOR LAW AND BANKRUPTCY LAW

A. *The National Labor Relations Act and the Railway Labor Act*

The National Labor Relations Act¹⁹ is the most encompassing federal labor law statute. The NLRA best exemplifies the salient legislative concerns underlying federal labor policies. Federal labor legislation was originally necessitated by employer domina-

Bankruptcy Act (the Act), 11 U.S.C. §§ 1-1200 (1976) (repealed 1978). While there are many similarities between the Code and the former Act, there are also important distinctions. For example, the new Code's section 365 includes an extensive list of exceptions to the trustee's ability to reject, assume, or assign executory contracts. However, most important for purposes of this article, the statutory provisions regarding the rejection of labor contracts are the same in the 1978 code (§ 365) as in the prior Bankruptcy Act (§ 313). Unless otherwise noted, references will be to the 1978 Code.

¹⁷ 104 U.S. 1188 (1984).

¹⁸ See generally *First Nat'l Maintenance, Corp. v. NLRB*, 452 U.S. 666, 674-80 (1981) (discussion of line of cases).

¹⁹ 29 U.S.C. §§ 151-169 (1982). Unless otherwise indicated, references to the NLRA include the Taft-Hartley Act amendments of 1947 as well as the original National Labor Relations Act, popularly referred to as the Wagner Act, enacted in 1935. In 1947, the NLRA was significantly amended by the Labor Management Relations Act (LMRA), also popularly referred to as the Taft-Hartley Act, 29 U.S.C. §§ 141-197 (1982). The second significant amendment to the core federal labor statute occurred in 1959, with the Landrum-Griffin amendments, the Labor Management Reporting and Disclosure Act (LMRDA). In this article, these three statutes will be generically referred to as the NLRA, unless otherwise indicated.

tion of the working environment. Congress expressly addressed the deleterious ramifications of this untenable bargaining and economic inequity in the opening paragraphs of the NLRA.²⁰ To rectify the labor relations imbalance attributable to corporate dominance, Congress recognized and protected employee rights to engage in viable collective bargaining.

The NLRA was designed to rectify this inequality of bargaining power by encouraging meaningful collective bargaining and by protecting employee free choice regarding collective action.²¹ These concerns were also stressed by the Supreme Court in upholding the constitutionality of the NLRA in *NLRB v. Jones & Laughlin Steel Corporation*.²² In that landmark case, the Court stated, "Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances."²³ Statutory encouragement and protection of the collective bargaining process

²⁰ Section 1 of the NLRA states, in pertinent part:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

29 U.S.C. § 151 (1982).

²¹ Section 1 of the NLRA expressly articulates the federal labor policy endorsing collective bargaining.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1982).

Similar policy considerations were earlier enunciated in the Norris-LaGuardia Act, which broadly prohibited federal courts from enjoining labor disputes:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protections

29 U.S.C. § 102 (1982).

²² 301 U.S. 1 (1937). Subsequent decisions likewise focus upon the importance of collective bargaining as an indispensable ingredient toward labor peace. *See also* *Brooks v. NLRB*, 348 U.S. 96, 103 (1954); *Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97, 103 (7th Cir. 1971); *NLRB v. North Ark. Elec. Corp., Inc.*, 445 F.2d 602 (8th Cir. 1971); *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 684 (2d Cir. 1952).

²³ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937).

and the labor contract, therefore, was the first step toward effecting at least some rough parity between labor and management.²⁴

Several key provisions of the NLRA specifically address these concerns. For example, section 7 of the NLRA guarantees the rights of employees to unionize, to bargain collectively, and to engage in other concerted action.²⁵ Section 8(d) of the NLRA further explicates the mutual obligation of the employer and the union to bargain collectively in good faith.²⁶ This section also requires strict adherence to a complex sequence to modify or terminate an unexpired collective bargaining agreement.²⁷ A union or employer which attempts to terminate or modify a contract without complying with section 8(d) commits an unfair labor practice in violation of the NLRA.²⁸ The debtor is subject to the federal labor laws and expressly considered a "person" within the meaning of the NLRA.²⁹

The Railway Labor Act ("RLA")³⁰ was enacted in 1926, and therefore predates the NLRA. Many of the pertinent RLA provisions served as a model for later parallel NLRA sections.³¹ RLA provisions³² regarding labor contract termination are as comprehensive

²⁴ In *NLRB v. Jones & Laughlin Steel Corp.*, the Court described how 'helpless labor was in dealing with management before enactment of the NLRA:

Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and his family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless able to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. 301 U.S. at 33.

²⁵ 29 U.S.C. § 157 (1982).

²⁶ . . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party.

29 U.S.C. § 158(d) (1982).

²⁷ See *supra* note 9.

²⁸ See *supra* notes 10 and 11.

²⁹ Section 2(1) of the NLRA specifically provides that, when used in the labor act, "the term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." 29 U.S.C. § 152 (1976).

³⁰ 45 U.S.C. §§ 151-188 (1982).

³¹ Compare RLA, 45 U.S.C. § 152 (1982) with NLRA, 29 U.S.C. §§ 151, 157 and 158 (1982).

³² Regarding contract termination or modification, section 6 of the RLA provides:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

45 U.S.C. § 156 (1982).

The Supreme Court has expressly ruled that section 2 of the RLA gives legal and binding effect

and strict as those of the NLRA.³³ The RLA pertains to collective bargaining agreements in the rail³⁴ and air industries.³⁵

The national labor policy expressed in these two statutes, therefore, strongly endorses collective bargaining and statutorily protects labor contracts from unilateral termination or modification. The procedures which must be followed to effect change or to repudiate labor agreements are comprehensively and painstakingly enumerated. In addition, these explicit statutory provisions have been strictly interpreted by courts who have addressed their scope. Beginning with *J.I. Case Co. v. NLRB*,³⁶ the Supreme Court has repeatedly stated that the collective bargaining agreement is not an ordinary commercial contract.³⁷ In *Textile Workers v. Lincoln Mills*,³⁸ the Court endorsed judicial development of a federal common law to govern labor law and litigation pertaining to enforcement of collective bargaining agreements. Section 301 of the Labor Management Relations Act had been specially designed to govern litigation brought over violations of this unique form of contract, the collective bargaining agreement.

The Supreme Court has explained that unlike the ordinary contract, the labor contract rests on collective consensus and compromise, rather than on individual, voluntary action.³⁹ As one commentator has stated, perhaps the most significant distinction is

to collective bargaining agreements within the purview of the RLA; these labor contracts can be changed only in accord with RLA's strict and comprehensive statutory scheme. *Detroit & Toledo Shore Line Ry. v. United Transp. Union*, 396 U.S. 142, 156 (1969).

³³ See *supra* note 9.

³⁴ The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier."

45 U.S.C. § 151 (1976).

³⁵ "All of the provisions of title 1 of this Act, except the provisions of section 3 thereof are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce . . ." 45 U.S.C. § 201 (1976).

The RLA thus applies to all employees of railway carriers under the jurisdiction of the Interstate Commerce Commission and all employees of air carriers. 45 U.S.C. §§ 151, 181 (1976). Per 11 U.S.C. § 103(g) (1978), § 1167 of the 1978 Bankruptcy Code applies only to railroad employees.

³⁶ 321 U.S. 332 (1944) (Court analogized collective bargaining agreement to a comprehensive trade agreement).

³⁷ *John Wiley and Sons, Inc. v. Livingston*, 376 U.S. 543, 547-50 (1964); *United States Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960).

Prior to the *Wiley* decision, commentators had thoroughly distinguished the labor contract as a peculiar species of the generic contract. The collective bargaining agreement both transcends and is quite distinct from the ordinary contract. See Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 COLUM. L. REV. 829, 832 (1948) ("There is no indication that the collective bargaining agreement originated as a contract. It borrowed the form of contract, however, and as its use spread it became more and more related to contract."); Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 BUFFALO L. REV. 1, 17-18 (1952) ("The collective agreement differs as much from the common contract as humpy dumpty from a common egg.").

³⁸ 353 U.S. 448 (1957).

³⁹ The Supreme Court has explained:

A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship, they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to

that the collective bargaining agreement concerns workers' jobs and employment status while the commercial contract deals with manufactured goods and real property.⁴⁰ The agreement is a living document that grounds the labor-management relationship, and provides the basis for an entire integrated system of industrial self-government.⁴¹ The labor contract, therefore, has achieved an exalted and arguably unique contractual status. It has been described as a generalized code to govern the whole employment relationship and as a new common law, the common law of a particular industry or of a particular plant.⁴² To abrogate contract terms unilaterally without complying with the statutory provisions of the NLRA⁴³ or RLA⁴⁴ is among the gravest of all labor law statutory violations.⁴⁵ Not only is the contract breached, but the illegal unilateral change fundamentally and perhaps irrevocably damages the entire labor-management relationship. The parties are left without a workable code of industrial governance. These rigid labor law provisions, narrowly circumscribing labor contract modification and termination, however, are inconsistent with the more fluid, malleable standards of pertinent bankruptcy law. The next section of this article will consider these bankruptcy principles.

B. Bankruptcy Statutes Regarding Contract Rejection

Bankruptcy law has a fundamentally different policy perspective than labor law. As discussed earlier, federal labor policy is primarily concerned with industrial peace through labor contracts achieved by the collective bargaining process.⁴⁶ In contrast, bankruptcy law is designed to preserve the funds of the debtor for distribution to creditors and to ensure the debtor a new start.⁴⁷

dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship . . . Rather it is between having that relationship governed by an agreed upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.

United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 580 (1960).

⁴⁰ Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements*, 51 NOTRE DAME LAW. 819, 826 (1976) [hereinafter cited as Note, *Rejection of Agreements*].

⁴¹ See, e.g., Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 COLUM. L. REV. 829, 832 (1948); Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1490-93 (1959); Cox, *Rights Under A Labor Agreement*, 69 HARV. L. REV. 601, 610-12 (1956); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1,2 (1958); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1002 (1955) ("Collective bargaining is today, as Brandeis pointed out, the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."); Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 534 (1969); Note, *Corporate Reorganizations and the Rights of Labor*, 53 HARV. L. REV. 1360, 1363-64 (1940).

⁴² United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 579 (1960).

⁴³ See *supra* note 9.

⁴⁴ See *supra* note 32.

⁴⁵ See *supra* notes 10 and 11.

⁴⁶ S. REP. NO. 573, 74th Cong., 1st Sess. 1 (1935). See *supra* note 23 and accompanying text.

⁴⁷ Comment, *Collective Bargaining and Bankruptcy*, 42 S. CAL. L. REV. 477 (1974) [hereinafter cited as Comment, *Collective Bargaining*]; see H.R. REP. NO. 595, 95th Cong., 1st Sess. 4-5 (1977) [hereinafter cited as H.R. REP. NO. 595]; REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, 93d Cong., 1st Sess. pt. 1, 71 (1973) [hereinafter cited as COMMISSION REPORT]. See also *Burlingham v. Crouse*, 228 U.S. 459, 473 (1913) (preservation of funds

The bankruptcy courts have jurisdiction over all proceedings under the Code.⁴⁸ The

for distribution to creditors and a fresh start to the debtor are the underlying goals in bankruptcy law). See generally Costa, *Bankruptcy: The Legal Whipping Boy*, 49 ST. JOHN'S L. REV. 52 (1974); Note, *Resolution of Rejected Collective Bargaining Agreement Claims in Bankruptcy: Which Forum is Appropriate?*, 48 BROOKLYN L. REV. 75 (1981).

⁴⁸ 28 U.S.C. §§ 1471 (a-b) confers original, exclusive jurisdiction on the bankruptcy court over all Title 11 cases, and original jurisdiction in all civil cases related to Title 11 matters, notwithstanding any congressional conferral of exclusive jurisdiction on any other court. This article will not directly deal with the controversy surrounding the constitutionality of the 1978 Code. The Supreme Court has held that the 1978 Code violates the command of Article III of the Constitution that the judicial power of the United States must be vested only in courts whose judges enjoy Article III life tenure and protection against salary diminution during term of office. *Northern Pipeline Construction Co. v. Marathon Pipeline Company*, 458 U.S. 50 (1982). Bankruptcy judges are not Article III judges. *Id.* at 61. "In sum, Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art. III does not apply." *Id.* at 76. For commentary on the *Marathon* case, see, e.g., Fullerton, *No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts*, 49 BROOKLYN L. REV. 207 (1983); King, *The Unmaking of a Bankruptcy Court: Aftermath of Northern Pipeline v. Marathon*, 40 WASH. & LEE L. REV. 99 (1983). See also Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297 (1981); Note, *Bankruptcy — United States Bankruptcy Courts and the Need for Article III Status*, 31 KANSAS L. REV. 492 (1983); Note, *Northern Pipeline Construction Co. v. Marathon Pipeline Co.: The Scope of Article I Court Jurisdiction: Abstract Principles or Practical Considerations?*, 10 OHIO N.U.L. REV. 361 (1983); Note, *Constitutional Law — Jurisdiction of Bankruptcy Courts — Bankruptcy Reform Act's Broad Grant of Jurisdiction Violates Article III*, 60 U. DET. J. URB. L. 289 (1983). Anderson, *Bankruptcy*, 28 LOY. L. REV. 805 (1982); Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, 1982 SUP. CT. REV. 25; Benedictis, *Judges Split on Bankruptcy Rule Validity*, L.A. DAILY J., Jan. 21, 1983, at 5, col. 1; Carlin & Banks, *District Courts' Bankruptcy Jurisdiction Holds After Northern Pipeline*, N.Y.L.J., Feb. 7, 1983, at 4, col. 1; Conley, *Bankruptcy*, 43 LA. L. REV. 327 (1982); Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1983); Kaminer, *Northern Pipeline Ruling and the Reference Rule*, N.Y.L.J., Jan. 24, 1983, at 1, col. 2; Kristl, *Limitations on Legislative Court Judicial Power: The Need for Balancing Competing Interests — Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 59 CHI. KENT L. REV. 873 (1983); Levit & Mason, *Where Do We Go From Here? Bankruptcy Administration Post-Marathon*, 87 COM. L.J. 353 (1982); Maley, *Bankruptcy in Turmoil*, 10 LITIG. 33 (Fall 1983); Parsons, *The Broad Jurisdiction Granted to the Bankruptcy Courts by the Bankruptcy Reform Act of 1978 Is Invalidated*, 24 S. TEX. L.J. 317 (1983); Redish, *Legislative Court, Administrative Agencies and the Northern Pipeline Decision*, 1983 DUKE L.J. 197; Schaefer, *Prospective Rulings: Two Perspectives*, 1982 SUP. CT. REV. 1; Vihon, *Delegation of Authority and the Model Rule: The Continuing Saga of Northern Pipeline*, 88 COM. L.J. 64 (1983). See also generally Young, *Bankruptcy — Article I Judges*, 68 A.B.A. J. 1150 (1982); 1981 Supreme Court Term — *Federal Jurisdiction and Procedure: Salary Clause Restrictions on Article I Courts*, 96 HARV. L. REV. 257 (1982); Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1983); Comment, *Constitutional Law — Article III: A Clear Test for the Constitutionality of Non-Article III Courts*, 18 LAND & WATER L. REV. 313 (1982).

Recognizing that judicial administration of the bankruptcy system could immediately grind to a halt following a summary pronouncement of unconstitutionality, the Court repeatedly stayed its judgment in *Marathon Pipeline* to give Congress "an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." 458 U.S. at 88. Until a forthcoming legislative solution will rectify the present constitutional difficulties, most courts have held that bankruptcy courts can continue to exercise all jurisdiction originally conferred by the 1978 Code. See generally *In re Cherry Pond Coal Co.*, 21 Bankr. 592 (S.D.W.Va. 1982); *In re O.P.M. Leasing Services, Inc.*, 21 Bankr. 986 (S.D.N.Y. 1982); *In re Otero Mills, Inc.*, 21 Bankr. 645 (D.N.M. 1982).

Congress faced a deadline of April 1, 1984 to amend the Bankruptcy Code to rectify the

Marathon Pipeline problem of unconstitutionality, in that bankruptcy judges are not Article III judges. 458 U.S. at 61.

Unable to come to agreement by March 30, the House and Senate passed an emergency thirty-day extension until midnight on April 30th. The extension has been repeatedly lengthened (to May 26, to June 20), without forthcoming legislation. Without the extension, the appointments of all bankruptcy judges would have expired. Since the *Marathon Pipeline* decision, the bankruptcy courts have operated under interim provisions allowing bankruptcy judges to hear cases under the supervision of the federal district courts. If Congress is still unable to come to a legislative solution, the Judicial Conference of the United States has intimated that it has developed a still secret contingency plan to keep the bankruptcy system functional. See Lanter, *Bankruptcy Battle Put On Hold For One Month*, Vol. 6, 32 NAT'L L.J. 5 (Apr. 16, 1984); Lanter, *Deadlines Spurs Bankruptcy Moves*, Vol. 6, 31 NAT'L L.J. 3, 26 (Apr. 9, 1984); N.Y. Times, Mar. 31, 1984, Business Section; N.Y. Times, Mar. 22, 1984, 1A; *Opening for Labor In Bankruptcy Crisis*, 115 LAB. REL. REP. 231 (BNA News and Background Information, Mar. 19, 1984).

As this article was going to press, the joint conferees of the House and Senate were still unable to come to agreement on the bankruptcy legislation. For purposes of this article, the most significant development was H.R. 5174, which passed the House on March 21, 1984. The House bill would have legislatively overruled the *Bildisco* decision, and would have adopted the Second Circuit's strict *REA Express* "last resort" test for labor contract rejection, and then only after good faith bargaining and formal court approval for the petition for rejection. *Id.* The Senate has refused to agree to the House bill. Pertinent provisions of H.R. 5174 provided:

... "collective bargaining agreement" means a collective bargaining agreement which is covered by title II of the Railway Labor Act or the National Labor Relations Act.

(b) The trustee may reject or assume a collective bargaining agreement under this title only if and after the court approves the rejection or assumption of such agreements.

(c) The court, only on the motion of the trustee, may approve the rejection of a collective bargaining agreement under this title only after notice to all parties in interest and a hearing.

(d)(1) The trustee shall —

(A) meet and confer in good faith with the authorized representative of the employees who are subject to a collective bargaining agreement; and

(B) provide such authorized representative with the relevant financial and other information.

(2) The trustee may file a motion for the rejection of a collective bargaining agreement under this title if —

(A) the trustee has proposed modifications in such agreement to such authorized representative deemed necessary by the trustee for successful financial reorganization of the debtor and preservation of the jobs covered by such agreement;

(B) the trustee has considered but rejected as inadequate for successful financial reorganization of the debtor and preservation of the jobs covered by such agreement alternative proposals for modifying such agreement made by such authorized representatives; and

(C) a prompt hearing on rejection is necessary to successful financial reorganization of the debtor.

(e) The court, upon motion of the trustee to reject a collective bargaining agreement, shall hold an expedited hearing to determine whether such agreement may be rejected under this title, not less than 7 days and not more than 14 days after the filing of such motion, or within such additional time as the court, for cause, within such 14-day period fixes. Such hearing shall be completed no later than 14 days after the commencement of such hearing, or within such additional time as the court, for cause, within such 14-day period fixes.

(f) The financial information relevant to determining whether a collective bargaining agreement may be rejected under this title shall be made available, under such conditions and within such time as the court may specify, to the authorized representative of the employees who are subject to such agreement.

(g) The court may not approve the rejection of a collective bargaining agreement under this title unless —

(1) the trustee has complied with subsection (d) of this section; and

Code governs rejection of executory contracts,⁴⁹ and provides for resolution and allowance of claims attributable to contract rejection.⁵⁰ Although neither the 1978 Code nor the

(2) *absent rejection of such agreement, the jobs covered by such agreement will be lost and any financial reorganization of the debtor will fail.*

(h) *No provision of this title shall be construed to permit the trustee unilaterally to terminate or alter any of the wages, hours, terms and conditions established by a collective bargaining agreement.* (emphasis added).

There is intensive lobbying by both organized labor and employer associations in Congress. If *Bildisco* legislation is not immediately forthcoming, it is likely that no further congressional action will be taken on this important element of the pending bankruptcy legislation until after the summer recess and perhaps not until after the fall election. Senator Packwood is leading efforts in the Senate to pass satisfactory compromise legislation addressing *Bildisco*. However, he has been unable to get his proposed amendment (of H.R. 5174) to a vote in the Senate. The Article III problem of the bankruptcy courts can be addressed separately; politically, however, the entire legislation may hinge on the ability of the joint conferees to agree on *Bildisco* provisions.

Regardless of any legislation, the *Bildisco* decision will remain a critically important indicator of the radical distortion underway in contemporary labor law jurisprudence in favor of private ownership elites.

⁴⁹ 11 U.S.C. § 365 (1982). General contract rejection in bankruptcy has its origin in English common law principles that the trustee could renounce title to and abandon burdensome property. See, e.g., *United States Trust Co. v. Wabashwestern R. Co.*, 150 U.S. 287, 299-300 (1893); *Sparhawk v. Yerkes*, 142 U.S. 115 (1891); *Sunflower Oil Co. v. Wilson*, 142 U.S. 313, 322-23 (1891); 2 COLLIER ON BANKRUPTCY, 365.01 at 365-6 and 365-7 (15th ed. 1982) [hereinafter cited as COLLIER]; Countryman, *Part I, supra* note 5, at 440 ("Long before the English Bankruptcy Act contained any express provisions on the subject, the courts had concluded that the assignee in bankruptcy taking title to the bankrupt's property could elect to abandon, rather than retain, that which was worthless or onerous, including leases and other executory contracts.").

The labor contract cannot be partially rejected. The debtor in possession cannot seek to sever only unpalatable wage and benefit terms while preserving the balance of the contract. "Rejection . . . is an all-or-nothing proposition. The debtor in possession cannot ask for partial rejection of a contract, nor can the court require that certain portions of an agreement be retained." Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, 80 MICH. L. REV. 134, 152 (1981). See also, e.g., *In re Italian Cook Oil Corp.* 190 F.2d 994, 997 (3d Cir. 1951); *In re David A. Roscow, Inc.*, 9 BANKR. 190, 193 n.5 (D. Conn. 1981); *In re Klaber Bros.*, 173 F. Supp. 83, 85 (S.D.N.Y. 1959); *In re M & S Amusement Enterprises, Inc.*, 122 F. Supp. 364, 366 (D. Del. 1954); 2 COLLIER 365.01 (2) at 365-11, *supra*.

One commentator has advocated partial rejection. "Onerous wage and monetary benefit provisions could thus be altered without rejecting less burdensome provisions, such as seniority systems, meal periods, and health and welfare benefits. These would remain in effect until the parties negotiated a new contract." Note, *The Bankruptcy Law's Effect on Collective Bargaining Agreements*, 81 COLUM. L. REV. 391, 403 (1981) [hereinafter cited as Note, *Law's Effect*]; see also Note, *Labor-Rejection of Collective Bargaining Agreements in Chapter XI Arrangement Proceedings*, 17 B.C. IND. & COMM. L. REV. 192, 213 (1976).

⁵⁰ 11 U.S.C. § 502(b)(8)(A-B) (1982) provides:

(b) Except as provided in subsection (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that —

(8) if such claim is for damages resulting from the termination of an employment contract, such claim exceeds —

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of —

(i) the date of the filing of the petition; and

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) the unpaid compensation due under such contract without acceleration, on the earlier of such dates. . . .

prior Bankruptcy Act expressly defines the collective bargaining agreement as an executory contract, all of the courts⁵¹ which have considered the issue regard labor agreements as executory⁵² contracts under the pertinent bankruptcy statute.⁵³ Consequently, there is no longer any dispute over the bankruptcy court's power to authorize labor contract rejection.⁵⁴ The task of determining the appropriate tests for such rejection, however, has been fraught with pragmatic and conceptual difficulties. Because rejection of the labor contract may often be an integral part of bankruptcy proceedings, it is important to conduct a critical analysis of the proper standards for such rejection and explication of the policy ramifications of these difficult choices.

The Code provides two general alternatives for the commercial enterprise in financial distress. Chapter 7 is the primary mechanism for liquidation of assets and distribution to creditors.⁵⁵ Chapter 11 offers debtors the option of reorganization and possible avoidance of liquidation.⁵⁶ Although the labor contract can technically be rejected in both Chapter 7 straight bankruptcy liquidations and Chapter 11 reorganizations,⁵⁷ the vast majority of cases dealing with labor contract rejection occur within the Chapter 11 reorganization context. Obviously, in Chapter 7 liquidation proceedings it is largely academic whether or not contracts are rejected because the business will not reemerge in

⁵¹ See *NLRB v. Bildisco*, 104 S.Ct. 1188 (1984); *In re Brada Miller Freight System, Inc.*, 702 F.2d 890, 894 (11th Cir. 1983); *Joint Local Executive Board, AFL-CIO v. Hotel Circle, Inc.*, 613 F.2d 210, 212-13 (9th Cir. 1980); *Bhd. of Ry., Airline & S.S. Clerks v. REA Express, Inc.*, 523 F.2d 164, 169 (2d Cir. 1975); *Shopmen's Local Union 455 v. Kevin Steel Prod., Inc.*, 519 F.2d 698, 706 (2d Cir. 1975). In addition to the Supreme Court and these federal courts of appeals, a host of bankruptcy court decisions are in accord. For a compendium of further consonant cases, see Comment, *Collective Bargaining Agreements and the Bankruptcy Reform Act: What Test Should the Bankruptcy Court Use in Deciding Whether to Allow a Debtor to Reject a Collective Bargaining Agreement?*, 51 U. CINN. L. REV. 862, 866 n.29 (1982) [hereinafter cited as Comment, *What Test?*].

⁵² The Code's legislative history states that an executory contract is one where "performance remains due to some extent on both sides." H. REP. NO. 95-595, 95th Cong. 1st Sess. 347 (1977); S. REP. NO. 989, 95th Cong. 2d Sess. 58 (1978). Whether Congress intended section 365(a) to apply to collective bargaining agreements as well as ordinary commercial contracts is, however, another matter. Regrettably, the legislative history of section 365 offers no direct clue as to whether Congress even considered the issue. Circumstantial evidence supports the view that Congress intended to permit the rejection of collective bargaining agreements, however. Bordewick and Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANK. L.J. 293, 294 (1983) [hereinafter cited as Bordewick and Countryman].

⁵³ Section 365(a) of the 1978 Code provides, in pertinent part: "Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." (Section 313 of the Bankruptcy Act was the predecessor to section 365.) For excellent comprehensive treatment of rejection of executory contracts in general, see Countryman, *Part I*, *supra* note 5, and *Part II*, *supra* note 2; Fogel, *Executory Contracts and Unexpired Leases in the Bankruptcy Code*, 64 MINN. L. REV. 341 (1980); Nimmer, *Executory Contracts in Bankruptcy: Protecting the Fundamental Terms of the Bargain*, 54 COLO. LAW., 507 (1983); Silverstein, *Rejection of Executory Contracts in Bankruptcy and Reorganization*, 31 U. CHI. L. REV. 467 (1964).

⁵⁴ See Bordewick and Countryman, *supra* note 52, at 294 ("courts now routinely hold that a collective bargaining agreement is an executory contract which may be rejected in a bankruptcy proceeding").

⁵⁵ 11 U.S.C. §§ 701-766 (1982).

⁵⁶ 11 U.S.C. §§ 1101-1174 (1982). "A reorganization, at least as a start, may be viewed as a form of liquidation. The business entity, however, is sold to the creditors themselves rather than to third parties." Note, *Bankruptcy, Non-Bankruptcy, Entitlement and the Creditors' Bargain*, 91 YALE L.J. 857, 893 (1982).

⁵⁷ Chapters 1, 3, and 5 of the Code apply to both Chapter 7 and 11 proceedings.

any event. The Chapter 11 reorganization, however, has a different focus and purpose. Ultimately, the aim of reorganization is to enable debtors to reduce or extend their debts so that they can return to a viable condition of operation.⁵⁸ If reorganization is successful, all parties are in relatively better positions than they would be if it were a Chapter 7 liquidation. The debtor reemerges as a viable business entity, and the employees retain their jobs. "A successful reorganization will generally give creditors a greater return on their claims than would a straight bankruptcy."⁵⁹ In the Chapter 11 reorganization context, the rejection of the labor contract is sometimes the critical factor in determining the ultimate success or failure of the reorganization effort.⁶⁰

After the employer files the petition for reorganization under Chapter 11⁶¹ it operates under the supervision of the bankruptcy court. Normally, the court will permit the debtor to continue its business operations subject to the court's continuing supervision. The petitioning company is designated as the debtor in possession,⁶² and generally has trustee's⁶³ powers.⁶⁴ Among its many duties, the debtor in possession must file a list of

⁵⁸ Note, *Law's Effect*, *supra* note 49, at 392. Congress also specifically addressed the primary purpose of Chapter 11 reorganization, as distinguished from Chapter 7 liquidation:

The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap. Often, the return on assets that a business can produce is inadequate to compensate those who have invested in the business. Cash flow problems may develop, and require creditors of the business, both trade creditors and long-term lenders, to wait for payment of their claims. If the business can extend or reduce its debts, it often can be returned to a viable state. It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.

H.R. REP. NO. 595, 95th Cong., 1st Sess., 220 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5963, 6179. *See also* Comment, *What Test?*, *supra* note 51, at 868.

⁵⁹ Note, *Law's Effect*, *supra* note 49, at 392. *See also* D. Stanley & M. Girth, *Bankruptcy: Problem, Process, Reform*, 129-30 & 142-43 (1971).

⁶⁰ For purposes of this article, therefore, most of the cases also occur within the Chapter 11 reorganization context.

⁶¹ Both Chapter 7 liquidation and Chapter 11 reorganization proceedings may be either voluntarily initiated by the debtor, 11 U.S.C. § 301 (1982), or involuntarily by the creditors, 11 U.S.C. § 303 (1982). Chapter 7 proceedings can be converted to Chapter 11 reorganizations, and the reverse, by the debtor or the court. 11 U.S.C. §§ 706, 1112 (1982).

⁶² Section 1101(1) provides: "'debtor in possession' means debtor except when a person that has qualified under section 322 of this title is serving as a trustee in the case." 11 U.S.C. § 1101(1) (1982).

⁶³ Section 1104 provides for appointment of a trustee. However, "the norm, under section 1104, is to leave the debtor in possession unless a party in interest requests appointment of a trustee or examiner. Upon such request, after notice and hearing the court shall appoint a trustee if one of two conditions is found to exist: (1) fraud, dishonesty, incompetence or gross mismanagement, or (2) a trustee would be in the best interest of creditors, and equity security holders, and other interests, regardless of number of holders of securities or the amount of assets or liabilities." Herzog and King, *COLLIER* (pamphlet ed. 1983), *supra* note 49 at 463.

⁶⁴ Section 1107(a) sets forth the rights, powers, and duties of the debtor in possession: Subject to any limitations on a trustee under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

11 U.S.C. § 1107(a) (1982).

creditors.⁶⁵ The debtor in possession is given a period in which it need not repay debts incurred before it filed the petition. During this period, the debtor often works out a repayment plan called a plan of reorganization with its creditors.⁶⁶

Regardless of whether proceedings are under Chapter 7 or 11, if all creditors' claims cannot be satisfied, certain creditors are entitled to priority in obtaining repayment under the Code.⁶⁷ After these priority claims have been satisfied, unsecured claims which arose before the filing of the petition are then addressed.⁶⁸ Some claims under collective bargaining agreements are entitled to certain priority status.⁶⁹

⁶⁵ Section 521(1) provides that the debtor shall "file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, and a statement of the debtor's financial affairs." 11 U.S.C. § 521(1) (1982).

⁶⁶ 11 U.S.C. § 362 stays all debt collection attempts. The purpose of the automatic stay is summarized in the legislative history:

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure action. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy. The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors

House Report for the Bankruptcy Reform Act, H.R. Rep. 95-595, 95th Cong., 2d Sess. 340, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS, 5787, 6296, 6297.

⁶⁷ 11 U.S.C. § 507 (1982).

⁶⁸ 11 U.S.C. § 726(a)(2) (1982).

⁶⁹ For an excellent synthesis of the priorities accorded labor contract claims, see Note, *Law's Effect*, *supra* note 49, at 393 n.17:

For unions and collective bargaining agreements, the relevant priority rules are as follows. All claims for services rendered before the ninety days prior to the filing of the petition are general claims, for which the statute grants no priority. Claims for wages (including vacation, sick leave, and severance pay) earned within ninety days before the petition was filed receive third priority. 11 U.S.C. § 507(a)(3) (Supp. II 1978). Claims for contributions to employee benefit plans arising from services rendered within 180 days before the petition are given fourth priority. § 507(a)(4). Finally, wages and benefits earned during the reorganization period are considered administrative expenses, which are given first priority. §§ 503(b)(1)(A), 507(a)(1). Wages and benefits earned but unpaid are prorated: the amount earned before is appropriately divided into third priority, fourth priority, and general claims.

Note, *Law's Effect*, *supra* note 49, at 393 n.17.

Although unsecured wage claims earned within 90 days before the date of the filing of the petition in bankruptcy do have third priority, 11 U.S.C. § 507(a)(3) (1982), each individual employee's claim is limited to a maximum of only \$2,000, § 507(a)(3)(B), and may be even further constrained, § 507(a)(4)(B)(i), (ii).

The Ninth Circuit provided a fine synthesis of the priorities accorded types of labor contract severance pay. In *re* Health Maintenance Foundation, 680 F.2d 619 (9th Cir. 1982). The court of appeals rejected the union's argument that the severance pay claims were entitled to the highest priority as costs of administration under section 64(a)(1) of the former Act, now sections 503(b)(1)(A) and 507(a)(1), which pertain to costs and expenses for services rendered after commencement of the bankruptcy case. *Id.* at 621. (Normally, section 507(a)(3)(A) and (B) of the 1978 Code accords third priority to "unsecured claims for wages, salaries, or commissions, including vacation, severance and sick leave pay earned by an individual within 90 days before the date of filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only to the extent of \$2,000 for each such individual.") 11 U.S.C. § 507(a)(3)(A), (B) (Supp. II 1978). The Ninth Circuit explained why labor contract severance pay based on length of service was not entitled to administrative expense priority status:

In a Chapter 7 liquidation, all debts in the priority class must be satisfied in full before any distribution can be made to the next lower priority class.⁷⁰ General unsecured creditors whose debts arose before the filing of the petition, therefore, are paid only after all priority claimants have been paid.⁷¹ In a Chapter 11 reorganization, first and second priority claims are to be paid in cash on the effective date of the reorganization plan.⁷² Lower priority claims and unsecured general claims are subject to more complex allocation formulas,⁷³ including possible outright cancellation.⁷⁴ A contract which is rejected in bankruptcy proceedings is treated as having been rejected the day before the petition was filed. Consequently, all damages for breach of the contract are pre-petition unsecured claims, accorded low priority and often not satisfied in full or even in part.⁷⁵

Given the specific provisions of the federal labor laws⁷⁶ regarding labor contract termination, and the more fluid bankruptcy statutes⁷⁷ dealing with contract rejection, the policy and pragmatic tensions between the two types of statutes are very clear. Labor law has long prohibited unilateral contract modification absent compliance with section 8(d).⁷⁸ In addition, both the NLRB and the courts have been prohibited from imposing substan-

There are two general types of severance pay: (1) pay at termination in lieu of notice; and (2) pay at termination based on length of employment. The first type of severance pay appears to be entitled to priority payment as a cost of administration. *In re Public Ledger*, 161 F.2d 762, 771 (3d Cir. 1947). The presumption is that the trustee chose to terminate the employee without notice as part of administering the Chapter XI reorganization, and the severance pay in lieu of notice is therefore considered a cost of administration.

Three circuits have considered the second type of severance pay — that based on length of employment — which is at issue here. The First and Third Circuits hold that such severance pay is not entitled to priority as a cost of administration. *In re Mammoth Mart, Inc.*, 536 F.2d 950, 955 (1st Cir. 1976); *In re Public Ledger*, 161 F.2d at 774. The Second Circuit holds that it is. *Straus-Duquarquet, Inc. v. Local Union No. 3 Int. Bro. of Elec. Workers*, 386 F.2d 649, 651 (2nd Cir. 1967) "Because the amount of the severance pay claims depends upon the length of employment, the consideration supporting . . . [the employees'] claims was the service performed for . . . [the debtor] over the entire period of . . . employment. Since no part of their present claim arise [sic] from services performed for the . . . [trustee], no portion . . . may receive . . . priority."

Health Maintenance, 680 F.2d at 621 (footnote omitted). See generally Comment, *The Priority of a Severance Pay Claim in Bankruptcy*, 27 U.C.L.A. L. REV. 722 (1980); Note, *Employee Fringe Benefits in Employer Bankruptcy*, 41 U. CHI. L. REV. 604 (1974).

⁷⁰ 11 U.S.C. § 726(a)(1) (1982).

⁷¹ 11 U.S.C. § 726(a)(2) (1982).

⁷² 11 U.S.C. § 1129(a)(9)(A) (1982).

⁷³ 11 U.S.C. § 1129(a)(9)(B) (1982).

⁷⁴ 11 U.S.C. § 1123(a)(5)(F) (1982). ⁷⁵ 11 U.S.C. § 365(g) (1982) provides in pertinent part: "[T]he rejection of any executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease — (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition

See 2 COLLIER 365.08, *supra* note 49.

Labor contract rejection is purchased at the expense of federal labor policy. "[F]ederal labor policy is grossly flouted by the unilateral rejection of a collective bargaining agreement by an unhappy employer. This is particularly true when a bankruptcy court permits the rejection to relate back to the date of the filing and thus eliminate unfair labor practices committed by the debtor post petition." Bordewieck and Countryman, *supra* note 52, at 294.

⁷⁶ 29 U.S.C. § 158(d) (1982); 45 U.S.C. § 156 (1982).

⁷⁷ 11 U.S.C. § 365 (1982).

⁷⁸ *Allied Chemical Workers of America v. Pittsburgh Plate Glass*, 404 U.S. 157, 178-182 (1971).

tive contract terms upon the parties.⁷⁹ Because the bankruptcy courts have the authority to sanction labor contract rejection by the debtor, however, these courts have, in effect, the ability to permit the debtor to rewrite unilaterally the substantive terms of the employment relationship.⁸⁰ This judicial intrusion into the labor contract in favor of the employer is anathema to established labor policy, and has created significant difficulties for courts seeking to determine whether the labor or bankruptcy statute should take priority in a given proceeding.

C. Discernment of Congressional Intent

Although the issue of statutory accommodation is of "preeminent significance"⁸¹ to the question of whether labor or bankruptcy provisions should be accorded greater weight, there is little evidence in the history of either statute regarding the act's relationship to the policies expressed in the other statute. As one court has noted, the legislative history can probably be read as supporting any desired result.⁸² The NLRA's position is

⁷⁹ *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970); *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 488 (1960).

⁸⁰ When a bankruptcy court permits a debtor to reject a collective bargaining agreement duly negotiated with the representative of its employees, it effectively regulates the substantive terms of the employment relationship over the objections of one of the parties:

[T]he employee of a debtor that terminates a collective bargaining agreement with the approval of the bankruptcy court will perceive correctly that the benefits of the collective bargaining agreement his union negotiated have been taken away by the bankruptcy court.

Bordewieck and Countryman, *supra* note 52, at 299.

⁸¹ Note, *Bankruptcy Law-Labor Law-Rejection, Assumption, and Modification of Collective Bargaining Agreements*, 1981 ARIZ. ST. L.J. 311, 312.

⁸² *Shopmen's Local Union No. 455 v. Kevin Steel Prod., Inc.*, 381 F. Supp. 336, 338 (S.D.N.Y. 1974), *rev'd*, 519 F.2d 698 (2d Cir. 1975). When a court is faced with a controversy created by an apparent conflict between the language of two statutes, one method of resolution is an "attempt to reconcile the statute in a manner which best effectuates the intent of Congress." *In re Brada Miller Freight System, Inc.*, 702 F.2d 890, 896 (11th Cir. 1983). Despite frequent reliance by the courts on legislative intent as a criterion for statutory interpretation, there remains considerable controversy over whether such reliance is misplaced. See, e.g., Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886 (1930) (claiming that "intended meaning" of a statute is in fact discoverable from records of legislative proceedings leading up to adoption of statute); MacCallum, *Legislative Intent*, 75 YALE L.J. 755 (1966) (questioning existence and discernability of legislative intent); Note, *Intent, Clear Statement, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982) (criticizing recent emphasis Supreme Court has placed upon finding of literal legislative intent by lower courts); Note, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) (arguing that existence of genuine "legislative intent" is questionable and that even if such intent were present, that it could not be revealed by examination of legislative proceedings").

One key factor in determining the intent of the legislature which enacted a statute is the specific language chosen for the wording of the statute by that legislative body. See SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* 48-68 (4th ed. 1973). Commentators in this area are careful to note, however, that "the statute itself in its entirety should not be interpreted solely by reference to its own terms, but rather by reference to other laws of the state, particularly to those pertaining to the same subject." E. CRAWFORD, *THE CONSTRUCTION OF STATUTES* 420 (1940). Crawford posits that "any statute which requires construction should be construed in harmony with existing law. This is a basic principle of construction." *Id.* at 421. Additional extrinsic aids in statutory interpretation include "information about circumstances and events occurring on or after the time when a statute goes into effect." SUTHERLAND, *supra*, at 228. In *Boy's Markets Inc. v. Retail Clerks Union*, 398 U.S. 235, 250 (1970), the Supreme Court expressed a similar rationale: "Statutory interpretation requires more

that the provisions of the labor statutes should prevail in the event of conflict with bankruptcy statutes.⁸³ Courts addressing labor contract rejection under section 313 of the former Bankruptcy Act, however, consistently chose in favor of bankruptcy statutory provisions and disregarded the seemingly clear language of the NLRA.⁸⁴

In view of the fact that the courts have given priority to the bankruptcy statute, the current difficulty is in developing the appropriate standards for deciding whether to authorize labor contract rejection under bankruptcy law.⁸⁵ The 1978 Code, as was the case with the prior Act, makes only one specific reference to the interrelationship of labor contract rejection in the bankruptcy and labor statutes.⁸⁶ Only when labor contracts are within the purview of the Railway Labor Act is the bankruptcy court expressly required to

than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions."

For a thorough discussion of the issue of statutory interpretation, see generally CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975); Bishen, *The Law Finders: An Essay on Statutory Interpretation*, 38 S. CAL. L. REV. 1 (1965); Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Williams, *Statutes as Sources of Law Beyond Their Terms in Common Law Cases*, 50 GEO. WASH. L. REV. 554 (1982).

⁸³ Section 15 of the NLRA provides:

Wherever the application of the provisions of section 672 of title 11 conflicts with the application of the provisions of this subchapter, this subchapter shall prevail: Provided, that in any situation where the provisions of this subchapter cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

29 U.S.C. § 165 (1982).

The courts, however, dismiss this seemingly unequivocal statutory language as non-dispositive. In *In re Klaber Bros., Inc.*, 173 F. Supp. 83, 85, 87 (S.D.N.Y. 1959), the union unsuccessfully argued that section 15 of the NLRA conferred preemptive jurisdiction on the Board. The court summarily rejected the union's position. "The fact that the Union filed with the National Labor Relations Board on March 18, 1959, a charge of unfair labor practice based upon the application for rejection of the contract and refusal to bargain, is immaterial. The National Labor Relations Board, in my opinion, has no jurisdiction here to interfere with the rejection of an executory contract . . ." *In re Klaber Bros., Inc.*, 173 F. Supp. at 85.

⁸⁴ See Comment, *What Test?*, *supra* note 51, at 862. See also Note, *Bankruptcy Law-Labor Law-Rejection of Collective Bargaining Agreements As Executory Contracts in Bankruptcy*, 22 WAYNE L. REV. 165, 171-172 (1975) [hereinafter cited as Note, *Bankruptcy Rejection*] ("[E]very case involving a bankruptcy/labor conflict has used a literal reading of the Bankruptcy Act, and no decision has yet found the NLRA to be controlling . . . and the unbroken string of decision favoring bankruptcy law supports the suggestion that there may be a permeating view elevating bankruptcy law above labor law."). Several commentators, however, have forcefully argued that all labor contracts are *sui generis* and therefore should be exempt from executory contract rejection under the bankruptcy laws. See Note, *Rejection of Agreements*, *supra* note 40, at 826.

⁸⁵ Comment, *What Test?*, *supra* note 51, at 862.

⁸⁶ Section 1167 of the 1982 Code provides:

Notwithstanding § 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. 151 et. seq.) except in accordance with § 6 of such Act (45 U.S.C. 156).

11 U.S.C. § 1167 (1982).

Although section 201 of the RLA specifically applied to air carriers, section 103(g) of the 1978 Bankruptcy Code provided that section 1167 of the Code would apply only to railroad reorganizations under subchapter IV of Chapter 11. Thus, bankruptcy courts have held that section 1167 is confined to the labor contracts of railroad employees. *In re Braniff Airways, Inc.*, 25 Bankr. 216, 217-18 (N.D. Tex. 1982). While labor contracts of air carriers are otherwise subject to the RLA, via section 103(g) of the Code, they are exempted from the section 1167 mandate of strict compliance with the RLA labor contract modification and termination procedures prior to rejection. *Id.*

comply with the contract termination provisions of the labor statute.⁸⁷ Significantly, neither the 1898 Act nor the 1978 Code addresses whether the bankruptcy court should also defer to the provisions contained in section 8(d) of the NLRA regarding rejection of those labor agreements outside the scope of the Railway Labor Act. Faced with these inconsistent statutory provisions, and conspicuous congressional failure to clarify the continuing statutory and policy dilemma with the passage of the 1978 Code, courts have rather uniformly ruled in favor of the bankruptcy provisions.⁸⁸ Considering the absence of evidence of congressional intent in this area, one commentator has stated that the legislative histories of both the Code and the NLRA suggest that Congress never even contemplated the interrelationship of these two areas of the law.⁸⁹ This failure, together with the fact that the Code gives the bankruptcy courts original jurisdiction in all matters coming under the Code, indicates that Congress chose such courts as the proper forum for resolving claims which arise following the rejection of a debtor's collective bargaining agreement.⁹⁰

The courts have not been oblivious to the Supreme Court's classic caution that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit or intention of its makers."⁹¹ In earlier analagous cases, however, the Supreme Court⁹² had read the Bankruptcy Act literally and ignored the policy of the Labor Act which called for a different result.⁹³ This literalist approach to statutory interpretation, though it has been soundly criticized,⁹⁴ remains dominant.⁹⁵ Virtually all

⁸⁷ 11 U.S.C. § 1167 (1982).

⁸⁸ See *supra* note 84.

⁸⁹ Note, *Resolution of Rejected Collective Bargaining Agreement Claims in Bankruptcy: Which Forum is Appropriate?*, 48 BROOKLYN L. REV. 75, 90 (1981) [hereinafter cited as Note, *Resolution*]; see also Note, *What Test?*, *supra* note 51, at 864-65; Note, *Law's Effect*, *supra* note 49, at 396 ("Congress had evidently never considered this situation; it had overlooked the problem of businesses in reorganization when it passed the NLRA, and collective bargaining agreements were in their infancy when Congress had last overhauled the bankruptcy laws.").

⁹⁰ Note, *Resolution*, *supra* note 89 at 90.

⁹¹ *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892), quoted in *In re Brada Miller Freight System, Inc.*, 702 F.2d 890, 896 (11th Cir. 1983).

⁹² *Electrical Industry Joint Board v. United States*, 391 U.S. 224 (1968).

⁹³ *Shopmen's Local Union No. 455 v. Kevin Steel Prod., Inc.*, 519 F.2d 698, 703 (2d Cir. 1975); see *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29, 33 (1959).

⁹⁴ See Bishen, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1, 3, 28 (1965); Note, *Bankruptcy-Labor Law-Statutes-Collective Bargaining*-§ 313(1) of the Bankruptcy Act Permits Rejection of a Collective Bargaining Agreement Only After Particularly Careful Scrutiny of the Request in Light of Policies Underlying the National Labor Relations Act, 45 CINN. L. REV. 281, 284-85 (1976) [hereinafter cited as Note, *Careful Scrutiny*]; Note, *Collective Bargaining and Bankruptcy*, 42 S. CAL. L. REV. 477, 486-87 (1969) ("[D]aily experience teaches that language is filled with inherent ambiguity. Modern linguistic analysis bears out our common experience. To complicate matters, the wording of a particular statute is often the product of formulation and revision by many authors and very frequently is the result of a compromise or accident. Therefore, a proper inquiry cannot begin and end with the words of the statute. The purpose of a given enactment frequently requires a somewhat different interpretation of its terms than a literal interpretation would dictate.").

⁹⁵ In earlier landmark labor law cases, the Supreme Court had expressly criticized the static "law finder" approach, in favor of a more dynamic mode of statutory interpretation. Drawing from landmark labor law cases, one commentator concisely summarized this evolution in the Court's thinking regarding the preferable mode of statutory analysis. Note, *Careful Scrutiny*, *supra* note 94, at 285-86.

Justice Brennan, dissenting in *Sinclair*, argued that literal reading of statutory material yields

courts which have considered the conflict between the bankruptcy and labor statutory provisions regarding labor contract termination in bankruptcy have concluded that the bankruptcy statutes control.⁹⁶

One commentator has suggested that the labor and bankruptcy statutes could be reconciled by a sequential application of the two bodies of law.⁹⁷ Under this approach, whenever the NLRA and bankruptcy law collide, the NLRA would be applied first. This would insure that proper sanctions were applied to an employer who had violated the NLRA but sought refuge in bankruptcy law.⁹⁸ This recommendation has yet to be adopted by the courts.

Many courts have attributed special significance to Congress' continued conspicuous failure to rectify these statutory dilemmas in the 1978 Code. For example, in *In re Brada Miller Freight System, Inc.*, the Eleventh Circuit Court of Appeals observed that the significance of Congress' failure to exempt other types of collective bargaining agreements was strengthened by the recent overhaul of the bankruptcy law which left unchanged the narrow exemption for railway labor agreements.⁹⁹ Section 1167 of the 1978 Code exempted Railway Labor Act collective bargaining agreements from the operation of section 365 of the Code, which governs executory contract rejection. Because Congress made no such similar provision for labor contracts not within the purview of the RLA, its silence indicated that no further exceptions should be made.¹⁰⁰

little when the nature of the subject matter to which an older statute was directed undergoes dramatic qualitative change. Brennan suggested that: "The Court then should so exercise its judgment as best to effect the most important purposes of each statute. It should not be bound by inscrutable congressional silence to a wooden preference for one statute over the other." The Court in *Boy's Markets* overruled *Sinclair*, expressly adopting the rationale of the Brennan dissent: "Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Id.*

⁹⁶ This result reflects an institutional judicial allegiance to the controlling entrepreneurial elites, dictating the subordination of labor interests. "Even a cursory review of recent case law demonstrates a strong, if understandable, pro-debtor bias . . ." Bordewick and Countryman, *supra* note 52, at 319. "[T]he unbroken string of decisions favoring bankruptcy law supports the suggestion that there may be a permeating view elevating conflict, maximum consistent effect should be given to both statutes." See *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

⁹⁷ See *infra* note 98.

⁹⁸ Note, *Bankruptcy Rejection*, *supra* note 84, at 175. This enlightened view is consonant with the axiom that if statutes are in potential conflict, maximum consistent effect should be given to both statutes. See *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

⁹⁹ Prior to enacting the 1978 Code, Congress, in 1976, had provided for municipal bankruptcy, and provided for labor contract rejection by the municipality. Pub. L. No. 94-260, § 90 Stat. 315-25 (1976). For pertinent legislative histories regarding municipal bankruptcy and labor contract rejection, see Note, *Executory Labor Contracts and Municipal Bankruptcy*, 85 YALE L.J. 957, 966 (1976).

11 U.S.C. §§ 901-946 (Supp. II 1978) deal with the adjustment of the debts of a municipality. See H.R. REP. NO. 94-686, 94th Cong., 1st Sess. (1975); S. REP. NO. 94-458, 94th Cong., 1st Sess. (1975); H.R. REP. NO. 94-938, 94th Cong., 2d Sess. (1976). Unfortunately, none of the legislative history of the 1978 Code articulates express standards for private or public sector labor contract rejection. The House Report regarding municipal labor contract rejection only states, without explanation or clarification, that "renegotiation and formulation of a new contract would, of course, have to be in accordance with applicable Federal, State, or Municipal law." Note, *Executory Labor Contracts and Municipal Bankruptcy*, 85 YALE L.J. 957, 966 (1976). This policy presumption favoring labor contract rejection was unaltered by section 365 of the 1978 Code.

¹⁰⁰ *In re Brada Miller Freight System, Inc.*, 702 F.2d 890, 896-97 (11th Cir. 1983).

The Eleventh Circuit rejected union arguments that all labor contracts were exempted from section 365 rejection and that no valid distinction could be made between labor agreements within and without the purview of the Railway Labor Act. The *Brada Miller* court explained that the mere existence of the Railway Labor Act demonstrates the unique status of labor relations in the railroad industry, a status frequently recognized by both Congress and the courts.¹⁰¹ As the Second Circuit Court of Appeals stated in *Shopmen's Local Union 455 v. Kevin Steel Products, Inc.*, "Congress knew how to remove labor agreements from the scope of a general power to reject executory contracts."¹⁰² Similar reasoning was expressed in *In re Concrete Pipe Machinery Co.*,¹⁰³ where the court noted that Congress was apparently aware of the underlying tension between the Bankruptcy Code and the NLRA. The court stated that by enacting section 367 of the Code, Congress chose to limit the labor contracts exempt from rejection by means of the bankruptcy agreements to those contracts governed by the RLA. No similar provision, the court continued, was made for bargaining agreements regulated by the NLRA. Consequently, the *Concrete Pipe* court ruled that courts do not have the authority to override such congressional policy by imposing more stringent requirements for the rejection of executory contracts than Congress had already established under the Code. The Third Circuit had earlier addressed the same issues in *In re Bildisco* where the court stated: "In enacting Section 365, Congress provided no indication that collective bargaining agreements were to be immune from rejection and thus unique among executory contracts. Indeed, the few inferences of congressional intent that may be gleaned from the Code and its legislative history are to the contrary."¹⁰⁴

In general, lower courts have attempted to refrain from judicial legislation, and have worked from the inferences most logically available from the present statutes. For example, in *Kevin Steel*, the Second Circuit Court of Appeals stated that courts should not hold that a statute as technical as the Bankruptcy Act sought to exclude indirectly the courts' power to reject labor contracts.¹⁰⁵ The court explained that if such a determination were made, courts would, in effect, be amending the federal statute. According to the Court, this power to remedy statutory "oversight," even when two very important statutes are involved, rests with the legislature, not the courts.¹⁰⁶

The 1978 Bankruptcy Code did not expressly address the very strict standards for contract rejection enunciated three years earlier in 1975 by the Second Circuit,¹⁰⁷ construing section 313 of the former Bankruptcy Act. It is curious, therefore, why the alternative argument, namely that Congress did intend that different standards apply, is not frequently made. Congress was presumably fully aware of this express judicial construction

¹⁰¹ *Id.*

¹⁰² *Shopmen's Local Union No. 455 v. Kevin Steel Prod., Inc.*, 519 F.2d 698, 704 (2d Cir. 1975).

¹⁰³ *In re Concrete Pipe Machinery Co.*, 28 Bankr. 837, 840 (N.D. Iowa 1983).

¹⁰⁴ *In re Bildisco*, 682 F.2d 72, 78 (3d Cir. 1982).

¹⁰⁵ *Shopmen's Local Union No. 455 v. Kevin Steel Prod., Inc.*, 519 F.2d 698, 705 (2d Cir. 1975); see also *In re Ateco Equipment Inc.*, 18 Bankr. 915, 917 (W.D. Penn. 1982) ("[T]his Court concludes that Congress did not intend special treatment for collective bargaining agreements protected by the N.L.R.A. There is no language in the Bankruptcy Code protecting collective bargaining agreements such as this one from § 365. In the absence of such language, this Court will not take it upon itself to legislate that result.").

¹⁰⁶ *Kevin Steel*, 519 F.2d at 705.

¹⁰⁷ *Shopmen's Local Union No. 455 v. Kevin Steel Prod., Inc.*, 519 F.2d 698, 706 (2d Cir. 1975); *Bhd. of Railway Employees v. REA Express, Inc.*, 523 F.2d 164, 169 (2d Cir. 1975), *cert. denied*, 423 U.S. 1017 (1976).

of the relevant statutory provision in 1975. It did not disagree with this judicial interpretation when it enacted the section 365 Code analog to the section 313 provision of the former Act. Therefore, it is arguable that the earlier 1975 Second Circuit construction should control disputes surrounding interpretation of the equivalent 1978 Code provision, in the face of continued knowing congressional silence.¹⁰⁸ Yet, curiously, this argument has not been frequently advanced. Congressional silence is presumed, perhaps erroneously, to subordinate labor interests to those of the debtor.

With the recent controversial Chapter 11 reorganizations in the airline industry¹⁰⁹ and the exacerbated labor tensions which resulted from those proceedings, congressional hearings were initiated in the fall, 1983.¹¹⁰ The hearings involved the possible amendment of the bankruptcy law to make it more difficult for the employer to effect such radical sudden restructuring of the employment and labor relations environments. The unions, represented by Harvard Law School Professor Countryman, forcefully argued that the courts have consistently misread the legislative intent from continued congressional silence regarding the proper interrelationship of the bankruptcy and labor statutes, and congressional representatives predicted dire consequences for future labor management relations.¹¹¹ If a meaningful interpretation of Congress's scant Delphic pronouncements is to be forthcoming, it is obvious that it will have to emanate from Congress itself.¹¹² Until then, courts will continue to manipulate the statutory contradictions to endorse bankruptcy court rejection of non-RLA labor contracts without regard to NLRA section 8(d) labor contract termination provisions. The article will now examine the positions of the

¹⁰⁸ See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt the interpretation when it . . . adopts a new law incorporating sections of a prior law.").

¹⁰⁹ See *supra* note 14.

¹¹⁰ Representative William Clay, Chairman of the Subcommittee on Labor-Management Relations, recently commented on the increasingly significant role which bankruptcies are playing in labor-management relations. According to Representative Clay,

[w]hat we see today is the potential undermining of both the bankruptcy law and the National Labor Relations Act. No doubt there can be instances when release from a collective bargaining agreement in bankruptcy is appropriate. It is clear that both the bankruptcy law and the collective bargaining law dictate that such a drastic step is appropriate only under extreme circumstances. It is equally clear that use of bankruptcy court toward a collective bargaining agreement compromises both labor law and bankruptcy law. Of even greater concern is the potential damage that can be inflicted on labor policy if this kind of abuse of the bankruptcy courts is systematically utilized. We will soon be faced with a situation where the mere threat of filing for bankruptcy undermines collective bargaining.

Statements on Bankruptcy and Collective Bargaining Before House Labor Subcommittee on Labor-Management Relations and Labor Standards, H.R. 5174 (1983) (opening statement of Rep. William Clay, Chairman, Subcomm. on Labor-Management Relations).

Citing the recent bankruptcy filings by the Manville Corporation, Wilson Foods, and Continental Airlines, Representative George Miller, Chairman of the Subcommittee on Labor Standards has stated that the federal bankruptcy laws are currently being used to undermine the labor statutes, a use never intended by Congress. *Id.* (opening statement of Rep. George Miller, Chairman, Subcomm. On Labor Standards). Moreover, Representative Miller warns that if management continues to resort to Chapter 11 proceedings to abrogate labor agreements, "labor will undoubtedly invent stratagems of its own — wildcat strikes, boycotts and walkouts — to challenge management's unilateral violations of collectively bargained agreements." *Id.* (opening statement of Rep. George Miller, Chairman, Subcomm. On Labor Standards). Such a result, Representative Miller concludes, is one "our economy can ill afford." *Id.*

¹¹¹ *Id.*

¹¹² See *supra* note 48 for a discussion of these legislative initiatives.

various circuits regarding the most appropriate standards for labor contract rejection. This analysis will also elucidate how different circuits have dealt with the problems posed by the scant inferential evidence of congressional intent.

II. STANDARDS GOVERNING LABOR CONTRACT REJECTION IN BANKRUPTCY

A. *The Second Circuit's Strict Standards*

1. *Shopmen's Local 455 v. Kevin Steel Products, Inc.*¹¹³

In *Kevin Steel*, the Second Circuit stated that the issue of what standards should govern the rejection of a collective bargaining agreement was one of first impression.¹¹⁴ The specific issue framed by the Second Circuit was whether section 313(1) of the Bankruptcy Act allows rejection of a collective bargaining agreement as an executory contract.¹¹⁵ The court of appeals concluded that while the answer was affirmative,¹¹⁶ several rigorous tests would have to be met as a precondition to court approval of the employer's petition to reject the labor contracts.¹¹⁷ In so ruling, the Second Circuit rejected the NLRB's position that "authorizing the rejection of collective bargaining agreements in arrangement proceedings permits a company to accomplish indirectly

¹¹³ 519 F.2d 698 (2d Cir. 1975).

¹¹⁴ Prior to *Kevin Steel*, other courts had considered other issues of labor contract rejection in bankruptcy. See, e.g., *In re Public Ledger, Inc.*, 161 F.2d 762, 767 (3d Cir. 1947) (rejection not allowed because of long adherence to its terms); *In re Overseas Nat'l Airways, Inc.*, 238 F. Supp. 359, 362 (E.D.N.Y. 1965) (labor contract rejection permitted only after thorough judicial scrutiny of respective equities); *In re Klaber Bros., Inc.*, 173 F. Supp. 83 (S.D.N.Y. 1959) (bankruptcy court had power to reject contract under Chapter XI of the former Act).

One commentator perceptively noted that *Public Ledger* must be narrowly construed. Note, *Bankruptcy Law — Labor Law — Rejection of Collective Bargaining Agreements as Executory Contracts in Bankruptcy — Receiver's Authority to Unilaterally Assume or Adopt Collective Bargaining Agreement*, 27 WAYNE L. REV. 1601, 1612 (1981) [hereinafter cited as Note, *Receiver's Authority*].

The *Public Ledger* line of cases are often erroneously cited for the proposition that a receiver can implicitly assume a debtor's collective bargaining agreement by conforming to its terms. In actuality, these cases are limited to the protection of wage-related benefits that have accrued or vested, but that are unpaid at the point in time when the receivership terminates. . . . Clearly the court's holding was limited to the protection of wage-related benefits which had accrued or vested during the period of the receiver's conformance to the labor contract.

Id.

¹¹⁵ 519 F.2d at 700. The analog to section 313(1) of the former Bankruptcy Act is now section 365(a) of the 1978 Bankruptcy Code. See *supra* note 16.

¹¹⁶ 519 F.2d at 700.

¹¹⁷ Most courts, to consider the special problems surrounding rejection of labor contracts in bankruptcy, have employed stricter scrutiny than would be applied to nonlabor executory contracts. The traditional "business judgment" test readily permitted rejection of nonlabor executory contracts without a showing of burdensomeness. *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R.Y. Co.*, 318 U.S. 523 (1943). See also *In re Tilco, Inc.*, 558 F.2d 1369, 1372 (10th Cir. 1977). Most courts, however, have required at least a showing of burdensomeness before authorizing labor contract rejection through bankruptcy. The business judgment test does not suffice. Therefore, the labor contract cannot be rejected merely because a more attractive arrangement is possible. The employer-debtor must demonstrate at least a real loss or burden to the enterprise, absent rejection. For examples of the "burdensome" requirement in earlier cases, see e.g. *In re Jackson Brewing Co.*, 567 F.2d 618, 621 (5th Cir. 1978); *In re Haitian Cook Oil Corp.* 190 F.2d 994, 946 (3d Cir. 1951); *In re Chicago Rapid Transit Co.*, 129 F.2d 1, 9 (7th Cir. 1942), *cert. denied*, 317 U.S. 683 (1942).

what it could not accomplish directly without violating the NLRA — namely, to unilaterally terminate a contract during its term.”¹¹⁸ The Second Circuit’s decision was consonant with prior decisions that had construed collective bargaining agreements as executory contracts.¹¹⁹ Congress had largely exempted collective bargaining agreements in the railroad industry from rejection in bankruptcy,¹²⁰ except in situations where there was strict compliance with the Railway Labor Act.¹²¹ Congress, however, provided no such exemption for labor contracts not within the purview of the RLA. Consequently, the court of appeals concluded that, due to this distinct omission, Congress did not intend to exempt non-railroad labor contracts from bankruptcy law rejection provisions.¹²²

Having found that the labor contract could be rejected as an executory contract, the Second Circuit then enunciated broad equity standards to be employed on a case-by-case basis by courts in deciding whether to allow the rejection of labor contracts.¹²³ The court of appeals set forth a more rigorous test than that applied to non-labor executory contract rejection petitions. The court stated that unlike the situation with non-labor contracts,

¹¹⁸ Brief for Intervenor-Appellee (NLRB) at 14. The NLRB had earlier affirmed the decision of its administrative law judge that the employer had violated sections 8(a)(1), (3), and (5) of the NLRA by refusing to sign a new contract between the union and the employer. 209 N.L.R.B. No. 80 (1974). The employer refused to comply with the NLRB’s make whole order for lost wages and benefits suffered by unlawfully discharged employees and by the employer’s refusal to sign the contract. *Kevin Steel*, 519 F.2d at 700-01. The NLRB appealed to the Second Circuit to enforce its order. By joint motion, the NLRB appeal was consolidated with the debtor’s appeal from the district court’s reversal of the bankruptcy court’s approval of the labor contract rejection. *Id.*

¹¹⁹ *Carpenters Local 2746 v. Turney Wood Products Inc.*, 289 F. Supp. 143, 147-50 (W.D. Ark. 1968); *In re Overseas Nat’l Airways, Inc.*, 238 F. Supp. 359, 361 (E.D.N.Y. 1965); *In re Klaber Bros., Inc.*, 173 F. Supp. 83 (S.D.N.Y. 1959); *In re Public Ledger, Inc.*, 63 F. Supp. 1008 (E.D. Pa. 1945), *rev’d in part*, 161 F.2d 762 (3d Cir. 1947). See also *supra* notes 53-56.

¹²⁰ Section 77(n) of the former Bankruptcy Act, 11 U.S.C. § 205(n) provided: “No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in §§ 151 to 163 of Title 45” Section 1167 of the 1978 Code, replacing section 205(n) of the former Act, exempted all collective bargaining agreements subject to the RLA. The former Act applied only to labor contracts covering railroad employees. However, in some circumstances of railroad reorganization under Chapter 11 of the 1978 Code, bankruptcy courts may order liquidation. 11 U.S.C. § 1174 (Supp. II 1978). “This change gives railroad employees the same stake in a successful reorganization that their peers in other industries have, and there remains little reason to treat them differently in this context.” Note, *Law’s Effect*, *supra* note 49, at 398-399 n. 65. In *Bhd. of Ry. Clerks v. REA Express, Inc.* 523 F.2d 164, 168-69 (2d Cir. 1975), *cert. denied* 423 U.S. 1017 (1975), *reh. denied*, 423 U.S. 1073 (1976), the court of appeals held that the facially strict requirements of the RLA apparently did not mandate labor contract rejection through only the ponderous RLA procedures. See also *supra* notes 83 and 86.

¹²¹ 45 U.S.C. §§ 151-163 (1982).

¹²² *Kevin Steel*, 519 F.2d at 702-703 (“The failure of Congress similarly to limit section 313(1) . . . shows a clear intention to include labor contracts within its scope The reported cases directly on point either hold or assume that the expansive language of § 313(1), or of analogous sections, reaches collective bargaining agreements.”). The Second Circuit concluded that labor contracts under the RLA were distinctly different from non-RLA collective bargaining agreements, and that the RLA was enacted to address specific and unique problems of a particular industry:

But certainly it would be wrong to assume that whatever Congress enacted with respect to the labor relations of those employers covered by the Railway Labor Act should automatically be applied to other employers. The distinct problems of the former group and their importance to the national economy are well recognized (citation omitted) and are highlighted by the differences between the Railway Labor Act and the National Labor Relations Act

Id. at 705.

¹²³ *Id.* at 707. See *infra* note 127 and accompanying text.

rejection should not be based solely on whether it will improve the debtor's financial status.¹²⁴ According to the court, because labor contracts and therefore, the NLRA were at issue, an especially careful balancing of the equities test, which had been enunciated earlier by a federal district court in *In re Overseas National Airways, Inc.*,¹²⁵ should be adopted.¹²⁶

Summarizing this test for rejection of labor contracts in bankruptcy, the court of appeals concluded that a bankruptcy court should accord a collective bargaining agreement meticulous scrutiny and conduct a careful balancing of the interests of the debtor and the union.¹²⁷ The *Kevin Steel* court emphasized that courts should move cautiously in permitting the rejection of labor contracts. In *Overseas National Airways*,¹²⁸ the district court had listed several legitimate employee interests.¹²⁹ The court of appeals in *Kevin Steel* was fully cognizant of the need to afford appropriate protections for these interests. In *Kevin Steel*, the union also raised serious questions, which the Second Circuit concluded required careful consideration by the bankruptcy court in a comprehensive assessment of all the equities.¹³⁰ Specifically, the court stated that particular scrutiny must be devoted to any possible anti-union animus by the employer, the true financial situation and the root causes of the difficulties of the company, and the more intangible employee interests at stake.¹³¹ The Second Circuit held that after careful consideration of all the equities, the labor contract rejection petition can be approved by the court.¹³²

2. *Brotherhood of Railway Clerks v. REA Express, Inc.*¹³³

In *REA*,¹³⁴ the Second Circuit substantially tightened the broad equities test it had set forth one month earlier in *Kevin Steel*.¹³⁵ The court clearly established that mere preponderance of general equities in favor of the debtor would not suffice to authorize rejection of the collective bargaining agreement.¹³⁶ Rather, in addition to a careful assessment of the equities, the Second Circuit ruled that bankruptcy courts could authorize labor

¹²⁴ *Kevin Steel*, 519 F.2d at 707. Such a narrow focus "totally ignores the policies of the Labor Act and makes no attempt to accommodate to them." *Id.*

¹²⁵ *In re Overseas Nat'l Airways, Inc.*, 238 F. Supp. 359, 361 (E.D.N.Y. 1965).

¹²⁶ *Kevin Steel*, 519 F.2d at 707.

¹²⁷ *Id.*

¹²⁸ 238 F. Supp. 359 (E.D.N.Y. 1965).

¹²⁹ [I]n relieving a debtor from its obligations under a collective bargaining agreement, it may be depriving the employees affected of their seniority, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim for money damages. That would leave the employees without compensation for their losses at the same time enabling the debtor, at the expense of the employees, to consummate what may be a more favorable plan of arrangement with its other creditors.

Overseas Nat'l Airways, 238 F. Supp. at 361-362.

¹³⁰ *Kevin Steel*, 519 F.2d at 707.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Bhd. of Ry. Clerks v. REA*, 523 F.2d 164 (2d Cir. 1975), cert. denied, 423 U.S. 1017 (1975), reh. denied, 423 U.S. 1073 (1976) [hereinafter cited as *REA*].

¹³⁴ *Id.*

¹³⁵ *Kevin Steel*, 519 F.2d 698 (2d Cir. 1975). Although both *Kevin Steel* and *REA* were decided by the Second Circuit, different judges were on the panels.

¹³⁶ *REA*, 523 F.2d at 169.

contract rejection only if there were no other viable alternative to total debtor collapse, final loss of all jobs, and ultimate liquidation.¹³⁷

The court of appeals stated that bankruptcy courts could authorize rejection of collective bargaining agreements only when a careful weighing of all the facts and equities, concludes "that an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a failing carrier in bankruptcy from collapse."¹³⁸ The Second Circuit concluded that labor contract rejection should be authorized only where it clearly appears to be the lesser of two evils. According to the *REA* court, it must appear that the carrier will collapse and the employees will become unemployed unless the agreement is rejected.¹³⁹ This "last resort" test obviously made it very difficult, although not impossible, for the debtor to acquire court approval for labor contract abrogation.

In *REA*, the court of appeals apparently exempted the air and surface carrier employer from the strictures of the RLA. In the court's view, rigid compliance with the seemingly absolute facial statutory terms of the RLA¹⁴⁰ would prove to be a "hollow pyrrhic victory."¹⁴¹ The court asserted that strict compliance with the RLA provisions would "defeat the purpose of the RLA itself, which is to avoid disruption of commerce by insuring that the carrier will continue operations pending resolution of labor disputes."¹⁴² Calcified adherence to the unwieldy, protracted procedures of the RLA, in the court's view, would frustrate the efficacy necessary to save jobs.¹⁴³ For all of these reasons, the Second Circuit relieved the air and surface carrier from the seemingly absolute mandate of the RLA.¹⁴⁴ Ironically, therefore, rather than render labor contract rejection a virtual

¹³⁷ *Id.* at 172.

¹³⁸ *Id.* at 169.

¹³⁹ *Id.* at 172. Because the district court had not considered the labor contract rejection issue according to these standards, the case was remanded. *Id.* Ultimately, *REA* was adjudicated bankrupt on November 6, 1975.

¹⁴⁰ See, e.g., § 1 of the RLA. 45 U.S.C. §§ 151-169 broadly defines "carrier" to include "any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier.'" Section 2 of the RLA provides:

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in § 156 of this title." 45 U.S.C. § 152 (1982). Section 6 of the RLA in turn provides for maintenance of the status quo ante, even when the labor contract has expired. 45 U.S.C. § 156 (1982). Further, section 6 of the RLA requires a minimum of thirty days written notice of any intended contract changes, requires conferences on any proposed changes, provides for submission of disputes to the National Mediation Board, and reiterates that, pending exhaustion of section 6 procedures, "rates of pay, rules, or working conditions shall not be altered by the carrier." 45 U.S.C. § 156 (1982). See also *REA*, 523 F.2d at 168. Concomitantly, section 205(n) of the former Act (in effect when *REA* was decided) mandated that the court strictly adhere to RLA provisions in any decision regarding rejection of a labor contract within the purview of the RLA. 11 U.S.C. § 205(n) (1976).

¹⁴¹ *REA*, 523 F.2d at 169.

¹⁴² *Id.*

¹⁴³ *Id.* ("[T]he end result could well be to preclude financial reorganization of the carrier and thus lead to its demise.").

¹⁴⁴ *REA* was decided under the prior Bankruptcy Act. *In re Braniff Airways, Inc.*, 25 Bankr. 216 (N.D. Texas, 1982) recently considered the interrelationship of the RLA and the 1978 Code regarding rejection of collective bargaining agreements. The court concluded that rejection was not absolutely precluded by the 1978 Code. *Id.* at 217-18. Section 1167 of the 1978 Code paralleled section 77(n) of the Act. Section 1167 provides:

Notwithstanding § 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective

impossibility, the Second Circuit's "last resort" test, in effect, gave the courts and the parties some freedom from the ponderous RLA requirements for labor contract termination. When applied to labor agreements beyond those within the purview of the RLA, however, the Second Circuit's two-tier test in *Kevin Steel/REA*¹⁴⁵ made it undeniably more difficult to reject labor contracts than under the former *Kevin Steel* general equities test alone.¹⁴⁶ Under the *REA* test, the debtor must prove that liquidation would ensue, absent labor contract abrogation.

3. The "New Entity" Theory And The Analogy to the Labor Law "Successor Employer"

In both *Kevin Steel* and *REA*, the Second Circuit regarded the debtor in possession as a "new entity," separate and distinct from the employer prior to bankruptcy proceedings.¹⁴⁷ The court of appeals analogized the debtor in possession to the successor em-

bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. § 151 *et. seq.*) except in accordance with § 6 of such Act (45 U.S.C. § 156).

11 U.S.C. § 116 (1982).

Both section 77(n) and section 1167 mandated compliance with the RLA section 6 contract termination procedures only in the case of railway employees. Since employees here were those of an air carrier, the court found 45 U.S.C. § 156 did not apply. *Braniff*, 25 Bankr. at 217.

One commentator pointed out that "§ 1167 of the Code in effect overrules *REA Express* by exempting all collective bargaining agreements covered by the RLA, whereas the Bankruptcy Act exempted only contracts covering railroad employees. 11 U.S.C. § 1167 (Supp. III 1979) (replaced 11 U.S.C. § 205(r) (1976)). The *REA Express* analysis is still useful because its rationale applies to all types of collective bargaining agreements." Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, 80 MICH. L. REV. 134, 140 n.35 (1981) [hereinafter cited as Note, *Labor-Bankruptcy Conflict*].

In fact, however, it is highly dubious whether section 1167 of the 1978 Code entirely overruled *REA Express*. Despite the fact that the RLA covers both rail and air carrier employees, section 1167 continues to apply only to railroad employees; section 1167 does not extend to the labor contracts of air carriers. This difference is attributable to the express operation of section 103(g) of the 1978 Code: "Subchapter IV of Chapter 11 of this title applies only in a case under such chapter concerning a railroad." 11 U.S.C. § 103(g). See *supra* note 86.

¹⁴⁵ For a representative compendium of the law review commentary regarding the *Kevin Steel* and *REA* cases, see Note, *Labor-Bankruptcy Conflict*, *supra* note 144 at 137 n.20.

¹⁴⁶ The leading treatise suggested that the *REA* test promulgated under the former Act was imperiled with the passage of the 1978 Bankruptcy Court: "Although a mere showing that rejection would improve the financial condition of the Debtor did not suffice under the Act, the result may be different under the Code due to the failure of Congress to incorporate a requirement of burdensomeness into § 365." COLLIER, *supra* note 49, at 365-18. Many courts have thus refused to follow the *REA* test. See *In re Ateco Equipment Inc.*, 18 Bankr. 915, 916 (W.D. Pa. 1982). Cf. *In re David A. Rosow, Inc.*, 9 Bankr. 190, 192 (D. Conn. 1981) ("Sixteen months experience under the Code suggests that unless there is a clear prohibition to the contrary in specific instances, courts continue to rely on pre-Code decisional law to resolve controversies under the Code . . . I hold that pre-Code case law in this circuit remains the authoritative precedent for resolving the issues before me."). The *Rosow* Court also pointed out that the above quote from COLLIER "does not exhaust that treatise's reflections on the matter. Indeed, the comment is but one tentative approach to the problem. COLLIER also sets forth the pre-Code law in some detail and observes that 'there is little if any reason to expect the courts to apply a less stringent standard to collective bargaining agreements under § 365.'" *Id.* at 192 (citation omitted) (quoting COLLIER, *supra* note 49, at 365-17).

¹⁴⁷ In *Kevin Steel*, the Court of Appeals stated:

A debtor-in-possession under Chapter XI or under Chapter X, a trustee under the latter chapter, or a trustee in a straight bankruptcy proceeding is *not* the same entity as the pre-bankruptcy company. A new entity is created with its own rights and duties, subject to the supervision of the bankruptcy court.

Kevin Steel, 519 F.2d at 704.

ployer of labor law doctrine.¹⁴⁸ Under this doctrine, while the successor employer is bound to continue to negotiate with the union in good faith,¹⁴⁹ the successor employer is

Subsequently, the Second Circuit elucidated further: "When REA, after going into Chapter XI proceedings, was authorized to operate as the debtor in possession, it acted as a new juridical entity." *REA*, 523 F.2d at 170.

¹⁴⁸ The classic case expounding the successor employer labor law doctrine is *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 287-91 (1972); see generally Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759 (1975). In *Kevin Steel*, the Second Circuit stated that, "it may be that the obligations of such a trustee or debtor are analogous to those of a successor employer." *Kevin Steel*, 519 F.2d at 704. Many bankruptcy courts also have since subscribed to the successor employer doctrine and regarded the debtor in possession as a new entity, distinct and separate from the pre-bankruptcy employer. See e.g., *In re Unit Parts Co.*, 10 Bankr. 970, 979 (W.D. Okla. 1981).

The new entity or successorship doctrine is but one of several allied, but distinct, doctrines utilized to define the nature and scope of bargaining obligations during and after corporate transformations. Within the context of the duty to bargain surrounding labor contract rejection in bankruptcy, this article and the pertinent cases focus exclusively on the new entity and successor analogy.

"Single employer" and "alter ego" theories are usually not employed. One commentator concisely summarized the single employer, alter ego, and successor theories, and elucidated their respective application:

In applying the first of these tests, to determine whether two or more nominally separate business entities will be considered a single employer for bargaining purposes, the NLRB and the courts apply a four-factor analysis, measuring the extent of "interrelation of operations, centralized control of labor relations, common management, and common ownership or financial control. Alternatively, the alter ego test seeks to impose a bargaining obligation upon a newly created corporate entity when the corporate change is motivated primarily by the employer's anti-union bias. Finally, the successorship doctrine measures the degree of employee continuity between the new and old business, imposing a bargaining obligation upon the new entity when there is sufficient evidence of the continued validity of the union's representative status after the business change.

Note, *Bargaining Obligations after Corporate Transformation*, 54 N.Y.U. L. REV. 624, 625 (1979).

¹⁴⁹ "Such a trustee or debtor may be required, for example, to bargain collectively with the representative of a majority of its employees; if an agreement is then entered into with a union, § 8(d) governs its termination." *Kevin Steel*, 519 F.2d at 704. "Although a debtor-in-possession such as REA is not bound to assume the collective bargaining agreements of its predecessor, it as a new employer is obligated to bargain collectively with the representative of the employees hired by it." *REA*, 523 F.2d at 170. Accord, *In re Commercial Motor Freight, Inc. of Indiana*, 27 Bankr. 293, 297-98 (S.D. Ind., 1983); *In re Concrete Pipe Mach.*, 28 Bankr. 837, 840 (N.D. Iowa, 1983); *In re Hoyt*, 27 Bankr. 13, 15 (D. Oregon 1982) (approving labor contract rejection wherein debtor had no employees subject to contract and no plans for employment as long as contract in effect); *In re St. Croix Hotel Corp.*, 18 Bankr. 375, 379 (D.V.I. 1982) ("Since the debtors do not now have any employees which are covered by the bargaining agreement, there are no present employees who would be effected by such rejection. If the contract is rejected future prospective employees could determine whether they wished to accept employment by the debtor without the benefit provided by the bargaining agreement. If the debtors were to find that they were unable to employ qualified laborers without providing such benefits, they could enter into such a bargaining agreement in the future."); *In re Unit Parts Co.*, 10 Bankr. 970, 978-80 (W.D. Okla. 1981) (The debtor in possession was not obligated to bargain with the union regarding employee hiring. The bankrupt employer had previously terminated all employees. The debtor in possession successor was free to hire "new" employees without regard to the predecessor's former employees, since it did not unlawfully discriminate regarding past union membership.); Accord, *In re Ryan Co.*, 4 BANKR. CT. DEC. 64, 65 (D. Conn. 1978).

In *Yorke v. NLRB*, 709 F.2d 1138 (7th Cir. 1983), the Seventh Circuit ruled that the trustee had the duty to bargain the effects of its decision to terminate all employees. *Yorke v. NLRB*, 709 F.2d 1138 (7th Cir. 1983). After filing the Chapter 11 reorganization bankruptcy petition on November 1,

not bound by the terms of prior collective bargaining agreements.¹⁵⁰ Relying on the successor employer labor law doctrine,¹⁵¹ the Second Circuit in *REA*, reasoned that the debtor in possession must be granted "certain prerogatives" in both the operations and labor relations of the reorganized business. Otherwise, in the court's view, the free flow of capital and efforts to preserve a weak enterprise might fail.¹⁵² Specifically, the court suggested that if the debtor in possession is not relieved of prior labor contract terms, it may not survive.¹⁵³ Thus, where the employees are represented, the court held that the debtor in possession must only give reasonable notice of its proposed terms and negotiate in good faith for a reasonable period of time before putting the terms into effect.¹⁵⁴

1979, Yorke reduced the work force from 150 to seven employees in early 1980. *Id.* at 1140. On February 4, 1980, the bankruptcy court appointed a trustee, due to allegations of fraud and mismanagement. *Id.* The trustee then terminated all operations and discharged the seven remaining employees, all union members, without giving the union prior notice nor affording the union subsequent opportunity to bargain the effects of the closing decision. *Id.* at 1141. The Seventh Circuit held that the trustee violated §§ 8(a)(1) and (5) of the NLRA: "a Trustee in Bankruptcy, like any other employer, must abide by the labor laws, as long as they prescribe conduct consistent with the duties imposed by the Bankruptcy Code." *Id.* at 1142.

Unfortunately, as a practical matter, post-rejection bargaining may be only a hollow, and largely meaningless, pro forma exercise:

{P}ost-rejection bargaining is no substitute for pre-rejection bargaining. For example, if the debtor-in-possession has obtained rejection of the agreement on the ground that its survival requires wages to be reduced by a certain percentage, as a realistic matter effective bargaining on that matter has been preempted.

Brief for the NLRB, *NLRB v. Bildisco*, 104 S.Ct. 1188 (filed May 6, 1983).

The union argued that good faith bargaining should be an absolute precondition to filing any petition for court authorization of labor contract rejection:

[I]f a debtor in possession is freed from the collective bargaining agreement upon the filing for bankruptcy or is permitted to obtain rejection of the collective bargaining agreement without first negotiating, then there is no opportunity for the parties to even attempt to devise a mutually agreeable concession contract which would at least maintain some of the basic benefits for the workers.

Brief For Petitioner Union, *NLRB v. Bildisco*, 104 S.Ct. 1188 (filed May 9, 1983).

¹⁵⁰ "Until the debtor here assumes the old agreement or makes a new one, it is not a 'party' under § 8(d) to any labor agreement with the union . . ." *Kevin Steel*, 519 F.2d at 704. "[T]he debtor in possession was not a party to and was not bound by the terms of the collective bargaining agreement entered into by REA as debtor . . ." *REA*, 523 F.2d at 170. *Accord, In re Unit Parts Co.* 10 Bankr. 970, 979 (W.D. Okla. 1981).

Some courts have also refused to enforce arbitration clauses of the labor contracts of employers in bankruptcy. *E.g., Johnson v. England*, 356 F.2d 44, 52 (9th Cir.), *cert. denied*, 384 U.S. 961 (1966).

¹⁵¹ See *supra* note 149. In *Burns*, the Court summarized the principal reasons why the successor employer normally will not be bound to the terms of the predecessor employer's collective bargaining agreements:

A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.

Burns, 406 U.S. 272, 287-88 (1972).

¹⁵² *REA*, 523 F.2d at 170.

¹⁵³ *Id.* at 171.

¹⁵⁴ *Id.* at 171. General labor law principles and landmark labor cases normally impose an obligation on the employer not to make a unilateral change in hours, wages, or conditions of employment without first advising the union and providing the union an opportunity to bargain regarding the proposed change. *First Nat'l Maintenance v. NLRB*, 452 U.S. 666, 681 (1981). *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 211 (1964); *cf. NLRB v. Katz*, 369 U.S. 736, 737-48 (1962).

Subsequently, in *Truck Drivers Local 807 v. Bohack Corporation*,¹⁵⁵ the Second Circuit narrowed the application of the successor employer analogy to the debtor in possession.¹⁵⁶ The court reasoned that because the debtor in possession is not a party¹⁵⁷ to the existing contract, section 8(d), the provision of the NLRA which normally governs the termination of labor contracts, will not apply to the debtor in possession.¹⁵⁸ Simply filing the initial petition for bankruptcy alone, however, the court stated, will not abrogate the labor contract. Until the court authorizes the specific petition for court approval of labor contract rejection, the debtor in possession technically continues to be bound by the contract.¹⁵⁹ Prior unilateral modification or abrogation of the contract without court approval, therefore, was an unfair labor practice.¹⁶⁰ Consequently, although freed of the labor contract, the debtor remained obligated to bargain with the representative of the employees after contract rejection.¹⁶¹

¹⁵⁵ 541 F.2d 312 (2d Cir. 1976), *aff'd per curiam after remand*, 567 F.2d 237 (2d Cir. 1977), *cert. denied*, 439 U.S. 825 (1978).

¹⁵⁶ *Id.* at 320.

¹⁵⁷ The court of appeals candidly admitted that it was necessarily indulging in transparent manipulation of a legal fiction:

Of course, the statement that the debtor is not a "party," and the analogy to the successor employer, cannot be taken literally since neither affirmation or rejection of the collective bargaining agreement would be possible by one not a party to it. See Countryman, *Executory Contracts in Bankruptcy: Part II*, 56 MINN. L. REV. 479, 489 n.259 (1974).

Truck Drivers, 541 F.2d at 320. See also Note, *Rejection of Agreements*, *supra* note 40, at 829. For earlier elucidation of this legal fiction, see *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 43 (3d Cir. 1942):

[A] debtor-in-possession is responsible for the unfair labor practices which occur during a reorganization. Its status as an employer is no different . . . than that of any other employer And where managerial control and economic interests of the debtor-in-possession and the reorganized company are the same, it could only be the blindness of formalism that would suggest separately instituted proceedings against the predecessor and the successor for the redress of their respective but continuous unfair labor practice.

Id.

¹⁵⁸ *Truck Drivers*, 541 F.2d at 320, citing *Kevin Steel*, 519 F.2d at 704.

¹⁵⁹ "As long as rejection is not ordered, the contract continues in existence . . ." COLLIER, *supra* note 49, at 365-422; see generally *In re W.T. Grant Co.*, 620 F.2d 319, 321 (2d Cir. 1980), *cert. denied*, 446 U.S. 983 (1980) ("only a formal rejection pursuant to § 313(1) of the Bankruptcy Act . . . is sufficient to disaffirm an executory contract."). See also *In re Unishops*, 553 F.2d 305 (2d Cir. 1977); *Texas Importing Co. v. Banco Popular de Puerto Rico*, 360 F.2d 582 (5th Cir. 1966); *Smith v. Hill*, 317 F.2d 539 (9th Cir. 1963); *Con. Gas Elec. Light and Power Co. v. United Rys. and Elec. Co.*, 85 F.2d 799 (9th Cir.), *cert. denied*, 300 U.S. 663 (1936); *In re Guardian Equipment Corp.*, 18 Bankr. 864 (S.D. Fla. 1982); *In re Smith Jones, Inc.*, 17 Bankr. 126 (D. Minn. 1981); *In re Penn Fruit Co.*, 1 Bankr. 714 (E.D. Pa. 1979); *Truck Drivers*, 541 F.2d at 312; *I.S.G. Extrusion Toolings, Inc.*, 262 N.L.R.B. 114 (1982) ("[B]argaining agreements remain effective and binding, notwithstanding the appointment of a debtor in possession. We have held that an employer is not relieved of its obligation to bargain over the effects of its decision to terminate operations merely because it has become a debtor-in-possession under the Bankruptcy Act, even if it believes itself to be financially unable to meet the union's bargaining demands." *Id.* at 115); *Burgmeyer Bros., Inc.*, 254 N.L.R.B. 1027 (1981); *Jersey Juniors, Inc.*, 230 N.L.R.B. 329, 332 (1977).

Unilateral change without court approval is a clear contract breach, and the normal third priority wage claims will be elevated to first priority as administrative expenses. *In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976).

¹⁶⁰ See Note, *Labor-Bankruptcy Conflict*, *supra* note 144, at 141 n.43 for an excellent synopsis defining the nature of the debtor's duty to bargain.

¹⁶¹ This reasoning of the successor employer analogy was reiterated in *In re Unishops, Inc.*,

Several commentators have criticized the Second Circuit's new entity and successor employer¹⁶² analogies to the debtor in possession.¹⁶³ According to two scholars, the analogy is a facile, spurious legal fiction.¹⁶⁴ If the debtor in possession were a new entity,

where the Court of Appeals for the Second Circuit stated:

We again caution that the language in *Shopmen's Local Union* . . . 'a debtor-in-possession under Chapter XI . . . is not the same entity as the pre-bankruptcy company' should not be extended as a generalization in cases other than these involving labor collective bargaining agreements where the claim is that § 8(d) . . . precludes disaffirmance of the labor agreement in a Chapter XI proceeding without taking the steps required under section 8(a) of the Labor Act . . .

In re Unishops, Inc. 543 F.2d 1017, 1018-19 (2d Cir. 1976).

¹⁶² A trinity of Supreme Court labor law decisions embodies the successor employer doctrine. See *Howard Johnson Co. v. Detroit Local Joint Executive Board Hotel Employees Nat'l Union*, 417 U.S. 249, 256-64 (1974); *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 281-91 (1972); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548 (1964). In *REA* and *Kevin Steel* the Second Circuit relied heavily on the *Burns* decision. See *REA*, 523 F.2d at 170; *Kevin Steel*, 519 F.2d at 704. For extensive discussion of the successor employer cases, see generally Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw. U.L. REV. 735 (1969); Krupman and Kaplan, *The Stock Purchaser After Burns: Must He Buy the Union Contract?*, 31 LAB. L.J. 328 (1980); Morris and Gaus, *Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns*, 59 VA. L. REV. 1359 (1973); Nash, *Successorship in Light of Burns*, 7 GA. L. REV. 664 (1973); Slicker, *A Reconsideration of the Doctrine of Employer Successor — A Step Toward a Rational Approach*, 57 MINN. L. REV. 1051 (1973); Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759 (1975); Note, *The Impact of Howard Johnson on the Labor Obligations of the Successor Employer*, 74 MICH. L. REV. 555 (1976); Note, *Contract Rights and the Successor Employer: The Impact of Burns Security*, 71 MICH. L. REV. 571 (1973); Comment, *Contractual Successorship: The Impact of Burns*, 40 U. CHI. L. REV. 617 (1973).

¹⁶³ Countryman, *Part II*, *supra* note 2 at 489 n.215; Note, *Law's Effect*, *supra* note 49 at 404; Note, *Labor-Bankruptcy Conflict*, *supra* note 144 at 142-48; Note, *Bankruptcy Rejection*, *supra* note 84 at 172-73.

¹⁶⁴ Bordewieck and Countryman, *supra* note 52 at 301. Bordewieck and Countryman note:

The "new entity" theory simply cannot withstand close scrutiny; one need only observe that a "new entity," not a party to the contracts of its pre-petition predecessor, would scarcely need bankruptcy court approval to reject one of those contracts. Indeed, since there is no logical basis for confining the new entity theory to a case involving a collective bargaining agreement, the theory suggests that upon the filing of a bankruptcy petition the debtor ceases to be a party to any contract. Such a conclusion is plainly nothing but nonsense . . . A weighty fiction is needed before one can conclude that a chapter 11 debtor did not agree to be bound by the collective bargaining agreement it now wishes to reject. *Burns* is simply inapplicable in a bankruptcy proceeding. Indeed, were *Burns* applicable, a debtor viewed as a "successor" employer would not be bound by the provisions of the collective bargaining agreement in the first place, and thus would not need to seek court approval of the agreement's termination.

Id. at 301-07. See also Note, *Bankruptcy Rejection*, *supra* note 84, at 173, where the author stated that "it is difficult to see how a debtor-in-possession can be truly distinct from its former self. Where there have been no changes in management, except to introduce overall bankruptcy court supervision, any analogy to successor employer situations seems tenuous."

The NLRB and some courts consistently rejected the new entity, successor analogy to the debtor in possession, especially when the business continues to be operated in substantially the same fashion as before the bankruptcy filing; in that case, the Board regarded the debtor in possession as the alter ego, rather than as the successor, of the pre-bankruptcy employer. See *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 43-44 (3d Cir. 1942) (where managerial control and economic interest of debtor in possession and company are same then "in no legally significant sense . . . can debtor be differentiated from debtor in possession so far as employer-employee relationship is concerned"); *In re Tucker Freight*, 115 L.R.R.M. 2202, (W.D. Mich. 1983) (In the most recent bankruptcy court decision rejecting the successor doctrine, the court enjoined the debtor employer from decreasing the wage rates without union consent: "Tucker's pre-petition and post-petition is essentially the same

under the statute, there would be no need for it to seek court approval to reject the contract. Like the successor employer, the new entity debtor in possession simply would not be bound by the prior contracts. In effect, the new entity was never a party to the original contract. An additional distinction is that in successorship cases, the employees will frequently be dealing with a far more viable new employer.¹⁶⁵ In the reorganization cases, however, the employees' only "gain" is job preservation. This laissez faire, minimalist perspective cynically transmogrifies employee aspirations into a bleak Malthusian state, given the undeniable reality that a job is usually better than the specter of unemployment.¹⁶⁶ Thus, rather than placate employees trapped in this survivalist mode, labor contract rejection in reorganization, through facile use of the successorship analogy, instead may serve to precipitate and exacerbate labor tension. One commentator summarized and highlighted the irony of the misplaced successor analogy in the bankruptcy context:

When a business is sold, the successor employer is frequently financially stronger than its predecessor; and the union will seek to renegotiate its contract to guarantee wages and benefits commensurate with the new management's economic position. New contracts following the sale of a business may thus benefit the union and promote industrial peace. In reorganization proceedings, however, it is the rejection of the debtor's collective bargaining agreement that may cause labor unrest.¹⁶⁷

The Eleventh Circuit also expressed serious misgivings with the tenuous new entity and successor analogy to the debtor in possession in *In re Brada Miller Freight System, Inc.*¹⁶⁸

business, apparently using the same plant, same work force, operating under the same working conditions, using the same machinery and equipment and method of production, offering identical services to the public, and has continued its operations during the transition period . . . [T]he new entity/successor employer theory enunciated in the Court decisions is not intended to provide justification for a DIP's unilateral changes of union contracts, but rather to set forth a proposition that unrelated entity to preexisting contracts will not be bound."); *In re Price Chopper Supermarkets, Inc.*, 19 Bankr. 462, 464 (S.D. Cal. 1982) ("This new entity theory has been criticized for it creates the paradoxical situation that the debtor-in-possession is cast as a new employer, apparently not bound by preexisting executory contracts and yet, it must make an appropriate showing to reject such agreements, including satisfying the higher standard imposed when dealing with applications to reject collective bargaining contracts."); *Century Printing Co.*, 242 N.L.R.B. 659, 666-67 (1979), enforced 661 F.2d 914 (3d Cir. 1981); *Airport Limousine Service, Inc.*, 231 N.L.R.B. 932, 935 (1977); *Jersey Juniors, Inc.*, 230 N.L.R.B. 329, 334 (1977); *Stateside Shipyard and Marina, Inc.*, 178 N.L.R.B. 516, 518 (1969). The Supreme Court definitively has recognized and rejected the analogy of the debtor in possession to the new entity/successor doctrines. *NLRB v. Bildisco*, 104 S.Ct. at 1197.

¹⁶⁵ *REA*, 523 F.2d at 170.

¹⁶⁶ Several courts have recently highlighted this dire truth, authorizing rejection of labor contracts. See *In re Concrete Pipe Machinery Co.*, 28 Bankr. 837, 838 (N.D. Iowa 1983) ("The Debtor will not likely resume normal operations, thus not returning any unemployed workers to their jobs, if the financially burdensome covenants of the collective bargaining agreement must be performed."); *In re Blue Ribbon Transportation Co.*, 30 Bankr. 783, 786 (D.R.I. 1983) ("[I]f the debtor in possession is not permitted to reject the contract, the business will close within a matter of weeks, with the resulting loss of jobs by the drivers currently employed. This factor is often given great weight in favoring rejection of the contract."); *In re Southern Electronics Co., Inc.*, 23 Bankr. 348, 362 (E.D. Tenn. 1982); *In re Braniff Airways, Inc.*, 25 Bankr. 216, 219-21 (N.D. Tex. 1982) ("[I]n a reorganization situation the very existence of jobs becomes a prime factor . . . [T]here will be no jobs if the agreement is not rejected . . . It is basic principle that a job without seniority is better than no job at all.");

¹⁶⁷ Note, *Labor-Bankruptcy Conflict*, *supra* note 144, at 145.

¹⁶⁸ *In re Brada Miller Freight Systems, Inc.*, 702 F.2d 890, 891-96 (11th Cir. 1983).

In *Brada Miller*, the court of appeals stated that other circuits had speciously resorted to the analogy in order to avoid dealing directly with the obvious tension between section 365 of the Bankruptcy Code and section 8(d) of the NLRA regarding contract termination.¹⁶⁹ The Eleventh Circuit observed that although the new entity theory was a useful analytical tool, its application in this context would cause trouble because of certain "conceptual inconsistencies."¹⁷⁰ Thus, while the Eleventh Circuit admitted the viability of the new juridical entity for some limited purposes,¹⁷¹ the court refused to extend the concept to find any distinction between the debtor in possession and the pre-bankruptcy employer regarding labor law obligations.¹⁷² If the debtor in possession truly is not a party to extant collective bargaining agreements, the court recognized, it would be illogical to require the debtor in possession to petition and receive court approval prior to labor contract rejection.¹⁷³ According to the court, the Code could just as readily have provided that labor contracts are automatically abrogated upon filing the Chapter 11 petition for reorganization.¹⁷⁴ The court stated the unilateral termination without prior court approval, however, remains a clear employer unfair labor practice in violation of section 8(a)(5) of the NLRA.¹⁷⁵ Further, the court observed that if the bankruptcy court refuses to grant the petition to reject the labor contracts, the debtor in possession is bound by the terms of the collective bargaining agreement.¹⁷⁶ The court pointed out, however, that the proponents of the new entity concept had failed to articulate a legal theory which justifies binding a "non-party" to the agreement.¹⁷⁷ Summarizing the fundamental conceptual incongruities with the attenuated application of the new entity and successor doctrine analogies, the court stated that the viability of the new entity theory rested on the bankruptcy court's granting of the debtor in possession's motion to reject the collective bargaining agreement. According to the court, the new entity theory was obviously unworkable in contrary situations where the debtor in possession is compelled to comply with the terms of an existing collective bargaining agreement.¹⁷⁸

B. Subsequent Tests in Other Circuits

The Ninth Circuit closely followed the two-tier test for labor contract rejection set forth by the Second Circuit in *Kevin Steel/REA*. In *Local Joint Executive Board v. Hotel Circle Inc.*,¹⁷⁹ the Ninth Circuit affirmed bankruptcy court authorization of labor contract rejection in bankruptcy.¹⁸⁰ Following the earlier Second Circuit rationale, the Ninth Circuit found the labor contract to be an executory contract and therefore subject to rejection under section 313(1) of the Act.¹⁸¹ The *Hotel Circle* court also found the successor

¹⁶⁹ *Id.* at 894.

¹⁷⁰ *Id.* at 894-95.

¹⁷¹ *Id.* at 895.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 895 n.15.

¹⁷⁵ *Id.* at 896.

¹⁷⁶ *Id.* at 895.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ 613 F.2d 210 (9th Cir. 1980).

¹⁸⁰ *Id.* at 219. For a thorough, exhaustive discussion of the facts of the case, see generally Note, *Bankruptcy Law-Labor Law-Rejection, Assumption and Modification of Collective Bargaining Agreements*, 1981 ARIZ. ST. L.J. 311 (1981); Note, *Receiver's Authority*, *supra* note 114.

¹⁸¹ *Joint Executive Board*, 613 F.2d at 213.

analogy persuasive.¹⁸² The Ninth Circuit, however, expressly declined to articulate any general rule regarding the standard for labor contract rejection.¹⁸³ In the court's view, the existence of myriad factual considerations dictated that each decision must necessarily be made on a case-by-case basis.¹⁸⁴ Significantly, the Ninth Circuit appeared to retreat from the strict two-tier, or last resort, test of the Second Circuit. Instead, the Ninth Circuit opted for a general equities test, more consistent with *Kevin Steel* than with *REA*.¹⁸⁵ The court held that the petitioner for rejection need not prove that business collapse and loss of jobs is the inevitable consequence absent contract rejection.¹⁸⁶ The Ninth Circuit endorsed the less stringent test allowing rejection for "labor agreements found to be onerous and burdensome to the debtor's estate."¹⁸⁷

The receiver in *Joint Executive Board* had unilaterally accepted a proposed wage increase and had further agreed to extend the life of the labor contract.¹⁸⁸ Subsequently, the creditors' committee obtained court approval for rejection of the contract.¹⁸⁹ The union then unsuccessfully argued that the receiver had unilateral authority to affirm the contract and to bind the estate without court approval of the receiver's conduct.¹⁹⁰ The Ninth Circuit required prior court approval for either rejection, or, in this case, adoption of the labor contract by the receiver.¹⁹¹ In so ruling, the court of appeals rejected¹⁹² the *REA* view that the debtor in possession could unilaterally assume the labor contract "either expressly or conforming to its terms without disaffirmance."¹⁹³ The Ninth Circuit distinguished the prior cases relied on by the Second Circuit in *REA* which suggested that the debtor in possession had the unilateral ability to affirm the labor contract without prior court approval.¹⁹⁴ Instead, the Ninth Circuit looked to more recent decisions from

¹⁸² *Id.* at 214.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 214 n.3.

¹⁸⁵ *Id.* at 216-17.

¹⁸⁶ *Id.* at 214.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 212.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 215.

¹⁹² *Id.* at 217 n.5.

¹⁹³ *REA*, 523 F.2d at 170.

¹⁹⁴ *Id.* at 216-19 citing *In re Public Ledger, Inc.*, 161 F.2d 762, 767 (3d Cir. 1947); *In re Wil-Low Cafeterias, Inc.* 111 F.2d 429, 431 (2d Cir. 1940).

The reasoning of the Ninth Circuit was also applied in *In re Concrete Pipe Machinery Co.*, 28 Bankr. 837, 841 (N.D. Iowa, 1983); *In re Steelship Corp.*, 576 F.2d 128, 132 (8th Cir. 1978); *In re Letterman*, 29 Bankr. 351, 354 (E.D. Cal. 1983).

Recently, *In re Price Chopper Supermarkets, Inc.* 19 Bankr. 462, 466-67 (S.D. Cal. 1982) made an important and significant pre-*Bildisco* observation regarding the difference in contract rejection proceedings between Chapter 11 and Chapter 7. Prior court authorization for labor contract rejection is required only in Chapter 11 reorganization proceedings. This decision held that the trustee can unilaterally reject labor contracts without prior judicial authority in Chapter 7 straight bankruptcy liquidation proceedings. *Id.*:

If Chapter 7 trustees had to present these numerous determinations to reject such contracts to the courts, it would undoubtedly create a considerable administrative burden. Congress apparently recognized this potential problem in enacting § 365(d)(1), which vests the decision regarding rejection of executory contracts solely in the Chapter 7 trustee, for a sixty-day period. (citations omitted). If the Chapter 7 trustee does not indicate an intention to assume the contract during the sixty-day period, then the contract is automatically deemed rejected.

Id. 11 U.S.C. § 365(d)(1) of the 1978 Code provides:

the Fifth and Seventh¹⁹⁵ Circuits, the leading bankruptcy treatise,¹⁹⁶ and its own prior decision to synthesize what it deemed the better rule.¹⁹⁷

While *Joint Executive Board* did not significantly contribute to the judicial tests to be utilized in deciding whether to reject labor contracts, the decision unequivocally held that prior court authority is an essential prerequisite to rejection or adoption of the contract by the receiver, trustee, or debtor in possession. This holding clarified an important preliminary issue in Chapter 11 proceedings. Regarding the actual evaluative standards, the Ninth Circuit suggested a more liberal equities test and a retreat from the strict two-tier, last resort standard espoused by the Second Circuit in *REA*.

The Third Circuit provided the next major decision to address the judicial standards by which to evaluate a petition for rejection of the collective bargaining agreement. In *In re Bildisco*¹⁹⁸ the court expressly disavowed the strict tests of the *REA* decision.¹⁹⁹ Instead, the Third Circuit endorsed only the initial *Kevin Steel* standards, and thus accepted only the first tier of the Second Circuit's two-tier test. The Third Circuit substantially liberalized the standards for labor contract rejection. After reviewing both of the important prior Second Circuit decisions, the Third Circuit concluded:

We are satisfied that *Kevin Steel*, isolated from its illegitimate progeny [*REA*],

In a case under Chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60 day period, fixes, then such contract or lease is deemed rejected.

Id.

For cases holding that express action by the debtor is required to assume or reject the contract, see *Mills v. Gilbert*, 22 Bankr. 482, 487 (M.D. N.C. 1982) ("Where a contract has not been rejected as an executory contract with the permission of the court and where the debtor in possession has accepted the services of the employees under the terms of that contract, that contract remains in full force and the debtor in possession is bound by all of its terms."). See also *Brown v. Presbyterian Ministers' Fund*, 484 F.2d 998, 1005 (3d Cir. 1973); *Consolidated Gas Electric Light & Power Co. v. United Rys. & Electric Co.*, 85 F.2d 799, 802-03 (4th Cir. 1936), *cert. denied*, 300 U.S. 663 (1936); *In re Central Watch, Inc.*, 22 Bankr. 561, 564-65 (E.D. Wis. 1982); *In re Shoppers Paradise, Inc.*, 8 Bankr. 271, 278-79 (S.D.N.Y. 1980). "Until assumed or rejected, an executory contract or unexpired lease remains in force and if neither assumed nor rejected, passes with other property of the debtor to the reorganized corporation." *Central Watch*, 22 Bankr. at 564-65, citing *Shoppers Paradise*, 8 Bankr. at 278-79. The *Central Watch* court stated that "although 11 U.S.C. §§ 365(a) and (d)(2) provide that a debtor may, with the court's approval, assume or reject an executory contract at any time prior to confirmation, the Code does not specifically address the effects of inaction. Nevertheless, courts have generally held that executory contracts continue in force until expressly assumed or rejected." *Central Watch*, 22 Bankr. at 564-65. Therefore, in *Central Watch*, a former executive's executory contract remained enforceable after Chapter 11 reorganization.

¹⁹⁵ *In re American Nat'l Trust*, 426 F.2d 1059, 1064 (7th Cir. 1970); *Texas Importing Co. v. Banco Popular de Puerto Rico*, 360 F.2d 582, 584 (5th Cir. 1966).

¹⁹⁶ 4A COLLIER ON BANKRUPTCY, §§ 3.23(5), 70.43(5) (14th ed. 1976).

¹⁹⁷ *Joint Executive Board*, 613 F.2d at 216. The Court stated that:

... assumption or adoption of the contract can only be effected through an express order of the bankruptcy Judge The general rule that economy of administration calls for close, strict, and active control by the court of all administrative expenditures seems to lead to the conclusion that it is improper for a trustee to assume executory contracts on his own responsibility [I]t is well settled bankruptcy law that on important decisions, whatever their character, the trustee must get the court's approval

Id.

¹⁹⁸ 682 F.2d 72 (3d Cir. 1982), *aff'd*, 104 S.Ct. 1188 (1984).

¹⁹⁹ *Id.* at 81.

provides the appropriate framework for an intelligent and equitable approach to the problem because it gives collective bargaining agreements a measure of protection beyond that available under the business judgment test without unduly advancing the interests served by the Labor Act over the other interests of the employees and those of the debtor's other creditors.²⁰⁰

Consequently, the Third Circuit in *Bildisco* did not require the debtor in possession to demonstrate that the ineluctable result of a failure to reject the labor contract would be final business collapse and loss of jobs. The court rejected this more stringent test for two reasons. First, the court asserted that it might be impossible to predict the success of a reorganization until very late in the arrangement proceedings. Second, the court recognized that even if the agreement were rejected, the employees may not continue to have jobs at all. The court stated that the more stringent test could actually work to the detriment of the workers it ostensibly sought to protect. In the court's view, the excessive evidentiary barrier to rejection of labor contracts erected in the *REA Express — Alan Wood Steel* formulation would make it likely that numerous businesses attempting to reorganize will in fact be forced over the line into liquidation. The court stated that adherence to a collective bargaining agreement together with a successful reorganization is clearly the best of possible worlds. The court explained, however, that given potential for conflict between these goals, it was preferable that jobs be preserved through the rejection of a labor contract, rather than lost because of its acceptance.²⁰¹

As a result, the Third Circuit embraced and expanded the broader, general equities test, and identified a number of key criteria. The court stated:

We believe that the debtor-in-possession must first demonstrate that the continuation of the collective bargaining agreement would be burdensome to the estate; that once this threshold determination has been made the debtor-in-possession must make a factual presentation sufficient to permit the bankruptcy court to weigh the competing equities; that the polestar is to do equity between claims which arise under the labor contract and other claims against the debtor; that, in this, the court must consider the rights of covered employees as supported by the national labor policy as well as the possible "sacrifices which other creditors are making" in the effort to bring about a successful reorganization and that the court must make a reasoned determination that the rejection of the labor contract will assist the debtor-in-possession or the trustee to achieve a satisfactory reorganization.²⁰²

The *Bildisco* elaboration of these most important considerations was fully consonant with a careful scrutiny of the equities promulgated in *Kevin Steel*. The Third Circuit clarified the inherent vagueness of the general equities standard, by explaining how the tests should be applied and when rejection should be permitted.²⁰³ The equities test will

²⁰⁰ *Id.*

²⁰¹ *Id.* The Court also noted:

We reject, however, the formulations of subsequent decisions pressed on us by the union and the Board, which purport to follow the rule of *Kevin Steel* but instead replace its "balancing of the equities" with a test predicated permission to reject on a showing "that an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a failing carrier in bankruptcy from collapse."

Id. (citations omitted).

²⁰² *Id.* at 80.

²⁰³ *Id.* Commentators endorsing *Bildisco* made a strikingly contradictory criticism of the *REA*

necessarily turn on the particular facts of each case.²⁰⁴ This Third Circuit test had not yet been applied to the particular facts in *Bildisco*; therefore, the case was remanded to the bankruptcy court.²⁰⁵ The bankruptcy court had originally granted permission to the debtor in possession to reject the labor contract,²⁰⁶ and this was affirmed by the district court in a bench opinion.²⁰⁷ Significantly, neither of the lower courts articulated the standards, if any, used to determine that labor contract rejection was proper in this case.²⁰⁸

Since January, 1980, the employer had not made its contractually mandated pension, health, and vacation plan payments. On April 14, 1980, the employer filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. Following the filing, the employer continued to operate the business as the debtor in possession. In May 1980, it refused to grant the wage raise called for under the labor contract. The union then filed unfair labor practice charges with the NLRB, alleging that "Bildisco had refused to grant certain wage increases, to pay pension and welfare contributions, or to turn over union dues, all in violation of the collective bargaining agreement."²⁰⁹ The general counsel of the NLRB issued a complaint on July 31, 1980, alleging employer violations of section 8(a)(1) and section 8(a)(5) of the NLRA.²¹⁰ In December 1980, the employer filed a motion with the bankruptcy court, seeking permission to reject the labor contract. On January 15, 1981, the bankruptcy court granted permission to the debtor in

strict tests for rejection as simultaneously being both too pro-labor and yet insufficiently protective of employee interests:

The *REA Express* test is still inherently inequitable because it is weighted so heavily in favor of labor that it fails to account for the debtor's interest in remaining in business. . . . The *REA Express* test does not provide for consideration of the employees' interest in the continued existence of the business By erecting an excessive evidentiary barrier to rejection of labor contracts, the test, if followed, would force more companies into liquidation and fail to protect the employees' interest in preserving their jobs.

Note, *What Test?*, *supra* note 51, at 874.

Professor Countryman, however, excoriated the Third Circuit's reasoning. See Bordewieck and Countryman, *supra* note 52, at 317. ("[T]he approach of the Third Circuit . . . fails to consider adequately the protections accorded to employees by federal labor law"); Pulliam, *The Rejection of Collective Bargaining Agreements Under Section 365 of the Bankruptcy Code*, 58 AM. BANK L.J. 1, 33(1984) ("Both components of *Bildisco*'s analysis are flawed: the standard for rejection under section 365(a) for overlooking the plain language of the statute and the reasoning of the pre-*Kevin Steel* authorities; the section 8(d) issue for its question-begging reliance on the inapt successorship doctrine Taken together, however, the two components of *Bildisco* are inconsistent and contradictory, thus compounding and magnifying the defects in each part.").

²⁰⁴ *Bildisco*, 682 F.2d at 80.

²⁰⁵ *Id.* at 85. The Third Circuit stated:

The bankruptcy court's bench opinion unfortunately was a woefully inadequate treatment of a sophisticated subject. It is not clear whether the bankruptcy court chose one of the two standards proffered by the parties or applied a synthesis of the two Because we have set forth in detail the appropriate precepts to apply to a hitherto unsettled area of the law, and because we do not have the benefit of an adequate explanation of the trial court's action, the preferable course is to remand the proceedings for reconsideration in light of the precepts we announce today.

Id. at 81-82.

²⁰⁶ *Id.* at 75.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 75 n.3.

²⁰⁹ *Id.* at 75.

²¹⁰ See *supra* note 10.

possession to reject the labor contract, retroactive to the date immediately preceding the April 14, 1980 petition.²¹¹ The general partner of Bildisco had testified the company could save \$100,000 in 1981 if freed from the labor contract. In early 1981, only three bargaining unit employees remained with the company.

Notwithstanding the bankruptcy court's decision to permit the employer to reject the labor contract, and the district court's affirmance of that order, on April 23, 1981, the NLRB summarily found that the debtor in possession committed an unfair labor practice by rejecting the collective bargaining agreement. The NLRB regarded the debtor in possession as the alter ego of the pre-bankruptcy employer partnership.

The debtor in possession, the Board found, had gradually reduced the number of its employees and had not replaced these unionized employees with newly hired, non-union personnel. In addition, the Board determined that operations were not interrupted or substantially changed and that remaining employees performed their jobs as they had prior to the bankruptcy filing. Finally, the Board found that there was no corporate merger or acquisition or transfer of capital, assets, management, or ownership. In summary, the Board concluded, the business operation remained substantially unchanged. The Board ordered Bildisco to make all the delinquent contributions and payments plus interest to its employees. In addition, the Board ordered the employer to honor the terms of the collective bargaining agreement, and to post appropriate notices.²¹² The Board then applied to the Third Circuit for enforcement of its order. Both the Board case and the union appeal from the district court's earlier affirmance of the bankruptcy court's rejection of the labor contract were consolidated.²¹³

The Third Circuit reiterated prior law holding that labor contracts were considered executory contracts under the Code.²¹⁴ In addition, the court of appeals subscribed to the new entity theory regarding the debtor in possession.²¹⁵ A debtor in possession, the court explained, while a new entity, is nevertheless an employer with a duty to bargain with the union.²¹⁶ According to the court, the employees retained an untrammelled right to strike.²¹⁷ The Third Circuit's acceptance of the successor employer analogy to the debtor

²¹¹ *Bildisco*, 682 F.2d at 75; see 11 U.S.C. § 365(g)(1) (1982).

²¹² *Bildisco*, 682 F.2d at 76.

²¹³ *Id.*

²¹⁴ *Id.* at 78.

²¹⁵ *Id.* at 78-79.

²¹⁶ *Id.* at 80.

²¹⁷ *Id. Accord In re Commercial Motor Freight, Inc. of Indiana*, 27 Bankr. 293, 298 (S.D. Ind. 1983); *In re Ateco Equipment Co.* 18 Bankr. 915, 917 (W.D. Pa. 1982); *Petrusch v. Teamsters*, 667 F.2d 297, 298-300 (2d Cir. 1981), *cert. denied*, 456 U.S. 974 (1982).

In *Petrusch*, the debtor in a Chapter 13 proceeding was picketed by the union when the debtor failed to make contractually mandated fringe benefit payments to the union's health, hospital, pension, and retirement funds. *Petrusch*, 667 F.2d at 298-300. Since these payments were part of the terms and conditions of employment, the union picketing over nonpayment was a nonenjoinable labor dispute within the meaning of the Norris-LaGuardia Act. *Id.*

Section 4 of the Norris-LaGuardia Act explicitly withdraws jurisdiction from all federal courts, including bankruptcy courts, to issue injunctions against strikes "in any case involving or growing out of any labor dispute . . ." 29 U.S.C. § 104 (1982). In turn, section 13(c) of that Act defines "labor disputes" as "[a]ny controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c) (Supp. III 1979).

The Supreme Court broadly construed "labor disputes." "The term 'labor dispute' should be most broadly and liberally construed. The term 'labor dispute' comprehends disputes growing out of

in possession was determinative of the unfair labor practice Board findings against the employer, because the debtor in possession was not bound by the pre-bankruptcy employer's collective bargaining agreement. Upon bankruptcy court approval, therefore, the debtor in possession legitimately rejected the collective bargaining agreement retroactive to the date of the petition for Chapter 11 reorganization under the Bankruptcy Code. Significantly, the debtor in possession could reject the contract without complying with the section 8(d) contract termination procedures of the NLRA²¹⁸ and without committing section 8(a)(1) and section 8(a)(5) unfair labor practices.²¹⁹ The Third Circuit criticized the NLRB for finding post-petition unfair labor practices arising from the court-author-

labor relations . . . all such disputes seem to be clearly included." *Jacksonville Bulk Terminals v. IILA*, 457 U.S. 702, 715 (1982). See *In re Crowe and Associates*, 713 F.2d 211, 213 (6th Cir. 1983). The Norris-LaGuardia Act prohibits the bankruptcy court from enjoining a peaceful, nonviolent union strike to collect prebankruptcy petition pension payments. Although the peaceful union strike may violate 11 U.S.C. § 362(a)(6) of the 1978 Bankruptcy Code, prohibiting any "act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case," nonviolent, unlawful labor activity is nonetheless immunized from federal court injunction by the Norris-LaGuardia Act. 29 U.S.C. §§ 101-115 (1982). See *Telegraphers v. Chicago and N.W.R. Co.*, 362 U.S. 330, 344 (1960); *Bhd. of Ry. Trainmen v. Chicago River & Indian Ry. Co.*, 353 U.S. 30, 39 (1957). Section 1079(a) of the Norris-LaGuardia Act allows injunctive relief where "unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained." 29 U.S.C. § 107(2) (1982). In *Crowe and Associates*, the Sixth Circuit summarized why the peaceful strike could not be enjoined by the bankruptcy court:

The Union's nonviolent strike activity cannot be enjoined merely because it is violative of the Bankruptcy Reform Act. We are unwilling to modify or abandon the declared congressional purpose of the anti-injunction provisions of the Norris-LaGuardia Act.

Neither are we willing to find that the Bankruptcy Reform Act supersedes or provides an exception to those anti-injunction provisions.

Crowe and Associates, 713 F.2d at 214.

There is precedent for bankruptcy court injunctions of labor picketing that threatens the property of the debtor. *In re Tucker Freight Lines*, 115 L.R.R.M. 2202 (W.D. Mich. 1983) (distinguishing *Crowe and Associates*, court enjoined debtor-employer from unilaterally reducing contract rate); *In re Cleveland & Sandusky Brewing Co.*, 11 F. Supp. 198, 201 (N.D. Ohio 1935) (bankruptcy court can enjoin union picketing interference with removal of beer from bankrupt's facilities to prevent spoilage); see generally Note, *The Automatic Stay of the 1978 Bankruptcy Code versus the Norris-LaGuardia Act: A Bankruptcy Court's Dilemma*, 61 TEX. L. REV. 321 (1982).

Nevertheless, bankruptcy courts have concluded, erroneously and rather summarily, that it is proper for them to interfere with the normal operations of the NLRB and to issue labor injunction notwithstanding the Norris-LaGuardia Act. "These actions suggest that bankruptcy courts are not likely to consider fully the principles of labor law implicated by a petition to reject a collective bargaining agreement." Bordewieck and Countryman, *supra* note 52, at 330 & n.99. In *Truck Drivers Local 807 v. Bohack Corp.* 541 F.2d 312 (2d Cir. 1976), *aff'd per curiam*, 567 F.2d 237 (2d Cir. 1977), *cert. denied*, 439 U.S. 825 (1978), the Second Circuit stated that "the power to permit rejection of the agreement in particular circumstances does not confer an antecedent jurisdiction on the court to enjoin picketing in spite of the Norris-LaGuardia Act." *Truck Drivers*, 541 F.2d 318.

Despite a largely untrammelled right to picket and to strike in protest of the labor contract rejection, union resort to these traditionally powerful labor weapons may result in pyrrhic victories. As one commentator has observed, "where the effect of the strike is to cause cessation of the operation of the business, and this is generally the goal, the union may be reluctant to strike because the employees are among the prime beneficiaries of the continued operation of the business. A strike, consequently, may be an unsuitable bargaining lever for the union." Note, *Collective Bargaining*, *supra* note 47, at 482.

²¹⁸ The Third Circuit held that "because Bildisco as debtor-in-possession is not a party to the agreement with Local 408, it had the ability to reject the agreement without following the procedures outlined in § 8d." *Bildisco*, 682 F.2d at 83.

²¹⁹ *Id.* at 84.

ized rejection of the collective bargaining agreement.²²⁰ The court of appeals denied the Board's petition for enforcement of its order without prejudice, pending the bankruptcy court's evaluation, on remand, of the petition to reject the labor contract in light of the standards set forth by the Third Circuit.²²¹

In addition to its criticisms of the application of the entity and successor analogy to the debtor in possession, the Eleventh Circuit's opinion in *Brada Miller Freight System Inc.*²²² contains the most recent court of appeals decision to address the issue of what standards are appropriate for rejecting a collective bargaining agreement. *Brada Freight* involved two collective bargaining agreements negotiated between the Teamsters Union and the employer association which had effective terms from April 1, 1979 to March 31, 1982.²²³ In 1978, Brada Miller had daily gross revenues of \$180,000 and profitably operated 550 trucks per day from 29 terminals.²²⁴ During 1979, a four month labor strike, together with the automobile industry recession, severely debilitated company operations and resulted in a net operating loss of \$188,000 for 1979.²²⁵ By the end of August, 1980, the company operated only 125 units, compared to the 550 units of 1978.²²⁶ During the summer of 1980, the company unsuccessfully instituted business austerity measures through layoffs and other cost reductions.²²⁷ On August 1, 1980, the company filed for reorganization through Chapter 11 of the Bankruptcy Code,²²⁸ and petitioned for court approval of labor contract rejection.²²⁹ During the proceedings, Brada Miller continued to operate the company as the debtor in possession.²³⁰

Subsequently, the union locals filed unfair labor practice charges against the em-

²²⁰ The Court stated:

We suggest to the NLRB that, at least in matters within this judicial circuit, it cease operating under such a fundamental misconception of the law. Indeed, we believe that persisting in such a misconception — one that goes to the difference between the prebankruptcy company which was the signatory to the collective bargaining agreement and the succeeding debtor-in-possession — is so fundamental that this error in and of itself is sufficient reason to refuse to enforce a summary judgment so predicated.

Id. at 83.

²²¹ *Id.* at 85.

²²² 702 F.2d 890 (11th Cir. 1983).

²²³ *Id.* at 892.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* Several courts perceptively examined whether managerial personnel have shared in the austerity measures. See *In re Blue Ribbon Transportation Co.*, 30 Bankr. 783, 788 (D. R.I. 1983) (The court found that inordinate management salaries and benefits constituted a greater impediment to successful reorganization than did the labor contract. As a precondition to permitting rejection of the labor agreement, the court required that management first reduce management salaries (from a total of \$93,600 to \$70,000 per year), and then reduce the seven company cars for the use of executives and their families to one car, restricted solely to company business.); *In re U.S. Truck Co.*, 24 Bankr. 853, 854 (E.D. Mich. 1982); *Brada Miller Freight*, 702 F.2d at 894. But see *In re Commercial Motor Freight, Inc. of Indiana*, 27 Bankr. 293, 297 (S.D. Ind. 1983) ("while the action of Commercial Motor Freight's directors in awarding themselves significant salary increases and other benefits was highly improvident under the circumstances, the court is not of the opinion that such evinces bad faith . . . the monetary amount involved is de minimis as compared to the total labor costs required by the contracts.").

²²⁸ *Brada Miller Freight*, 702 F.2d at 892.

²²⁹ *Id.*

²³⁰ *Id.*

ployer for rejection of the labor contracts. At the same time, the NLRB sought to enjoin²³¹ the alleged employer unfair labor practices pending a hearing.²³² The debtor in possession then petitioned the bankruptcy courts to stay all NLRB proceedings as unduly interfering with business operations and the company's attempt to reorganize successfully.²³³

Although the district court reversed the bankruptcy court's stay of the NLRB proceedings,²³⁴ the court affirmed the bankruptcy court's authorization of labor contract

²³¹ 29 U.S.C. § 160(j) of the NLRA provides:

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order.

Id.

The bankruptcy court is not obligated to consider NLRB unfair labor practice charges either as conclusive evidence of the debtor's bad faith or as establishing reasonable cause that an unfair labor practice had been committed. Rather, the bankruptcy court has independent jurisdiction to decide whether and "how conduct that forms the basis of an unfair labor practices complaint affects the equities" *In re Handy Andy, Inc.*, 112 L.R.R.M. 2657, 2658 (W.D. Tex. 1983).

²³² *Brada Miller Freight*, 702 F.2d at 892.

²³³ *Id.*

²³⁴ *Id.* at 893 nn. 4 and 5. The Eleventh Circuit stated:

The bankruptcy court also decided that (1) it has powers coextensive with the NLRB to adjudicate unfair labor practices and that the Company was guilty of an unfair labor practice; (2) it is empowered to enjoin the administrative processes of the NLRB; and (3) it is empowered to enjoin, and accordingly enjoined, the Company's employees from interfering with the Company's business.

The district court reversed the remainder of the bankruptcy court's decision. The district court held that: (1) the bankruptcy court does not have concurrent jurisdiction with the NLRB to adjudicate and remedy unfair labor practices; (2) the bankruptcy court exceeded its authority and violated the anti-injunction provisions of the Norris-LaGuardia Act (29 U.S.C. §§ 101, 104) by enjoining concerted employee activity arising out of the dispute between Brada Miller and its employees; and (3) the bankruptcy court failed to apply the proper legal test when it stayed the NLRB proceedings without finding that the proceedings threatened the Company's assets.

Brada Miller does not challenge these portions of the district court order on this appeal.

Id.

The NLRB has exclusive jurisdiction over unfair labor practice allegations; they cannot be removed to the bankruptcy court. *In re Adams Delivery Service*, 24 Bankr. 589, 591 (9th Cir. 1982).

The National Labor Relations Board General Counsel has been authorized by the Board to intervene in bankruptcy proceedings "for the purpose of persuading the court not to set aside collective bargaining agreements except when necessary to enable the business to continue." Gen. Counsel Memorandum 78-72 (Nov. 3, 1978).

Several circuits have held that prior union unfair labor practice charges against the employer are not mooted by a subsequent bankruptcy filing by the employer. The First Circuit recently ruled that an employer's section 8(a)(1) and 8(a)(3) unfair labor practices (unlawful threats to close unionized facilities, unlawful discharges, coercive interrogations, improper surveillance, and no-distribution rules) remained subject to NLRB remedial orders subsequent to the employer filing a Chapter 11 bankruptcy reorganization petition. *Ahrens Aircraft v. NLRB*, 703 F.2d 23, 25 (1st Cir. 1983); see also *NLRB v. Suburban Ford, Inc.* 646 F.2d 1244, 1249 n.4 (8th Cir. 1981); *NLRB v. Bell Co.*, 561 F.2d 1264, 1266 n.2 (7th Cir. 1977).

In *NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 294, (5th Cir. 1981), the Fifth Circuit held that NLRB enforcement proceedings to remedy unfair labor practices committed prior to the bankruptcy petition fall within the § 362(b)(4) exception to the § 362(a) automatic stay provision of the 1978 Code, which provides in part:

rejection by the debtor in possession pursuant to section 365(a) of the 1978 Bankruptcy

(a) Except as provided in subsection (b) of this section, a petition filed under § 301, 302 or 303 of this title operates as a stay, applicable to all entities, of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

(b) The filing of a petition under § 301, 302 or 303 of this title does not operate as a stay —

(4) under subsection (a)(1) of this section of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

11 U.S.C. § 362(a)(1) (1979).

The Fifth Circuit summarized its reasoning:

The crucial issue is whether the NLRB is a governmental unit and whether this action is one to enforce police or regulatory powers. It is clear that the NLRB is a governmental unit. This action was undertaken to enforce the federal law regulating the relationship between employer and employee. We can safely conclude therefore that this is an exercise of police or regulatory powers which places it within the § 362(b)(4) exemption to the automatic stay. We note that our decision today would permit the entry of judgment for injunctive relief and for back pay.

NLRB v. Evans Plumbing Co., 639 F.2d at 3061. *In re Shippers Interstate Service, Inc.*, 618 F.2d 9, 12 (7th Cir. 1980); *accord In re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248, 1251 (9th Cir. 1979).

However, both the Fifth Circuit in *Evans Plumbing* and other courts in subsequent decisions have held that the section 362(b) exceptions "do not go so far as to permit enforcement of a money judgment against the debtor or property of the estate." *D.M. Barber, Inc. v. Valverde*, 13 Bankr. 962, 964 (N.D. Tex. 1981). The Board is thus relegated to filing a claim in the bankruptcy proceeding in order to perhaps eventually satisfy at least a portion of a money judgment.

In *Shippers Interstate*, the Seventh Circuit provided important clarification on the interrelationship of NLRB authority and the automatic stay provisions of the Code:

[W]here, as here, it appears that the assets of the estate are not threatened and the company is being reorganized rather than liquidated, Bankruptcy Rule 11-44 shall not apply and regulatory proceedings of the National Labor Relations Board are not subject to the automatic stay provisions of that bankruptcy rule. This does not preclude imposition of a stay where a proper showing was made that the regulatory proceedings threatened the estate assets or that the bankruptcy or other proceedings would result in the liquidation of the company.

Shippers Interstate, 618 F.2d at 13.

Therefore, the bankruptcy courts have the discretion to enjoin post-bankruptcy petition NLRB charges of debtor unfair labor practices arising from the rejected agreement. In *In re San Juan Hotel Corp.*, 111 L.R.R.M. 2877 (D. P.R. 1982), the bankruptcy court properly enjoined the NLRB from filing for NLRA § 10(j) injunctive relief to obtain reinstatement of strikers protesting earlier labor contract rejection in bankruptcy. The court relied on the Third Circuit's *Bildisco* decision, and summarized the Third Circuit's rationale:

It distinguished between prepetition and post-petition charges of unfair labor practices and observed that where charges of unfair labor practices arise after the date of a Chapter 11 petition, the Board must await the determination of the Bankruptcy Court on the rejection of the collective bargaining agreement before it may proceed to consider the post-petition charges. It expressly stated that if the Bankruptcy Judge determines that the collective bargaining agreement may be rejected, the Board will be

Code.²³⁵ Following the *Kevin Steel/REA* two-tier test of the Second Circuit for labor contract rejection, the district court found that a denial of the motion to reject would likely have resulted in the collapse of Brada Miller and that the equities therefore weighed in favor of rejection.²³⁶ The union then appealed to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit concluded that "Congress intended collective bargaining agreements to be subject to unilateral rejection by the bankruptcy trustee (with the approval of the court) under section 365."²³⁷ Despite serious misgivings with the application of the new entity and successor employer doctrine analogies to the rejection of the labor contract obligations of the debtor in possession,²³⁸ the Eleventh Circuit found no distinction between labor agreements and other executory contracts with regard to section 365 of the Bankruptcy Code.²³⁹

After carefully examining the conflict between the Second and Third Circuits regarding the appropriate standards for rejection of the labor contract pursuant to the Bankruptcy Code, the Eleventh Circuit concluded that the *Bildisco* equity test should govern

bound by that determination, which would preclude any post-petition unfair labor practice arising from the rejected agreement.

In re San Juan Hotel Corp., 11 L.R.R.M. at 2880.

Neither can the union compel the employer to arbitrate disputes arising out of decisions to close facilities. The bankruptcy court has exclusive jurisdiction to approve or reject the debtor's business actions. *Local 692 v. Pantry Pride*, 109 L.R.R.M. 2007 (D. Md. 1981).

However, if any unfair labor practice charges, which occurred either before or after bankruptcy petitions, are to be heard, only the NLRB, and not the bankruptcy court, has the necessary expertise. Thus, while the bankruptcy court may be able to stay NLRB proceedings that threaten the estate, only the Board can decide unfair labor practice charges. *See NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 44 (3d Cir. 1942); *Seeburg Corp. v. NLRB*, 11 Bankr. 121, 122 (N.D. 111. 1980) ("The jurisdiction of a United States District Court in bankruptcy does not embrace the power to treat with a debtor's unfair labor practices which affect commerce. Nor is such a court's leave to the Board to proceed in appropriate manner required. By § 10(a) of the National Labor Relations Act, the Board is expressly empowered to prevent any person from engaging in any unfair labor practices affecting commerce; and that power is exclusive in the Board and unaffected 'by any other means of adjustment or prevention that has been or may be established by agreement code, law, or otherwise.'").

Unless the NLRB action actually threatens the assets of the debtor, the bankruptcy court cannot enjoin the NLRB from assessing back pay awards against the debtor in possession, resulting from the debtor's unilateral rejection of its labor contract. *See In re Tucson Yellow Cab Co.*, 27 Bankr. 621, 623 (9th Cir. 1983).

The NLRB alone has the exclusive jurisdiction to issue back pay orders, while the bankruptcy court has the exclusive duty to determine the priority to be accorded such NLRB back pay orders under the Code. An NLRB pay order alone does not automatically constitute an enjoined threat to the debtor's estate, "even though that order may greatly enhance the amount of priority obligations payable from the estate."

Id.

²³⁵ *Brada Miller Freight*, 702 F.2d at 893.

²³⁶ *Id.*

²³⁷ *Id.* at 894.

²³⁸ *Id.* at 894-96. *See supra* notes 147-178 and accompanying text.

²³⁹ *Brada Miller Freight*, 702 F.2d at 896-97. "We do not contemplate that Congress intended the ultimate fate of a corporation under Chapter XI to rest so largely in the hands of the Company's protected employees. There simply exist too many other critical interests, those of other employees, creditors, and shareholders, the protection of which provides the stimulus for the bankruptcy laws for this Court to conclude that the collective bargaining agreement was meant to hold a stranglehold position, totally immune from the flexibility provided by § 365." *Id.*

the matter before it.²⁴⁰ Although the court of appeals recognized the importance of employee interests at stake,²⁴¹ the court stated that employee contract terms and benefits did not enjoy an absolutely immune position.²⁴² In particular, the Eleventh Circuit disagreed with the second tier of the *REA* test, which requires the debtor in possession to show by a preponderance of the evidence that forced liquidation would be the inevitable result if the collective bargaining agreement were not rejected.²⁴³ According to the court, the possibility of liquidation absent labor contract rejection was but one of many equities to be weighed.²⁴⁴ The court stated that the interests of employees, creditors,²⁴⁵ and

²⁴⁰ Lower court endorsement of *Bildisco* has not been unanimous. Some courts continue to prefer the Second Circuit's *Kevin Steel/REA* strict two-tier test for rejection. See *In re J.R. Elkins, Inc.*, 27 Bankr. 862, 863 (E.D.N.Y. 1983); *In re U.S. Truck Co.*, 24 Bankr. 853, 855 (E.D. Mich. 1982); The *Elkins* court held:

[T]he debtor is on the brink of complete financial collapse and may shortly be forced into liquidation despite valiant efforts to remain afloat. In order to have a chance at survival a buyer must be found quickly. Time is of the essence The purchaser is adamant, in its refusal to assume the agreement as it now exists . . . the bottom line is that the collective bargaining agreement must be rejected if there is to be any hope of saving the jobs of the debtor's employees.

Elkins, 27 Bankr. at 863.

On balance, most lower courts have followed the *Bildisco* standards. See *In re Commercial Motor Freight, Inc. of Indiana*, 27 Bankr. 293, 297 (S.D. Ind. 1983); *In re Blue Ribbon Transportation Co.*, 30 Bankr. 783, 785 (D. R.I. 1983); *In re Reserve Roofing Florida, Inc.*, 21 Bankr. 96, 100 (M.D. Fla. 1982); *In re Miles Machinery Company*, 113 L.R.R.M. 3114, 3119 (E.D. Mich. 1982); *In re Hoyt*, 27 Bankr. 13, 14 (D. Or. 1982); *In re Yellow Limousine Service, Inc.*, 22 Bankr. 807, 808 (E.D. Pa. 1982); *In re Braniff Airways, Inc.*, 25 Bankr. 216, 219 (W.D. Tex. 1982) (stockholders of small debtor company had to contribute \$34,000 to cover wages and benefits; rejected contract had guaranteed wages even if employees failed to bring in sufficient revenues to meet wages) (following *REA*). At least one court has expressly rejected both the *Bildisco* and *REA* alternatives, opting instead to regard non-*RLA* collective bargaining agreements as equivalent to any other executory contract for section 365 rejection purposes. See *In re Concrete Pipe Machinery Co.*, 28 Bankr. 837, 840 (N.D. Iowa 1983). Of course, the Supreme Court's affirmance in *NLRB v. Bildisco* of the Third Circuit's tests effectively vitiates any further adherence to the Second Circuit's *REA* standard in the lower courts.

²⁴¹ *Brada Miller Freight*, 702 F.2d at 897. "An ordinary commercial contract may be rejected by a bankruptcy trustee upon a showing that rejection would benefit the estate. (citation omitted). However, this minimal burden is insufficient to protect the special rights accruing to employees under the federal labor laws." *Id.* (citation omitted).

²⁴² *Id.*

²⁴³ *Id.* at 899.

²⁴⁴ *Id.*

²⁴⁵ At least one bankruptcy court has recently ruled that the union was not a creditor within the meaning of § 101(9) of the 1978 Code. *In re Altair Airlines, Inc.*, 25 Bankr. 223, 223-24 (E.D. Pa. 1982). Neither did the union have a claim against the debtor within the meaning of section 101(4). *Id.* at 224. The union represented eighty-eight pilots of the employer; their wage claims totaled more than \$676,120. *Id.* In the aggregate, this was the second largest claim against the Chapter 11 debtor. *Id.* The union unsuccessfully sought to be appointed to the § 1102(a)(1) committee of unsecured creditors. *Id.* at 225. The court concluded that only the individual pilots, but not the union, had a right of payment against the debtor:

[W]e are bound by Congress' obvious intention to exclude from the present definition of "creditor" under the Code any language empowering a "duly authorized agent, attorney or proxy" of an entity that has a claim against the debtor to be considered a creditor

[T]he Association, being only the authorized agent of the "entity that has a claim against the debtor" — namely the individual pilots — is not a creditor within the meaning of section 101(9) of the Code."

In re Altair Airlines, Inc., 25 Bankr. 223, 225 (E.D. Pa. 1982).

This decision did not compromise cases holding that the NLRB is a creditor and can order back

shareholders, the nature and scope of the debtor in possession's bargaining obligation after contract rejection, and strike potential were other interrelated factors for courts to assess.²⁴⁶ In addition, the court explained that tangible, or non-monetary, employee interests such as seniority must be especially considered.²⁴⁷ The court explained that an important question is whether employees are as able to bear losses as the other creditors are.²⁴⁸

The court observed that, for the most part, employees are markedly different from commercial creditors. According to the court, employees must usually absorb the loss of their entire wages, as well as a panoply of important non-wage rights, such as seniority, vacation, and pension plans. Commercial creditors, the court noted, are typically able to pass the losses caused by one debtor bankruptcy to their customers. The court reasoned that the cumulative loss spread among many parties in the market makes the burden felt by either the commercial creditor itself or any of its customers negligible. Commercial creditors, the court noted, can usually draw on a variety of business resources to deal with the temporary adversity engendered by the collapse of a debtor. Individual employees, however, must usually fall back on their more limited personal assets when their employer fails to meet contractual obligations. For example, the court noted that commercial lines of credit are not available to the average employee. The employer's collapse, therefore, has profound adverse personal, as distinguished from primarily commercial, consequences for the individual employee.²⁴⁹ Finally, the Eleventh Court in *Brada Miller Freight*

pay awards to be paid by the bankrupt. Congress has designated the NLRB its public agent to enforce the NLRA. See *Nathanson v. NLRB*, 344 U.S. 25, 29-30 (1952); accord *In re Wilson Foods Corp.*, 31 Bankr. 269, 270 (W.D. Okla. 1983). The bankruptcy court, relying on *Nathanson*, denied the debtor-employer's request for injunctive relief against NLRB proceedings after filing the petition. Thus, despite the Chapter 11 petition, the bankruptcy court refused to stay the Board's unfair labor practice investigation. "If the board determines Wilson committed unfair labor practices it can fix an amount owed the employees. As stated in *Nathanson* that liability can become a liquidated claim against the bankruptcy estate. If objections are made it then becomes the function of this court to rule upon allowance. 11 U.S.C. § 502. Any questions of priority would also be determined in this court. 11 U.S.C. § 507." *Wilson Foods*, 31 Bankr. at 271.

²⁴⁶ *Brada Miller Freight*, 702 F.2d at 899. From this catalog of equities, the rights and position of other creditors has rather uniformly achieved the position of first among equals. See *In re Braniff Airways, Inc.*, 25 Bankr. 216, 220-21 (W.D. Tex. 1982) ("[U]nsecured creditors will not receive anything in liquidation. Consequently, their hopes are totally dependent upon a reorganization."). In most cases, the monetary value of the union member's loss is insignificant when compared with the loss to all other creditors if no reorganization occurs. The policy supporting reorganization has always sought equity among creditors. While priorities among claims are legitimate, unfair discrimination is repugnant to reorganization principles. See *Young v. Higbee Co.*, 324 U.S. 204, 210 (1945). See also 11 U.S.C. §§ 1122(a), 1123(a)(4), 1129(b)(1), all designed to provide for fair treatment among creditors' claims.

²⁴⁷ *Brada Miller Freight*, 702 F.2d at 900.

²⁴⁸ The court of appeals offers a pragmatic example of pronounced discrepancy in the "cost-spreading" abilities of the parties:

Certainly, a \$50,000 loss to a group of employees averaging \$20,000 a year in salary may have a far more devastating impact than a \$100,000 loss suffered by a group of large banks and other major creditors or by the debtor-employer itself. The consideration of this factor seems especially appropriate since it was the discrepancy in economic power between labor and management that provided the impetus behind the establishment of the labor law policies we now seek to preserve.

Id.

²⁴⁹ Professors Bordewieck and Countryman cogently highlighted the pronounced differences between employees and commercial creditors, and emphasized the irretrievable nature of the employees' losses following labor contract rejection:

held that the bankruptcy court should look to the pre-bankruptcy relationship of the employer and the union²⁵⁰ for evidence of the parties' motives.²⁵¹ If the employer oper-

Normally, a collective bargaining agreement provides employees with rights and obligations which cannot easily be reduced to monetary terms, such as seniority, grievance, and arbitration procedures, as well as no-strike and no-lockout clauses. These rights and obligations are, of course, destroyed when the collective bargaining agreement is rejected. A claim for monetary damages for breach of the agreement in any event will not compensate employees for the loss of rights which simply cannot be reduced to monetary terms The position of employees is quite different from that of most commercial creditors. Employees rely solely on their employer for wages and benefits; commercial creditors routinely contract with dozens, if not hundreds or thousands, of entities. A commercial creditor will not in the usual case be significantly injured by the loss of benefits it would have realized under the executory contracts it executed with the debtor.

Bordewieck and Countryman, *supra* note 52, at 312-13.

²⁵⁰ *Brada Miller Freight*, 702 F.2d at 900. For example, did the parties attempt to bargain cost-saving measures prior to the institution of bankruptcy proceedings? Other courts have strongly endorsed this practice as the preferred, proactive course. *In re Price Chopper Supermarkets, Inc.*, 19 Bankr. 462, 466 (S.D. Cal. 1982) ("[I]n all but the most extreme cases, the debtors in possession, or Chapter 11 trustees, should be required to move cautiously and bargain in good faith with their unions, in an attempt to foster a cooperative attitude in working towards a successful reorganization. This attempt at renegotiation should occur before coming to the court to achieve a unilateral rejection. Obviously, in cases where the survival of the business itself is at stake, the urgent need to reject will require immediate action. In such cases, the required bargaining process will, by necessity, be kept to a minimum.") *Cf. In re Braniff Airways, Inc.*, 25 Bankr. 216, 218 (W.D. Tex. 1982) ("[A] prerequisite of extended negotiation with a recalcitrant union should not be imposed when it destroys all possibility of reorganization.").

In briefs filed before the Supreme Court in *Bildisco*, the NLRB disagreed with the union's rigid insistence on absolute compliance with the section 8(d) NLRA complex provisions for any labor contract modification. The Board pointed out that section 8(d) procedures were too time consuming and lacked the necessary expedition when time was of the essence. Further, the union cannot be compelled to agree to any proposal. However, the Board firmly endorsed bargaining as the preferred recourse prior to seeking court approval of contract rejection:

[I]t is entirely appropriate for the bankruptcy court to encourage the parties to bargain prior to approval of rejection. The union party can be expected to agree to modifications that are necessary to preservation of the business (and thus preservation of jobs). Such a solution, which could avoid loss of important employee rights that do not impair the employer's economic viability, as well as loss of employer rights under the agreements, is far more consistent with the national labor policy than total rejection pursuant to the Bankruptcy Code.

Brief for the NLRB, *NLRB v. Bildisco*, 104 S.Ct. 1188 (filed May 6, 1983).

The NLRB's more malleable position is supported by Professors Bordewieck and Countryman. According to Bordewieck and Countryman, sheer union intransigence, refusal to bargain, and rigid insistence on adherence to existing contract terms should not be permitted to sabotage both employee and employer interests:

[I]t is foolish for a union to argue that rejection of the collective bargaining agreement is not justified if in fact the reorganization has a lot to lose if it adopts an incorrect position and prevails before the bankruptcy court. The debtor has very little to lose if it adopts an incorrect position and prevails. Accordingly, it would appear that considerable weight should be given to a considered union view that rejection is not necessary. This conclusion would not follow, however, if it appeared that the union was willing for tactical reasons to sacrifice the particular employees involved and thus did not care whether the debtor in fact was forced into liquidation. In such a rare case, the bankruptcy court would be fully justified in permitting rejection. The conclusion would also not apply to a union seeking only to forestall a liquidation by several months (or perhaps years) in order to preserve short-term employment. If liquidation may be

ated in bad faith prior to Chapter 11 proceedings, and is abusing the protections of Chapter 11 to avoid the labor contract rather than to reorganize, the petition to reject the labor agreement should be denied.²⁵² The Eleventh Circuit found that all of these

avoided by rejection of the collective bargaining agreement, a union seeking to preserve short-term employment benefits is not acting in the best interests of the employees.

Bordewieck and Countryman, *supra* note 52, at 319.

²⁵¹ *Brada Miller Freight*, 702 F.2d at 900. The court of appeals suggested some practical criteria to assess the motivation of the parties:

For example, did the employer seek concessions from the unions prior to its attempt to reject the contract? If so, how cooperative was the union? The tone of past negotiations between the parties is also relevant in evaluating their behavior. We stop short of requiring that the parties commence the bargaining process prior to the granting of a motion to reject, but we leave it to the discretion of the bankruptcy court to require such bargaining after considering the likelihood of success, the potential length of the negotiations, and the impact of delay on the debtor-employer.

Id.

Section 8(a)(3) of the NLRA prohibits employer "discrimination in regard to hire or tenure of employment or by any terms or condition of employment . . . discourage[ment of] membership in any labor organization." 29 U.S.C. § 158(a) (1958). Assessment of employer motive is always a key factor in the resolution of section 8(a)(3) unfair labor practice allegations. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 38 (1976); *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 313 (1965).

²⁵² *Brada Miller Freight*, 702 F.2d at 901. "It has long been held that such an abuse of the bankruptcy and labor laws will not be tolerated under any circumstances. Therefore, regardless of the outcome of the balancing of the equities, a bankruptcy court must make an 'explicit showing in the record that the debtors were not improperly motivated by a desire to rid themselves of the union' prior to allowing the rejection of a collective bargaining agreement." *Id.* See also *Kevin Steel*, 519 F.2d at 707; *Int'l Bhd. of Teamsters v. Quick Charge, Inc.*, 168 F.2d 513, 515-516 (10th Cir. 1948); *In re Tinti Construction Co.*, 29 Bankr. 971, 975 (E.D. Wis. 1983) (although court found no anti-union animus by the employer, and even though business seemed sure to fail without contract rejection, rejection was not allowed. While empathetic to the employer, court determined the chapter 11 case improperly filed for the sole purpose of obtaining rejection of the labor contract, and not in order to reorganize.); *In re Braniff Airways, Inc.*, 25 Bankr. 216, 219 (N.D. Tex. 1982); *In re St. Croix Hotel Corp.*, 18 Bankr. 375 (D. V.I. 1982); *In re Mamie Conti Gowns, Inc.*, 12 F. Supp. 478, 480 (S.D. N.Y. 1935); *In re Cleveland & Sandusky Brewing Co.*, 11 F. Supp. 198, 207 (N.D. Ohio 1935) ("the bankruptcy court may not be used as a temporary refuge from the consequences of labor trouble."). Cf. *In re Continental Airlines Corp.*, 115 L.R.R.M. 2364 (S.D. Tex. 1984). From 1978 airline deregulation until filing for Chapter 11 reorganization on September 24, 1983, Continental lost \$521,900,000. *Id.* at 2365. The unions did not challenge these financial losses by the employer. *Id.* at 2366. The unions unsuccessfully argued that the airline's sole, or at least primary, purpose for the Chapter 11 filing was to reject its labor contracts. *Id.* at 2367-68. The bankruptcy court rejected the unions' contentions. *Id.* The employer's financial losses were incontrovertible, and even if one of the employer's intentions was to obtain rejection of the labor contracts, this motive alone was certainly not tantamount to a "bad faith" filing. 115 L.R.R.M. at 2367. The bankruptcy court rejected the unions' motions to dismiss Continental's Chapter 11 petition. See Bordewieck and Countryman, *supra* note 52, at 317 ("[T]he court should insure that the union is given a full opportunity to analyze the arguments and financial data submitted by the debtor or relevant to the issue, so that the union will be in a position to argue cogently that the modifications sought by the debtor are not in fact necessary to a successful reorganization, if such an argument can be made. The court should also satisfy itself that the debtor is not primarily motivated by a desire to eliminate the union.") Further, 11 U.S.C. § 1112(b) permits the bankruptcy court to dismiss any Chapter 11 case, if the petition had been filed in bad faith. See *In re G-2 Realty Trust*, 6 Bankr. 549, 553-54 (D. Mass. 1980).

However, despite express employer motives to avoid unionization and contractual seniority strictures, rather than to reduce wage rates, some courts nevertheless permit contract rejection. Judicial admonition regarding the employer's anti-union animus as an improper basis for rejection can be utterly meaningless. The *S. Electronics Co.* court found the debtor's financial straits partially attributable to mismanagement. *In re S. Electronics Co.*, 23 Bankr. 348, 362 (E.D. Tenn. 1982). Further, the employer was not concerned with wage rates; rather, the employer insisted improved

equitable factors must be carefully weighed in each case. Given the appellate court's elaboration of the *Bildisco* equity tests and the bankruptcy court's failure to articulate reasons for authorizing rejection of the labor contracts, the case was remanded for reconsideration.²⁵³

The Sixth Circuit also subscribed to the more liberal Third Circuit standards for

production and ultimate survival could be insured only by mass discharges of "unproductive" employees without employee recourse to contractual arbitration, concomitant layoff, mass recall without regard to seniority, and, in the employer's own words, "the total destruction of the Seniority clause from the current contract . . . [M]y main desire is to operate in a union free environment." *Id.* at 354.

The court expressly recognized these reprehensible employer tactics, not directly related to economic modification of wage rates, as having "obvious potential for arbitrariness or capriciousness on the part of an employer." *Id.* at 360.

Nevertheless, based on only "meager" evidence of improved productivity, and no direct allegations of onerous wages, the court authorized labor contract rejection. *Id.* The employer was not obliged to arbitrate mass discharge grievances. The union was flexible; the employer remained intransigent throughout, demanding abolition of contractual seniority and no arbitration of earlier mass discharges of senior employees and recall of junior employees. The court summarized:

In its present precarious financial condition the debtor needs the most productive workers it can employ and it simply cannot afford any additional expense. Resolution of the grievances pursuant to the provisions of the collective bargaining agreement would be burdensome absent an internal settlement, which simply is not going to occur under these circumstances.

Id. at 361.

In August of 1982, Manville Corporation, despite a book net worth of approximately \$1 billion, filed for reorganization under Chapter 11 of the bankruptcy code. Bulow, Jackson & Mnookin, *Winners and Losers in the Manville Bankruptcy*, Wall St. J., Nov. 4, 1982, at 30, col. 12. Although Manville, the world's largest asbestos manufacturing company, was "not broke in the usual sense", Glaberson, *The Bankruptcy Laws May be Stretching Too Far*, Bus. Wk., May 9, 1983, at 33, col. 1, the corporation is currently faced with 16,500 tort claims filed against it by victims of asbestos-related diseases, and expects that between 30,000 and 130,000 persons will commence similar suits over the next twenty years. Bulow, *Winners and Losers*, *supra*, at 30, col. 12; see generally Note, *The Insurance Problem in Asbestosis Litigation: A Case for the Manifestation Theory*, 57 ST. JOHN'S L. REV. 485, 510 n.153 (1983) (stressing need for a legislative response to problem of asbestosis victim compensation). Manville has estimated that the present cost of satisfying all of the claims against it would be in excess of \$2 billion, leaving the company insolvent. Lewin, *Business and the Law: Bankruptcy Courts' Scope*, N.Y. Times, May 3, 1983, at col. 1; Bulow, *supra*, at col. 12. Manville's search for protection under the federal bankruptcy laws, despite the corporation's present healthy cost position, has been met with harsh criticism, with "[l]awyer[s] representing asbestos victims call[ing] it a 'fraud' and a 'perversion' of the bankruptcy laws." *Id.* Notably, however, members of the asbestos industry are not the only solvent petitioners to have recently found their way into the bankruptcy courts, leading many commentators to question whether the bankruptcy code's units are being pressed too far. See, e.g., Glaberson, *supra*, at col. 1 (evaluating solvent companies use of bankruptcy laws as a "management strategy"); Lewin, *supra*, at col. 1 (commenting on Wilson Corporation's \$80 million credit agreement with Citicorp Industrial Credit, Inc. announced less than a week after Wilson filed for reorganization); Sorenson, *Chapter 11 Filing by Wilson Foods Workers' Lives, Tests Law*, Wall St. J., May 23, 1983, § 2, at 29, col. 10 (noting increasing frequency with which companies are using Chapter 11 "to solve problems other than insolvency"); *Wilson's Back-Door Bid to Cut Labor Costs*, Bus. Wk., May 9, 1983, at 33, col. 1 (discussing Wilson Food Corp., "which still had net assets of \$60 million, [and] is the latest company to take the bankruptcy route to solve what is not strictly a financial problem).

²⁵³ *Brada Miller Freight*, 702 F.2d at 901 n.37. "We feel compelled to comment that the bankruptcy court's disposition of this case was inadequate regardless of the applicable standard. The court failed even to articulate that test on which it relied for the particular facts which supported its ultimate conclusion. The important interests of unionized employees in the continuity of a collective bargaining agreement may not be sacrificed in such a cursory manner." *Id.*

labor contract rejection. In *Borman's, Inc. v. Allied Supermarkets*,²⁵⁴ the Sixth Circuit concluded that the proper test is whether rejection would be advantageous to the debtor.²⁵⁵ The union in *Borman's*, however, did not contest the plan filed by the employer, Allied Supermarkets.²⁵⁶ The Sixth Circuit resolved an important question which had previously been raised in the Ninth Circuit's decision in *Joint Hotel Executive Board v. Hotel Circle*.²⁵⁷ In both cases, the debtor was a member of a multi-employer bargaining association. The Ninth Circuit left unresolved whether the interest of fellow employers in such a bargaining unit should be considered. In *Borman's*, the Sixth Circuit expressly ruled that the interests of fellow employer competitors within the multi-employer bargaining association to which the debtor belonged should not be weighed in determining whether to authorize rejection of the debtor's labor contract. According to the *Borman's* court, competitors' interests were insubstantial and did not rise to the level of the interests of the debtor and the union parties to the labor contract. Consequently, the Sixth Circuit held that another employer's interest in holding the debtor in possession to the terms of a labor contract negotiated by a multi-employer bargaining unit need not be weighed when passing upon applications to disaffirm executory labor contracts.²⁵⁸

Allied Supermarkets, the employer in *Borman's*, had already obtained the prior consent of both its affected unions and the creditors' committee to its proposed comprehensive business plan under Chapter 11.²⁵⁹ Rejection of existing labor contracts and subsequent renegotiation through collective bargaining was a principal element of that reorganization plan. Significantly, the affected unions either affirmatively concurred with or raised no objection to the plan.²⁶⁰ *Borman's*, a competing business and member of the multi-employer bargaining association with Allied, intervened, however, in the bankruptcy court's contract rejection proceeding.²⁶¹ The bankruptcy court approved the debtor's application to reject the collective agreement, and the district court affirmed.²⁶² On appeal by *Borman's*, the Sixth Circuit affirmed the labor contract rejection. The court explained that *Borman's* was unable to cite a single case to support its argument that the interests of a debtor's competitor in holding the debtor to the terms of the labor contract negotiated by the multi-employer bargaining association are also to be weighed.²⁶³ The Sixth Circuit found that regardless of the impact on the multi-employer bargaining

²⁵⁴ 706 F.2d 187 (6th Cir. 1983).

²⁵⁵ *Id.* at 189.

²⁵⁶ *Id.* at 190 n.8. Under the former Chapter X of the 1898 Act, the union, at the discretion of the bankruptcy court, could participate in the formulation of the plan of reorganization. Bankruptcy Act, ch. 541, 30 Stat. 544 (1898); ch. 575 § 106, 52 Stat. 883 (amended 1938) (codified as amended at 11 U.S.C. § 101 (1976)). Section 206 of the former Act provided that "the judge may, for cause shown, permit a labor union or employees' association, representative of the employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employee." See ch. 575 § 206, 52 Stat. 894 (as amended 1938) (codified as amended at 11 U.S.C. § 101 (1976)). See Teton, *Reorganization Revised*, 48 YALE L.J. 573, 595-96 (1939) ("One of the most controversial features of the effort to socialize reorganization proceedings was the attempt to confer upon labor unions, employees' associations . . . a right to be heard on the economic soundness of any plan.")

The 1978 code lacks an express analog; however 11 U.S.C. § 1121 continues to provide for creditor input.

²⁵⁷ 613 F.2d 210, 219 (9th Cir. 1980).

²⁵⁸ *Borman's*, 706 F.2d 187.

²⁵⁹ *Id.* at 188.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 189.

association, the business competitors are certainly not in a contractual employment relationship.²⁶⁴ The competitors' interests in the debtor's labor contract rejection, in the court's view, did not rise to a sufficient level to enter into the weighing of equities' calculus.²⁶⁵

In summary, the circuit courts have manifested wide divergence of opinion regarding the appropriate standards to be utilized in deciding whether to authorize labor contract rejection in bankruptcy. In order to resolve this split, the United States Supreme Court granted the Union's petition for certiorari in *In re Bildisco*.²⁶⁶ The next section of the article analyzes the Supreme Court's opinion in that case.

C. The Supreme Court's Decision in *NLRB v. Bildisco*²⁶⁷

On February 22, 1984, the Supreme Court dealt a devastating blow to labor policy by affirming the Third Circuit's decision.²⁶⁸ The Court unanimously affirmed²⁶⁹ the lower court's core ruling,²⁷⁰ holding that the debtor in possession can secure bankruptcy court approval of the petition to reject the collective bargaining agreement upon a showing that the labor contract "burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract."²⁷¹ The Court expressly rejected the strict *REA Express* standard articulated by the Second Circuit, which required the debtor in possession to show that liquidation would inevitably occur absent court-authorized rejection.²⁷²

Turning to the second issue, a majority of the court held that the debtor in possession does not commit an unfair labor practice by unilaterally rejecting or modifying a collective bargaining agreement prior to obtaining formal authorization for such action by the bankruptcy court.²⁷³ This section will scrutinize each part of the opinion in detail, with particular attention to the unanimous basic ruling regarding the appropriate standard for rejection and the split decision regarding the ancillary unfair labor practice issue.

1. Unanimous Affirmance of the Third Circuit's Standard for Labor Contract Rejection²⁷⁴

The Court began its opinion by expressly stating that collective bargaining agreements covered by the NLRA were executory contracts within the meaning of section 365(a) of the Bankruptcy Code.²⁷⁵ In so ruling, the Court rejected the union's argument that Congress intended to exempt labor contracts subject to the NLRA from the trustee's

²⁶⁴ *Id.* at 189 n.7.

²⁶⁵ *Id.* at 189.

²⁶⁶ *Bildisco*, 104 S.Ct. at 1188.

²⁶⁷ *Id.*

²⁶⁸ For thorough discussion of the lower history and facts of the case, see *supra* notes 198-221 and accompanying text.

²⁶⁹ Justice Rehnquist delivered the opinion.

²⁷⁰ Parts I and II of the opinion were unanimous on the core rule.

²⁷¹ *Bildisco*, 104 S.Ct. at 1196.

²⁷² *Id.*

²⁷³ *Id.* at 1197.

²⁷⁴ *Id.* at 1196. Although Parts I and II of the opinion were unanimous, Justice Brennan filed an opinion joined by Justices White, Marshall, and Blackmun dissenting to Part III of the majority opinion. Justice Rehnquist also delivered Part III of the opinion. The Chief Justice and Justices Powell, Stevens, and O'Connor, along with Justice Rehnquist, supported the opinion of the Court throughout.

²⁷⁵ *Id.* at 1191.

section 365(a) powers to reject.²⁷⁶ After this preliminary determination, the Court turned directly to a consideration of the critical issue: determination of the appropriate standard by which the bankruptcy courts must judge the petition of the debtor in possession to reject the collective bargaining agreement.

The Court agreed with the Board's contention that the standard for rejection must be "stricter than the traditional 'business judgment' standard applied by the courts to authorize rejection of the ordinary executory contract."²⁷⁷ Summarizing the positions of the various circuits that considered the question, the Court concluded that "because of the special nature of a collective bargaining contract, and the consequent 'law of the shop' which it creates . . . a somewhat stricter standard should govern labor contracts."²⁷⁸ Despite this conclusion, the Court unequivocally rejected the position of both the Board and the union that the Second Circuit's strict *REA Express* standard should prevail. The Court reviewed the legislative history that referred to both *Kevin Steel* and *REA Express* in the process of enacting the 1978 Bankruptcy Code. The Court concluded that these two Second Circuit decisions set forth differing standards for rejection, and that the pertinent legislative history did not indicate a preference for either standard.²⁷⁹ At most, the Court stated, the House report, supported "only an inference that Congress approved the use of a somewhat higher standard than the business judgment rule."²⁸⁰ Consequently, the Court rejected the strict *REA Express* standard because of the strong possibility that it would interfere with the reorganization process.²⁸¹ Instead, the Court adopted the standard of the Third Circuit in *Bildisco* and of the Eleventh Circuit in *Brada Miller Freight*²⁸² as the governing rule.²⁸³ The Court explained that if the labor contract burdens the estate and a careful balancing of the equities favors rejection, the petition for rejection will be approved by the bankruptcy court.²⁸⁴ The Court listed several equitable interests which

²⁷⁶ Specifically, the Court noted:

[N]one of the express limitations on the debtor in possession's general power under § 365(a) apply to collective-bargaining agreements. Section 1167, in turn, expressly exempts collective-bargaining agreements subject to the Railway Labor Act, but grants no similar exemption to agreements subject to the NLRA. Obviously, Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to all collective-bargaining agreements covered by the NLRA (emphasis added).

Id. at 1194-95.

²⁷⁷ *Id.* at 1195.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 1196. The Court stated:

Quite simply, *Kevin Steel* and *REA Express* reflect two different formulations of a standard for rejecting collective-bargaining agreements. Congress cannot be presumed to have adopted one standard over the other without some affirmative indication of which it preferred. The reference in the House report to *Kevin Steel* and *REA Express* also cannot be considered a congressional endorsement of the stricter standard imposed on rejection of collective bargaining agreements by the Second Circuit in *REA Express*, since the report indicates no preference for either formulation.

Id.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² See *supra* notes 222-253 and accompanying text for discussion of the case.

²⁸³ *Bildisco*, 104 S.Ct. at 1196. See also *supra* note, 284.

²⁸⁴ *Id.* at 1197. "The standard which we think Congress intended is a higher one than that of the 'business judgment' rule, but a lesser one than that embodied in the *REA Express* opinion." *Id.* at 1196.

the bankruptcy court must consider, and required that its determination that rejection was appropriate should be based upon a reasoned finding on the record.²⁸⁵

With the fatal blow delivered to labor policy, the Court paid *pro forma* attention to the remaining shreds of the NLRA. The Court recommended, but did not mandate, that voluntary negotiations toward labor contract modification be initiated prior to the bankruptcy court action on the petition for rejection.²⁸⁶ The Court did not, however, require the bankruptcy court to determine whether an impasse had been reached before it took any action.²⁸⁷ The Court suggested merely that reasonable efforts be made to negotiate a voluntary modification and that those efforts be shown as not likely to produce a prompt and satisfactory solution of the conflict.²⁸⁸ Concluding the unanimous portion of the opinion, the Court vested bankruptcy courts with broad, though not totally unrestrained, discretion in order to carefully weigh and balance the pertinent equities, thereby affirming the Third Circuit's "burdensome to the estate" standard for labor contract rejection.²⁸⁹

Turning to the question of the unfair labor practice charge, the majority ruled that the debtor in possession can reject the labor contract before authorization by the bankruptcy court.²⁹⁰ The Court's inquiry into the applicability of the successor employer and new entity analogy to the debtor in possession was brief. The majority concluded that an "exhaustive analysis" had "no profit,"²⁹¹ explaining that for its purposes, "it was sensible to view the debtor in possession as the same 'entity' which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have done absent the bankruptcy filing."²⁹² All parties agreed that the bankruptcy court could ultimately approve rejection of the labor contract, albeit by radically different proffered standards. The Board and the Union, however, unsuccessfully contended that the debtor in possession violated section 8(d) and committed a section 8(a)(5) unfair labor practice by unilaterally effecting the abrogation of the collective bargaining agreement without prior court authorization. The majority refused to defer to the Board's position, believing that the Board's labor expertise did not qualify it to discern congressional intent regarding the Bankruptcy Code.²⁹³ Regarding the issue of unilateral labor contract abrogation by the debtor in possession, the majority concluded that the Board could not enforce the contract terms of the

²⁸⁵ *Id.* at 1197.

²⁸⁶ *Id.* at 1200-01.

²⁸⁷ *Id.* "Our rejection of the need for full compliance with § 8(d) procedures of necessity means that any corresponding duty to bargain to impasse under § 8(a)(5) and § 8(d) before seeking rejection must also be subordinated to the exigencies of bankruptcy. Whether impasse has been reached generally is a judgment call for the Board to make; imposing such a requirement as a condition precedent to rejection of the labor contract will simply divert the Bankruptcy Court from its customary area of expertise into a field in which it presumably has little or none" (footnote omitted). *Id.* at 1200.

²⁸⁸ *Id.* at 1196.

²⁸⁹ *Id.* at 1197. The Court ruled that:

[T]he Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities. The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization. The Bankruptcy Court's inquiry is of necessity speculative and it must have great latitude to consider any type of evidence relevant to this issue.

Id.

²⁹⁰ *Bildisco*, 104 S.Ct. at 1199.

²⁹¹ *Id.* at 1197.

²⁹² *Id.*

²⁹³ *Id.* at 1198 n.9.

collective bargaining agreement by filing unfair labor practices against the debtor in possession for violating section 8(d) of the NLRA.²⁹⁴

Finally, in perhaps the most sweeping portion of Part III, the majority concluded that from the filing of a petition in bankruptcy until formal acceptance, "the collective-bargaining agreement is not an enforceable contract within the meaning of § 8(d)"²⁹⁵ This conclusion, which has potential ramifications transcending the immediate context of labor rejection in bankruptcy, was based on the majority's rationale that the contract was rejected by operation of law, and not by any unilateral act of the employer. Under this reasoning, the Court concluded that the section 8(d) strictures of the NLRA did not apply. The Court stated that while the debtor in possession remains an employer within the meaning of the NLRA and is therefore obligated to bargain collectively with the employees' certified representative over the terms of a new contract pending rejection of the existing contract or following formal approval of rejection by the bankruptcy court, the debtor may unilaterally abrogate the collective bargaining agreement prior to formal court approval of the petition for rejection.²⁹⁶

2. The Dissent

Justice Brennan wrote an opinion which dissented in part, and was joined by three other Justices.²⁹⁷ The dissent began by stating that the majority had failed to cite any portion of the Bankruptcy Code that rendered section 8(d) of the NLRA inapplicable. The dissent observed that the majority admitted that in the absence of such a section, the debtor in possession was obligated to bargain with certified representatives. According to the dissent, the majority's rationale for exempting the unilateral employer rejection from unfair labor practice constraints was based on a series of attenuated inferences.²⁹⁸ The dissent asserted that by simplistically pedestalizing employer prerogatives, the majority debilitated national labor policy. Next the dissent summarized the damage wrought by the attenuated reasoning of the Court. The dissent argued for harmonious equilibrium between labor and bankruptcy policy considerations stating:

There is an unavoidable conflict between the Code and the NLRA with which the Court has simply failed to grapple. Permitting a debtor in possession unilaterally to alter a collective-bargaining agreement in order to further the goals of the Bankruptcy Code seriously undermines the goals of the NLRA. We thus have the duty to decide the issue before us in a way that accommodates the policies of both federal statutes. That cannot properly be done, in the Court's fashion, by concentrating on the Bankruptcy Code alone; under that approach, a holding that Section 8(d) is inapplicable once a bankruptcy petition has been filed must obviously follow. One could as easily, and with as little justification, focus on the policies and provisions of the NLRA alone and conclude that Congress must have intended that § 8(d) remain applicable. Rather, it is necessary to examine the policies and provisions of both statutes to answer the question presented to the Court.²⁹⁹

²⁹⁴ *Id.* at 1200.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 1201.

²⁹⁷ Justices Brennan, White, Marshall, and Blackmun concurred in part and dissented in part. *Id.* at 1201-11.

²⁹⁸ *See id.* at 1203 (Brennan, J., dissenting).

²⁹⁹ *Id.* at 1204 (Brennan, J., dissenting).

After balancing the respective statutory provisions and policy considerations, the dissent "inexorably" concluded that Congress never intended the filing of a bankruptcy petition to affect the applicability of section 8(d). Consequently, in the dissent's view, a debtor in possession commits an unfair labor practice when he unilaterally alters the terms of an existing collective bargaining agreement after a bankruptcy petition has been filed but prior to rejection of that agreement.³⁰⁰ The dissent stated that the Court's ruling that section 8(d) did not apply was simply erroneous and inconsistent with both NLRA policies and prior case law interpreting section 8(d).³⁰¹

The dissent also disagreed with the majority's unsupportable conclusion that a labor contract ceases to be enforceable within the meaning of section 8(d) upon the filing of the petition for rejection.³⁰² According to the dissent, the Court's error stemmed in part from its imprecise terminology. The pertinent NLRA provision referred only to the contract being "in effect;" the dissent noted that there was no reference to whether the contract was "enforceable." The dissent then presented a number of situations in which the collective bargaining agreement should remain "in effect"³⁰³ between the filing of the petition for rejection and formal court authorization.³⁰⁴ The dissent further observed that if section 8(d) is preemptorily swept aside, the parties would be deprived of the "cooling off" statutory time period in which they might otherwise agree to voluntary contract modification and thus preserve labor management peace.³⁰⁵ Consequently, the dissent concluded that Congress clearly "intended that § 8(d) remain applicable after a bankruptcy petition has been filed."³⁰⁶

III. THE RATIONALE OF *NLRB v. Bildisco*

Once the Court adopted the Third Circuit's "burdensome" standard for labor contract rejection, and rebuffed the *REA Express* test of the Second Circuit, labor policy was gravely wounded. Correspondingly, bankruptcy law considerations were unnecessarily

³⁰⁰ *Id.* (Brennan, J., dissenting).

³⁰¹ *Id.* (Brennan, J., dissenting). "[T]he Court's position that § 8(d) is inapplicable once a bankruptcy petition has been filed is contrary to the goals of the NLRA, and a careful examination of the words Congress has chosen reveals that they do not clearly compel this result."

Id. at 1205 (Brennan, J., dissenting).

³⁰² *Id.* at 1206 (Brennan, J., dissenting).

³⁰³ *Id.* at 1207 n.13 (Brennan, J., dissenting). "It is noteworthy that courts considering bankruptcy cases often refer to executory contracts as remaining 'in effect' unless or until they are rejected." *Id.* (Brennan, J., dissenting).

³⁰⁴ *Id.* (Brennan, J., dissenting).

³⁰⁵ *Id.* at 1208 (Brennan, J., dissenting). "The notice and cooling-off requirements of § 8(d), which are components of the duty to bargain, are specifically designed to prevent labor strife resulting from unilateral modifications and terminations of collective bargaining agreements." *Id.* (Brennan, J., dissenting).

³⁰⁶ *Id.* at 1208-09 (Brennan, J., dissenting).

As the Court correctly points out, the primary goal of Chapter 11 is to enable a debtor to restructure his business so as to be able to continue operating. Unquestionably, the option to reject an executory contract is essential to this goal. But the option to violate a collective-bargaining agreement before it is rejected is scarcely vital to insuring successful reorganization. For if a contract is so burdensome that even temporary adherence will seriously jeopardize the reorganization, the debtor in possession may seek the Bankruptcy Court's permission to reject that contract. Under the test announced by the Court today, his request should be granted.

Id. at 1209 (Brennan, J., dissenting).

and unwisely given priority. This judicial sanctification of bankruptcy considerations at the unwarranted expense of labor policy is especially anomalous in light of the constitutionally imperiled status of the bankruptcy courts. The Court's suggestion of voluntary bargaining toward contract modification prior to bankruptcy court action on the petition for contract rejection is not the equivalent of judicially mandated prior bargaining. Even this "suggestion" was substantially compromised by the Court's decision to free the bankruptcy court from having to determine whether the parties bargained in good faith prior to reaching their impasse. The *Bildisco* decision, therefore, makes it clear that neither prior bargaining nor prior bargaining to impasse is required.

Furthermore, despite its disclaimer to the contrary, the Court granted the bankruptcy courts virtually unlimited discretion to scrutinize, and thus to manipulate, the equities involved in considering whether to allow the rejection of a collective agreement. In the past, the bankruptcy courts, at best, have consistently manifested indifference, if not open animosity, towards the interests of labor. In particular, these courts have often demonstrated overt ownership biases. The Supreme Court, by leaving the decision to reject entirely up to the bankruptcy court's discretion, has now virtually canonized ownership interests. The unavoidable result of the Court's opinion is that the interests of the private ownership elites have theoretically and pragmatically been elevated over both national labor policies and the interests of labor.³⁰⁷ Bankruptcy courts can now openly

³⁰⁷ *NLRB v. Bildisco* is a classic, contemporary case of unconstitutional delegation of legislative authority to private entrepreneurial interests, subject only to ill-defined, after-the-fact review by the bankruptcy court. Neither the Court nor the NLRB nor the union nor their amici perceived this fundamental core problem. In the 1935 term, the Court definitively struck down the National Industrial Recovery Act for a similar unconstitutional delegation of legislative authority to private business interests. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935).

As the Court rhetorically posited in *Schecter*:

But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? . . . The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

Schecter, 295 U.S. at 537.

The Court expanded on these sound principles in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936): "In the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor." Yet this was exactly the situation endorsed by the Court in *Bildisco*. Private employers are now given judicial carte blanche to abrogate their labor contracts, free of any enabling statute, and subject only to subsequent pro forma review by a constitutionally imperiled bankruptcy court.

Justice Douglas offered perhaps the most eloquent observations on the pernicious nature of the unconstitutional delegation of legislative authority. His thoughts are eerily prescient of the *Bildisco* scenario.

There are those who still say that NIRA was FDR's fling with socialism, but it had no resemblance to any school of socialist thought. NIRA was an attempt to grant to industry the power to set production quotas and prices. It was a grant of monopolistic power to private industry, placing the making of rules governing business in the hands of business itself.

As [Justice] Black had said, this Act thus placed lawmaking in the hands of private industry . . . New Dealers who blessed this monstrosity cannot be excused. They certainly knew better. And it is difficult, even after long reflection, to grasp the

obviate their entrepreneurial prejudices at the expense of labor. The most realistic, though admittedly wholly bleak, prognosis for the implementation of the Court's reasoning in *Bildisco* is that labor and employee equities will routinely and consistently be subordinated to the ownership interests in all but the most egregious cases of systemic abuse by the debtor in possession. This result will be readily effected through judicial

mentality . . . in conceiving an industrial system under which the biggest, the most powerful units in business laid down the rules of price and competition for the group. The result would obviously be a vicious form of cartel, in which a few companies would determine the destinies of the smaller entrepreneurs.

The project was declared unconstitutional by a unanimous Court in 1935 . . . Any Supreme Court that ever sat would have so ruled, because lawmaking under the Constitution is a matter for Congress, not for private parties. That proposal of FDR's would have made a structural change in capitalism that would have strengthened the Establishment and taken us a long way down the road to the corporate state.

DOUGLAS, *GO EAST, YOUNG MAN* 347 (1974).

As Dean Ely points out in his elegant book, *DEMOCRACY AND DISTRUST*, the nondelegation doctrine has suffered an unwarranted "death by association" with the substantive due process doctrine. Although it has been widely regarded as an arcane, dusty remnant of constitutional history, this is a cavalier view. *Bildisco* posits the perfect situation for revitalization of a refined contemporary nondelegation doctrine, to insure appropriate and adequate legislation to structure the actions of the private ownership elites in labor contract abrogation.

Most recent commentary on nondelegation has been in the administrative law context. Recent criticism of the administrative process, the "fourth branch of Government," Federal Trade Comm'n v. *Rubero Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting), has been widespread. See BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* 2-4 (1975); Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 579 (1972); Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111 (1972); Schwartz, *Of Administrators and Philosopher-Kings: The Republic, The Laws, and Delegations of Power*, 72 NW. U.L. REV. 443, 456-59 (1978); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1681-88 (1975).

Some commentary, however, has focused primarily on the nondelegation issue *per se*. See, e.g., I K. DAVIS, *ADMINISTRATIVE LAW JUSTICE* § 3-13, at 198 (2d ed. 1978); I B. MEZINES, J. STEIN & GRUFF, *ADMINISTRATIVE LAW* § 3.03 [1], at 3-72 (1983); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 7 n.16 (1982); Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969); Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307 (1976); Stewart, *supra* at 1694. The factors underlying the arguments disfavoring the doctrine have been termed "overwhelming." I K. DAVIS, *supra*, § 3-13, at 198. Indeed, the majority of commentators regard the doctrine to be a dead letter, G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 59 (2d ed. 1980); Aranson, Gellhorn & Robinson, *supra*, at 5; Freedman, *supra*, at 308; See Note, *Rethinking the Nondelegation Doctrine*, 62 B.U.L. REV. 257, 258 (1982). "The nondelegation doctrine is almost a complete failure. It has not prevented the delegation of legislative power, nor has it accomplished its later purpose of assuring that delegated power will be guided by meaningful standards. More importantly, it has failed to provide needed protection against unnecessary and uncontrolled discretionary power. The time has come for the courts to acknowledge that the nondelegation doctrine is unsatisfactory and to invent better ways to protect against arbitrary administrative power." Davis, *supra*, at 713.

However, despite the unforeseeability of a revival of the nondelegation doctrine, Aranson, Gellhorn & Robinson, *supra*, at 17, several commentators have recently urged that the doctrine be resurrected. T. LOWI, *THE END OF LIBERALISM* 297-98 (1969); G. ROBINSON, E. GELLHORN & H. BRUFF, *supra*, at 72 ("there may be life in the delegation doctrine yet"); McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1130 (1977); Wright, *supra*, at 582-84. "[T]he delegation doctrine remains an important potential as a check on the exercise of unbounded, standardless discretion by administrative agencies." Wright, *supra* at 583. Judge Wright asserts that although "Congress should control discretion by reassuming its rightful role as the architect of fundamental administrative policy," *id.* at 581, the primary burden must be borne by the courts, which must formulate rules limiting discretion and "reestablish the doctrines which were designed to

manipulation of the congeries of equities. It is likely that some courts will conclude simplistically that a job at a lower wage is better than no job, and, thereby deem employee and labor interests to have been carefully considered. With the core issue of the appropriate standard for contract rejection unanimously resolved in favor of the employer, the remainder of the *Bildisco* opinion is dictated by resolution of the appropriate standard issue. An examination of both the majority and the four-member dissent regarding the unfair practice issue, however, offers some suggestion that the judicial juggernaut is not uncompromisingly aligned against labor. Although the employer also prevailed on the unfair labor practice issue, the dissent offers some vestige of faint hope for future judicial, or, perhaps more likely, legislative rectification of the grotesque imbalance *Bildisco* has surely wrought in labor-management relations.

The Court's endorsement of precipitous unilateral contract rejection is fraught with hazards. The debtor in possession may hastily abrogate a labor contract that he would otherwise, after deliberation and good faith negotiations with the union, wish to preserve. Preemptory rejection at the outset divests the debtor in possession of the wiser option of pursuing negotiations. In many instances, it is likely that employers will immediately abrogate, and only later regret, such hasty, ill-advised conduct. The recent history of significant union concessions upon good faith bargaining toward contract modification demonstrates the wisdom of refraining from immediate unilateral rejection.³⁰⁸

The prudent employer will avoid precipitous action, even though the Court has removed unfair labor practice constraints from immediate unilateral labor contract rejection prior to the authorization of the petition for rejection by the bankruptcy court. One major reason for this restraint is that the union is likely to remain as the employee's representative after reorganization. As a result, the reorganized employer will have to continue to bargain with the union. Post-reorganization labor relations will be significantly enhanced or severely impeded by the employer's prior actions toward the union during the reorganization. If the employer first pursues good faith negotiations toward modification rather than invoking immediate contract rejection under the *Bildisco* decision, post-reorganization labor relations are likely to be expeditious and relatively harmonious. In contrast, Draconian contract abrogation by the debtor in possession is sure to engender some, and perhaps permanent, bitterness and, therefore, poison the labor

compel or encourage other branches of government to assume their parts of the task." *Id.* at 581-82; accord G. ROBINSON, E. GELLHORN & H. BRUFF, *supra*, at 60.

The unconstitutional delegation issue, especially in the context of *Bildisco*, essentially centers on the problem of unrestrained law-making by private parties. See, e.g., the classic articles by Professor Jaffe, *An Essay On Delegation of Legislative Power*, 47 COLUM. L. REV. 561 (1947); *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); see also Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L. REV. 650 (1975).

For a succinct overview of the nondelegation issue, see TRIBE, *AMERICAN CONSTITUTIONAL LAW* 5-17 (1978).

Of course, the classic recent thinking on the appropriateness of a refined contemporary non-delegation doctrine is ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131-134 (1980).

³⁰⁸ [B]ecause unions have a strong incentive to avoid rejection of contracts, they frequently may be willing to enter into negotiated settlements for the interim period that will at least forestall rejection. Consequently, in many cases, requiring the debtor in possession to adhere to the terms of an existing agreement will not lead to early rejection at all. In sum, because the debtor in possession may apply to the bankruptcy court for rejection of executory contracts, holding § 8(d) applicable to the reorganization period will not seriously undermine the chances for a successful reorganization.

Id. at 1210 (Brennan, J., dissenting).

relations climate which will exist after reorganization. Surprisingly, in *Bildisco*, the Supreme Court failed to address one especially immediate and obvious difficulty stemming from precipitous unilateral abrogation. Specifically, even if the debtor in possession relies on *Bildisco* and abrogates the labor contract immediately upon filing the petition for rejection, under the Court's opinion this action by the debtor in possession does not automatically guarantee subsequent court authorization of the petition. After a careful weighing of the equities, the bankruptcy court may still conclude that the labor contract was not sufficiently onerous and burdensome to reorganization and therefore should presumably not have been rejected. Such a conclusion, however, would probably not cause the earlier rejection to be an unfair labor practice. The Court's failure to answer this question in *Bildisco* is certain to invite future litigation. This uncertainty is yet another reason militating against precipitous unilateral labor contract abrogation by the employer. It will be an unfair labor practice, subjecting the employer debtor to retroactive liability, if the bankruptcy court later fails to approve the contract abrogation.

The major significance of the Court's decision in *Bildisco* is that it suggests a possible return to atavistic, pre-Act labor relations. Admittedly, it is unlikely that the decision will open the bankruptcy floodgates in so far as most major multinational corporations are concerned. An otherwise solvent and viable employer of any size is unlikely to enter the rigors of total reorganization merely to escape an unpalatable labor contract. Many marginal employers, however, unable or unwilling to engage in adequate strategic financial future planning, and without perceptive labor counsel, may mistakenly read *Bildisco* as a carte blanche for labor contract avoidance.

One way in which labor can partially counter the *Bildisco* employer prerogatives is by demanding one year contracts. This system will, of course, significantly increase employer labor relations costs. Unions would be foolhardy to agree to labor contracts of two or three years, as is now the norm, with any but the most solvent, large corporations. Knowing that the employer may file for reorganization and reject the normal three year contract in less than mid-term with almost two years of previously negotiated provisions suddenly abolished, labor will surely insist on one-year agreements. One-year contracts, however, will make labor relations fitful and disjointed and will militate against continuity and stability.

More ominously, unthinking employer invocation of *Bildisco* would allow management to return to the bleak Hobbesian pre-NLRA "war of all against all." Significantly increased strike activity and labor violence may well ensue. As the dissent pessimistically, but realistically, concluded: "Holding Section 8(d) inapplicable . . . strikes at the very heart of the policies underlying that section and the NLRA, and will . . . spawn precisely the type of industrial strife that NLRA Section 8(d) was designed to avoid."³⁰⁹

In view of the fact that it is unlikely that *Bildisco* will be overruled by the Court in the foreseeable future, responsible congressional action to legislatively overrule the decision is the only immediate viable recourse. The prospect for the ultimate success of any such legislative initiatives, however, is not good.³¹⁰ *Bildisco* is cut from the same cloth as several other recent Supreme Court decisions endorsing unchecked ownership prerogatives.³¹¹

³⁰⁹ *Id.* at 1211 (Brennan, J., dissenting).

³¹⁰ See *supra* note 48 for an exploration of this recent legislation.

³¹¹ *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965); *NLRB v. MacKay Radio and Tel. Co.*, 304 U.S. 333 (1938); see also Klare, *Judicial Deradicalization of the Wagner Act and the Origin of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); Gregory, *Book Review*, 62 TEX. L. REV. 389 (1983).

The most egregious example of these decisions is *First National Maintenance v. NLRB*.³¹² The article will now turn to an analysis of the theoretical foundations for these decisions, which are so wholly opposed to the established national labor policies.

IV. *Bildisco*: THE INELUCTABLE RESULT OF *First National Maintenance*

The Supreme Court's endorsement of the Third Circuit's radical liberalization of the Second Circuit's *REA* strict standards for labor contract rejection was dictated by the Court's controversial decision in 1981 in *First National Maintenance v. NLRB*.³¹³ Although *FNM* has been the most significant judicial endorsement of unencumbered entrepreneurial prerogatives in business operation, the decision was the predictable culmination of a line of Supreme Court opinions that had incrementally broadened the scope of managerial power.³¹⁴ In the landmark decision *Fibreboard Paper Products Corp. v. NLRB*,³¹⁵ for example, Justice Stewart stated in a powerful, influential concurrence that "[n]othing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lies at the core of entrepreneurial control."³¹⁶ In *FNM*, the Court utilized this influential *Fibreboard* language to exempt the employer's decision whether to terminate one line of its business operation from the prior duty to bargain.³¹⁷

FNM provided custodial housekeeping, maintenance and janitorial services to commercial customers throughout the New York City metropolitan area. Each customer receiving the service paid FNM a fixed fee plus labor costs. FNM maintained separate personnel to perform the contracted services for each separate customer, rather than transferring personnel among its separate contracted operations.³¹⁸

One of FNM's custodial contracts was with the Greenpark Nursing Home. On November 1, 1976, Greenpark reduced the weekly fee it paid to FNM for custodial services from \$500 to \$250. On June 30, 1977, after months of dissatisfaction, FNM formally notified Greenpark that FNM would terminate services if Greenpark did not reinstitute the former weekly payments of \$500. When Greenpark did not meet FNM's terms, FNM terminated custodial services for Greenpark on August 1, 1977.³¹⁹ At the same time, FNM also terminated all of its employees who had performed services under the FNM contract with Greenpark. None of the employees were transferred into other FNM operations. The company closed this line of its operation without consulting the employees' union, with which it had signed a collective bargaining agreement.

³¹² 452 U.S. 666 (1981).

³¹³ *Id.*

³¹⁴ See *supra* note 311.

³¹⁵ 379 U.S. 203 (1964). In *Fibreboard*, the Supreme Court held that the employer's subcontracting decision was a section 8(d) mandatory subject of bargaining under the facts of that case. *Id.* at 213. The work would continue to be performed in virtually identical fashion and under the same conditions as previously, since the only real, but crucial, difference was that the employees were to be replaced by the personnel of the subcontractor. *Id.* Under those facts, requiring the employer to bargain over the subcontracting decision would not unduly impede the employer's ability to manage the business. *Id.* The subcontracting decision did not impact fundamentally upon the employer's basic business operation or financial resources. *Id.* at 213-214.

³¹⁶ *Id.* at 223.

³¹⁷ See *infra* notes 324-28 and accompanying text.

³¹⁸ 452 U.S. at 668.

³¹⁹ *Id.* at 668-69.

Reversing both the Board³²⁰ and the Second Circuit,³²¹ the Supreme Court held that the employer could terminate one line of its business operation without having reached any compromise agreement with the union. The Court explained that only the impact of the decision was a mandatory subject of bargaining. In so holding, the Court articulated a balancing test between the employer's interest³²² in expeditiously closing its unprofitable operations and the union's interest³²³ in bargaining over that core decision: "[I]n view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of business."³²⁴

Given the Court's approach, it was inevitable that the union would lose its challenge. Significantly, the Court stated that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."³²⁵ The employer's economic decision to close operations partially was, therefore, freed from the duty to bargain. The Court, in effect, articulated a virtual *per se* rule for management:

[W]e conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in the decision, and we hold the decision itself is not part of Section 8(d)'s "terms and conditions. . . ." ³²⁶

The Court relegated the union's interests to the purportedly sufficient protections afforded through post-decision effects bargaining "in a meaningful manner and at a meaningful time."³²⁷ In endorsing the employer's unilateral action as exempt from any prior bargaining obligation, the Court emphasized that the employer's motivation was purely economic; there was no antiunion animus.³²⁸ By exempting the employer's economically motivated, core business decision to partially close from its duty to bargain, *FNM* radically expanded the unilateral prerogatives of the employer.³²⁹ It should be

³²⁰ *First National Maintenance Corp.*, 242 N.L.R.B. 462 (1979).

³²¹ 627 F.2d 596 (2d Cir. 1980), *rev'd* 452 U.S. 666 (1981).

³²² The court summarized the purportedly compelling reasons for allowing the employer to decide to partially close business operations for economic reasons without imposing a mandatory duty to bargain regarding that decision:

[The company] may face significant tax or securities consequences that hinge on confidentiality of a plant closing, or a reorganization of the corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business.

452 U.S. at 683 (1981).

³²³ The Court acknowledged the employees' "legitimate concern over job security." *Id.* at 682. Further, although the court recognized that unions may work with the employer and develop viable alternatives to closing the operation, this factor was quickly discounted. The Court emphasized what it feared as the greater likelihood of union obstructionist and dilatory tactics if the employer's economic decision to effect partial closing of operations was made a subject of prior mandatory bargaining. *Id.* at 681. "The union's practical purpose in participating . . . will be . . . to delay or halt the closing." *Id.*

³²⁴ *Id.* at 679.

³²⁵ *Id.* at 678-79.

³²⁶ *Id.* at 682-83.

³²⁷ *Id.* at 682.

³²⁸ *FNM* "had no intention to replace the discharged employees or move operations elsewhere." *Id.* at 687.

³²⁹ *Id.* at 687-88.

recognized that at the time of the Court's decision, the nation was affected with severe economic recession. This unfavorable business climate, when combined with the *FNM* decision, ushered in a virtually unprecedented wave of threatened and actual plant closings, bankruptcies and reorganizations, and pervasive "concessions" bargaining.³³⁰

The Court's decision in *FNM* has been severely criticized as distorting the theoretical equilibrium in relative bargaining power that ideally should be maintained between labor and management. One commentator, for example, pointedly summarized the dire consequences of the *FNM* decision upon labor, arguing that unions had been deprived of viable alternatives, other than judicially sanctioned acquiescence to employer prerogatives. According to the author:

Unions . . . are left without effective economic weapons with which to force employers to recognize employee interests, since strikes by non-employees cannot harm the employer. . . .

The *FNM* decision, by allowing employers more leeway in making business decisions, greatly reduces the bargaining power of unions. The *FNM* decision thus thwarts Congress' purpose of balancing bargaining power, and complicates application of the employer's section 8(a)(5) duty to bargain over terms and conditions of employment.³³¹

With the entrepreneurial decision to terminate operations partially freed from the duty to bargain, the employer was only required to bargain regarding the post-decision impact, or effect, of the economic decision. While impact bargaining addresses severance, pensions, seniority and reemployment rights at other facilities, and thus can be significant, it does not fundamentally alter the original employer decision to cease operations.³³² Employees, who have often put their entire adult lives and working careers into

³³⁰ For recent examples of significant union concessions, see *Lone Star-Steelworkers Wage Concession Contract*, 114 LAB. REL. REP. 41 (BNA) (Sept. 19, 1983) (members of the United Steelworkers Union accept "one of the steepest pay cuts negotiated in the current round of contract concessions — an across-the-board reduction of \$2.80 per hour"); *Concessions for Meatpackers*, 113 LAB. REL. REP. 188 (BNA) (July 4, 1983) (members of United Food and Commercial Workers vote to accept concessions significantly reducing wages and benefits after employer filed for bankruptcy); *Contract Approvals in Airline Industry*, 112 LAB. REL. REP. 202 (BNA) (March 14, 1983) (concessions agreed to by transport workers union include elimination of paid meal periods, "increased deductibles under a comprehensive medical insurance plan and slower procession schedules to top rates for new hires"); *Wage, Benefit Cuts For Steel Employees*, 112 LAB. REL. REP. 22 (BNA) (Jan. 10, 1983) (steelworkers approve new contract cutting wages, benefits, vacations and holidays); Holusha, *Unions May Wait to Make Up for Lost Time*, N.Y. Times, Dec. 11, 1983 at E5, col. 1; Serrin, *How Deregulation Allowed Greyhound to Win Concessions From Strikers*, N.Y. Times, Dec. 7, 1983 at A22, col. 1; Williams, *Wilson Food Fights Back*, N.Y. Times, Dec. 3, 1983 at L31, col. 1 (the corporation originally sought wage reductions from \$10.69 to 6.50 an hour, in its bankruptcy petitions filed in April, 1983. This precipitated strikes by 5,000 employees at seven plants. However, the last of the striking unions has agreed to a wage reduction to \$8 per hour, plus similar reductions in fringe benefits).

³³¹ Note, *First National Maintenance Corp. v. NLRB: The Supreme Court Narrows Employers' Section 8(a)(5) Duty to Bargain*, 39 WASH. AND LEE L. REV. 285, 302 (1982); see also Note, *Scope of Mandatory Bargaining Under the NLRA — The Supreme Court, 1980 Term*, 95 HARV. L. REV. 329, 335 (1981) ("The exclusion of subjects of bargaining from the mandate of section 8(d) . . . precludes the parties from freely allocating their finite bargaining power to protect the interests they deem most vital. The Court's interest balancing therefore skews the actual terms likely to be incorporated in collective agreements on the basis of a judicial appraisal of the parties' gains and losses.").

³³² One commentator, however, eloquently argued that *FNM* will not have such apocalyptic results. Kohler, *Distinctions Without Differences: Effects Bargaining In Light of First National Maintenance*

the enterprise, therefore, are deprived of any meaningful control over their basic employment destinies. Jobs can be eliminated and employees lives intrinsically and perhaps irreparably debilitated by the employer's bargaining-exempt economic decision. Consequently, *FNM* engendered a grievous distortion in the labor-management equilibrium.³³³ This analysis presumes, of course, that there indeed originally was actual parity in the labor-management equation.³³⁴

nance, 5 IND. REL. L.J. 402, 421 (1983). He posited that effects bargaining is a viable and forceful union tool, and may often positively influence the economic partial closing decision. *Id.*

Pragmatically, there may be little if any difference between decision and effects bargaining to an astute, sophisticated union negotiator. He summarized:

The goal of decision and effects bargaining are essentially identical: to afford the affected employees' bargaining representative notice sufficiently in advance of the implementation of an operational change to permit the union the opportunity, through bargaining, to preserve jobs and otherwise protect the interests of employees. Further, their mechanical features are alike. Within their respective spheres, the scope of bargaining is equally broad, and in both, the union has the right to secure information under the employer's control which the union needs in order to bargain intelligently. Finally, and most critically, the duties attach at virtually the same time, i.e., sufficiently in advance of the implementation of a change as to permit the union a "meaningful opportunity" to bargain. In the final analysis, the differences between the two duties seem more of degree than kind. The emphasis in decision bargaining is on an exploration of alternatives which the employer may find attractive enough to forego the contemplated change. In effects bargaining, the focus is on ways to ameliorate the impact of the change's execution, particularly through discussions concerning opportunities for continued employment for affected workers at the employer's other facilities. The duties then, are actually variations of a theme.

Id.

³³³ *FNM* has, however, also received favorable commentary. See, e.g., Harper, *Leveling The Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1450 (1982) ("The *FNM* decision can be reconciled on its facts with a limited and economically meaningful principle that only minimally restricts the scope of mandatory bargaining. This decision would exclude from compulsory bargaining all decisions that determine what products are created and sold, in what quantities, for which markets, and at what prices. This principle, moreover, need be the only substantive limitation on legal mandatory bargaining topics." (emphasis in original)); Kohler, *supra* note 332, at 422. Note, *First National Maintenance Corp. v. NLRB: No Duty to Bargain Over Economically Motivated Partial Closing Decision*, 30 AM. U.L. REV. 1099, 1126 (1981); Comment, *Job Security, Managerial Prerogative, and First National Maintenance*, 31 BUFFALO L. REV. 509, 512 (1982) ("... mandatory decision-bargaining should become the rare exception, not a process required whenever management contemplates a decision which adversely affects unit employment. Since free enterprise is the traditional foundation of our economic system, the high regard for managerial freedom expressed in *First National Maintenance* is appropriate in the absence of congressional guidance."); Note, *Labor Law — An Employer's Decision To Terminate Partially A Business Operation Is Not A Mandatory Subject of Bargaining*, 56 TULANE L. REV. 1065, 1082 (1982).

For other general discussions of *FNM*, see generally, Fenton, *Partial Closing After First National Maintenance: Legal Refusals to Bargain Collectively*, 1981 ARIZ. ST. L.J. 865; Note, *Collective Bargaining Over Plant Relocation Decisions: Let's Make A Deal*, 18 NEW ENG. L. REV. 715 (1983); Note, *Labor Law: Narrowing the Scope of the Employer's Duty to Bargain Over Job Termination Decisions — First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), 4 W. NEW ENG. L. REV. 513 (1982); Note, *Partial Closing Of Business Is Not Mandatory Subject Of Bargaining Under The NLRA: First National Maintenance v. NLRB*, 14 U. CONN. L. REV. 435 (1982).

³³⁴ Critical legal scholars maintain that any pretense of labor/management parity is a transparent, cruel sham perpetrated by the ownership interests to dominate labor. These writers have begun to articulate a new labor jurisprudence, and have largely rejected any hollow maintenance of the facade of labor management parity. Professor Klare has summarized the principal tenets of critical labor jurisprudence:

The Court in *FNM* made it clear that it was not deciding whether other management decisions, "such as plant relocation, sales, and other kinds of subcontracting automation" were subject to the section 8(d) duty to bargain.³³⁵ As a result, the NLRB's General Counsel³³⁶ and some subsequent decisions³³⁷ have narrowly construed *FNM*, limiting it to

Despite sharp differences on other matters, two common themes run throughout critical labor jurisprudence. First, we argue that collective bargaining law articulates an ideology that aims to legitimate and justify unnecessary and destructive hierarchy and domination in the workplace. The second theme is that collective bargaining law has evolved an institutional architecture, a set of managerial and legal arrangements, that reinforces this hierarchy and domination. Viewed as a component of public policy, the two central goals of the collective bargaining laws are to integrate the labor movement into the mainstream contours of pressure-group politics and to institutionalize, regulate and thereby dampen industrial conflict. Viewed as a component of managerial practice, the collective bargaining laws seek to formalize industrial dispute-resolution and thereby to reinforce management control over enterprise goals and the direction of the work process. In fulfilling its public policy and managerial functions, collective bargaining law frequently aims to restrain labor unions from serving as vigorous, uninhibited representatives of employee interests. Rather it seeks to place the union in the uncomfortable position of serving as fiduciaries of an imagined societal interest in industrial peace and of serving specific managerial and disciplinary functions. I believe that a primary initial achievement of the critical labor jurisprudence is its demonstration that the doctrine of collective bargaining law has been systematically fashioned, particularly at the Supreme Court level, to serve these goals.

Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 IND. REL. L.J. 450, 452-453 (1981). See also ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); KLARE, *Critical Theory and Labor Relations Law in THE POLITICS OF LAW* (D. Kairys, ed. 1982); Lynd, *Investment Decisions and the Quid Pro Quo Myth*, 29 CASE W. RES. L. REV. 396 (1979); Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

³³⁵ 452 U.S. at 686 n.22.

³³⁶ NLRB Gen. Coun. Mem. 81-57 (July 14, 1981) and 81-38 (Nov. 30, 1981). "In order to assess the impact of *First National* on pending and future cases . . . Regional Offices are requested to submit information concerning cases that involve the issue of whether an employer has a duty to bargain over the following decisions if such decisions arguably have an impact on terms and conditions of employment; plant relocation, sub-contracting, automation, consolidation, sale of business and partial closure of business. [I]t is recognized that under current Board law, the general rule is that such decisions are subject to mandatory bargaining However, there is language in the Court's opinion which may alter the scope of the region's investigation and any litigation which may follow." Office of the NLRB General Counsel, Memorandum Regarding *First National Maintenance Corp. v. NLRB*, 1, 1-2 (1981).

³³⁷ See *Bob's Big Boy Family Restaurants*, 264 N.L.R.B. 1369 (1982) (The employer decision to terminate its shrimp processing operation was regarded as only one component of the total business of food preparation for the employer's restaurants. The shrimp processing work was not a distinct line of business. Therefore, the employer's decision was seen as one of subcontracting out work and thus subject to the duty to bargain rather than as a decision bargaining-exempt *FNM* partial closing.); *Ford Brothers, Inc.* 263 N.L.R.B. 92 (1982) (Employer's anti-union animus tainted the management decision to transfer truck driving duties from its Ohio to its West Virginia facility, and strengthened the employer's obligation to bargain over the non-*FNM* exempt relocation decision.); *Carbonex Coal Company*, 262 N.L.R.B. 1306 (1982) (The employer closed down part of its mining operation in an existing mine, and opened a new mine. The Board distinguished this situation from *FNM*, holding that the employer had merely moved, rather than closed, its operation. Thus, the decision was still subject to the duty to bargain); *Tocco Division of Park Ohio Industries, Inc.*, 257 N.L.R.B. 413 (1981) ("an employer has an obligation to bargain concerning a decision to relocate unit work.").

All of these prior Board decisions, however, have been substantially compromised by the NLRB's most recent decision in *Milwaukee Spring Division of Illinois Coil Spring Co.*, 268 N.L.R.B. 87 (Jan. 23, 1984) (reversing 265 N.L.R.B. 28 (1982)). Reversing its 1982 decision, and now falling squarely within the *FNM* rationale of virtually untrammelled employer prerogatives, the Board has

economic closing decisions. Just as one commentator has posited that there is little practical difference to the sophisticated union negotiator between decision and effects bargaining,³³⁸ however, it is at least equally true that the sophisticated employer will often be subtly able to subsume other management action under the rubric of the *FNM* exemption for economic closings from decision bargaining.

By exempting the very decision to go out of business from prior bargaining, labor was improperly subordinated to entrepreneurial interests. Multinational corporations are actively positioned to capitalize on opportunities in world markets. For economic reasons, the corporations can decide to transfer operations outside the United States with relative ease. Labor, however, has no similar, viable multinational capability. Unlike the corporations, the unions are necessarily constrained by the more parochial and immediate concerns of their constituencies. Even large international unions cannot begin to match the financial power of the multinational corporations. Unions properly owe their primary allegiance to their constituent membership.

In the contemporary period of increasing corporate merger and takeover activity and international markets and operations expansions, it is increasingly difficult to ascertain the precise nature of the corporation. Whether it is a discreet entity, or rather an amorphous amalgamation of officers, directors, shareholders, assets, and employees greater than the sum of its parts is a separate and perhaps insoluble question. For present purposes, as *FNM* makes unequivocally clear, employees, if they have any part in the corporate composite, are relegated to only a peripheral and subordinate position vis-a-vis other competing interests. *FNM* thus ominously and ineluctably augured the perniciously liberalized *Bildisco* standards for labor contract rejection. The *FNM* rationale provided the impetus for the continued erosion of labor law jurisprudence through the sophisticated manipulation of the bankruptcy statutes. Viewed together, *FNM* and *Bildisco* suggest that there is little remaining hope for an integrated and coherent national labor law doctrine. The present federal labor law policy, so fundamentally subordinated to the power and prerogative of the employer, makes a hollow and transparent mockery of the original Congressional intent of labor-management economic equilibrium that had been the bedrock of the NLRA.³³⁹ Virtually unfettered economic prerogatives of the ownership interests now dominate.³⁴⁰ If labor-management parity were ever an actuality, it has been

now ruled that the employer can unilaterally remove work from its unionized to its nonunionized facilities during the effective term of the collective bargaining agreement. *Id.* Absent a very specific, express contract term forbidding such action, the employer is free to initiate these fundamental and unilateral changes without prior union consent and, per *FNM*, free from the duty to bargain over the core decision. *Id.* In *Milwaukee Spring*, the union refused to make mid-term contract wage and benefit concessions at the employer's unionized plant. *Id.* The employer then transferred operations to its nonunionized facility solely for the *FNM*-approved reason of economic efficiency through lower labor costs. *Id.*

The employer's economic hardship alone has never excused unilateral contract modification. *Phoenix Air Conditioning, Inc.*, 231 N.L.R.B. 341, 342 n.6 (1977), *enf'd*, 580 F.2d 1053 (9th Cir. 1978); *Airport Limousine Service*, 231 N.L.R.B. 932, 934 (1977); *Oak Cliff-Gorman Baking Co.*, 207 N.L.R.B. 1063, 1064 (1973), *enf'd*, 505 F.2d 1302 (5th Cir. 1974), *cert. denied*, 423 U.S. 826 (1975).

³³⁸ Kohler, *Distinctions Without Differences: Effects Bargaining In Light Of First National Maintenance*, 5 IND. REL. L.J. 402, 425 (1983).

³³⁹ See *supra* notes 20-21 and accompanying text.

³⁴⁰ Prior to *FNM*, the Sixth Circuit refused to recognize community property right claims asserted by the unions. This was a futile effort to prevent economically motivated steel plant closings by United States Steel in Youngstown, Ohio and the inevitable dramatic ramifications of those actions. In *United Steel Workers of America v. United States Steel Corp.*, 631 F.2d 1264, 1265 (6th

shattered. Concomitantly, any remaining aspirations to achieve and maintain indispensable labor-management balance are quickly fading.

Labor is caught between the dual threat of the *FNM* prerogative to cease operations and the *Bildisco* functional equivalent of abrogating labor contracts through bankruptcy. This unpalatable dilemma leaves labor without viable alternatives to the specter of interminable concessions bargaining. It is not the case, however, that the employer invariably utilizes these available strategies in a purely rapacious, exploitive fashion. On the contrary, most of the pertinent cases indicate that management was motivated by legitimate and pressing economic concerns, rather than by overt antiunion animus. That analysis, of course, presupposes the theoretical validity of the distinction between economic and antiunion motivations. In any event, if the increasingly complex corporate entity indeed has any sense of allegiance, it is clear that it is not fundamentally predisposed toward the employees or to any geographic or national political constraints. Employees and nationalism are relegated to the end of any list, which is seemingly increasingly headed by the self interests of the corporate officers.³⁴¹

Recognizing the legitimacy of employer economic concerns, the erosion of United States' markets and efficient manufacturing capabilities in the world market, and the labor-intensive position of declining heavy manufacturing industries in the high-technology age, employers need the necessary capability to make active business decisions through informed strategic planning. To vitalize employer options at the sole, heavy, and inordinate expense of labor, however, is unwise. Continued and attenuated, if not entirely disingenuous, judicial inferences from inexcusable legislative inaction only exacerbate the fundamental conflict between labor law and bankruptcy law.

The most effective immediate legislation to remedy *Bildisco* would authorize labor contract rejection "only in extraordinary cases, when the union involved has unjustifiably refused to agree to a modification of the agreement necessary to insure a successful reorganization."³⁴² Professor Countryman has advocated imposition of such a bargaining requirement as a precondition to a petition for labor contract rejection.³⁴³ Furthermore,

Cir. 1980), the court of appeals expressly acknowledged the sweeping impact of the corporation's decision to close the Youngstown plants:

For all of the years United States Steel has been operating in Youngstown, it has been a dominant factor in the lives of its thousands of employees and their families, and in the life of the city itself. The contemplated abrupt departure of United States Steel from Youngstown will, of course, have direct impact on 3,500 workers and their families. It will doubtless mean a devastating blow to them, to the business community and to the City of Youngstown itself. While we cannot read the future of Youngstown from this record, what the record does indicate clearly is that we deal with an economic tragedy of major proportion to Youngstown and Ohio's Mahoning Valley.

Id.

Although sympathetic to the employees, the court maintained that any amelioration must be effected through legislation. *Id.* at 1280. Citing a history of prior changes in American industry resulting in plant closing, such as the nineteenth century shift of the textile industry from the New England milltowns to the South, the court of appeals refused to recognize plaintiff's argument of a community property interest to prevent the corporate steel plant closure. *Id.* at 1266.

³⁴¹ Note, *Golden Parachute Agreements: Cushioning Executive Bailouts in the Wake of a Tender Offer*, 57 ST. JOHN'S L. REV. 515 (1983).

³⁴² Bordewieck and Countryman, *supra* note 52, at 293, 300.

³⁴³ *Id.* at 317. According to the authors:

At the very minimum, no bankruptcy court should authorize the rejection of a collective bargaining agreement until the debtor establishes that it bargained in good faith with the union with respect to modifications in the collective bargaining agreement

the bankruptcy courts should make greater use of the expertise of labor arbitrators to assess the value of less tangible labor contract rights, such as seniority, accrued pension, vacation, and severance pay claims. Incorporating the time-honored wisdom of labor arbitrators into the bankruptcy court's difficult decision whether to permit labor contract rejection is likely to make the ultimate decision far more palatable to the parties.³⁴⁴

Inevitably, any recommendation will be somewhat dissatisfying. Within the immediate constraints of the problem and in the short term, therefore, it is imperative to maintain the integrity of the national policies that vitalize labor and bankruptcy law. By requiring the employer to bargain with the union in good faith to impasse as the absolute precondition to petitioning the bankruptcy court for permission to reject the contract, this goal can be accomplished very effectively. This chronological, sequential approach has been repeatedly endorsed as most efficacious and harmonious.³⁴⁵

Of course, there is always a danger that bargaining can be illegitimately manipulated through interminable delay. Obstructionist tactics, however, are less likely to occur when the bargaining scenario is necessarily expedited under the supervisory authority of the bankruptcy court. If allegations of unfair labor practices, such as bad faith bargaining or refusal to bargain, surface within the context of the negotiations, the Board should be prepared to resolve such allegations on an expedited, priority basis. Joint court supervision and NLRB-expedited attention would foster cooperation between the employer and the union and would largely moot the potential for obscurantist, recalcitrant bargaining strategies.

Intensive bargaining within concentrated time constraints under this preferred scenario is likely to engender agreement to modified contract terms and thus avoid the necessity of contract rejection. Although less desirable than the original contract, from the union's perspective, the parties could then retain a workable basis to undergird the employment relationship. Under the present system, if the contract is rejected, the parties are left utterly bereft of any tangible foundation for the employment relationship.³⁴⁶

The ominous consequence of such expedited bargaining is the potential for the parties, more likely the employer, to insist intractably on original terms or to otherwise quickly proclaim impasse to achieve quick contract rejection. This threat, however, could

deemed necessary by the debtor for continuation of the business enterprise, and that the union refused to agree to these modifications.

Id.

The requirement of bargaining as a precondition to a petition for court authorization of labor contract rejection had been previously advocated by other commentators. *See, e.g.,* Note, *Labor-Bankruptcy Conflict*, *supra* note 143 at 150. ("A bargaining requirement enables courts to preserve the NLRA's collective bargaining system to the fullest extent possible. If the parties negotiate to an impasse and are unable to reach a mutually satisfactory compromise, the bankruptcy court could then permit rejection if necessary to ensure the success of the reorganization . . . [C]ourts should, except in emergency situations, presume that a business will not collapse unless the parties have bargained to impasse.").

³⁴⁴ *See* Note, *Labor — Rejection of Collective Bargaining Agreements in Chapter XI Arrangement Proceedings* — *Iron Workers Local 455 v. Kevin Steel Products, Inc. and Brh. of Ry. Clerks v. REA Express, Inc.* 17 B.C. IND. & COMM. L. REV. 192, 210-212 (1976). There is precedent for sending disputes stemming from the consequences of contract rejection to labor arbitration. *Bohack Corp. v. Truck Drivers Local Union No. 807*, 431 F. Supp. 646 (E.D. N.Y. 1977), *aff'd*, 567 F.2d 237 (2d Cir.), *cert. denied*, 439 U.S. 825 (1979) (union demands regarding back pay and reinstatement following contract rejection were sent to arbitration by the court.); Note, *Law's Effect* *supra* note 49, at 409.

³⁴⁵ *See supra* note 343 and accompanying text.

³⁴⁶ *See supra* notes 37-42 and accompanying text.

be effectively neutralized by the courts. In the event of NLRB findings of bad faith bargaining or refusal to bargain on the part of the employer, the bankruptcy courts would refuse to authorize contract rejection unless and until the employer cured its bargaining defects. If the union engaged in bad faith obstructionist tactics, the courts would have the immediate authority to approve the debtor employer's petition for contract rejection. These judicial prerogatives would dampen any incentives to sabotage the bargaining process.

If despite good faith bargaining, pre-petition negotiations did not result in a modification of the entire contract, the bankruptcy court should have the ability to authorize only partial rejection. This authority would require the court to engage in delicate balancing evaluations. Presently, indelicate and indiscriminate wholesale rejection is the only avenue. Partial rejection would be a far more viable and palatable alternative. Upon partial rejection, the parties would have retained the portions of a modified contract they were able to salvage through their pre-petition negotiations. Partial rejection would surely be preferable to the sole present Draconian "solution" of complete rejection. Knowing that at least part of the original contract can be salvaged would encourage viable pre-petition negotiations and deter bad faith bargaining. Each party has core interests it would like to retain from the original contract. Pre-petition bargaining over those interests is likely to engender the fluid synergy necessary to achieve agreement on a broader negotiation agenda.

Unfortunately, imposing pre-petition bargaining as an absolute condition to seeking contract rejection and providing the alternative of only partial rejection are far less than complete solutions to the problems posed by labor contracts in bankruptcy. Viewed from a broad perspective, the core difficulty that could still frustrate pre-petition bargaining is the gross imbalance between the institutional power of the multinational corporations and that of organized labor. Rather than acting on its prerogative to go out of business completely, it is more likely that the multinational employer will simply transfer operations outside the United States for "economic" reasons. The domestic operation need not be unprofitable or only marginally profitable to be subject to transnational relocation. Rather, maximization of profits may be the governing criterion. Of course, the likelihood of such transfer is significantly heightened in the event of domestic unprofitability. It is this *FNM* rationale that enables the multinational employer to posit such a pernicious choice to labor: provide concessions *ad infinitum* upon employer demand, or face the specter of total unemployment through domestic closure and/or transnational economic relocation, largely beyond the effective ambit of United States labor laws.

The present recommendations can do little to counter the potential for the exercise of such sweeping multinational employer prerogatives. This imbalance between the power of the multinational corporations and their employees must be addressed ultimately by an international labor law. At present, that reform borders on utopian vision, and not on pragmatic capability for foreseeable effectuation. As a beginning, the broad problem requires a systematic rethinking of the entire labor-ownership calculus into the next century. This reflection would ultimately lead to an integrated and coherent labor jurisprudence, displacing the current disjointed and fitful isolated judicial reactions to individual cases.

In a narrower and more immediate perspective, the small employer faced with the threat of bankruptcy has legitimate, fundamental interests to protect through reorganization. Although not discounting the potential for illegitimate utilization of bankruptcy provisions by solvent enterprises to avoid unions, that will be the exception to the norm.

The imposition of the recommended requirement of good faith pre-petition bargaining to impasse will largely eliminate the threat of such manipulation by ferreting out solvent employers in the incipient stages of pre-petition bargaining. The legitimate reorganization needs of the imperiled employer can be effectively addressed through pre-petition negotiation of a palatable modified contract. If the contract cannot be entirely restructured after good faith bargaining to impasse, judicial recourse of partial rejection can be invoked. Total rejection of the contract, therefore, may become necessary only in a minority of future reorganization cases. Fundamental tenets of federal labor policy will be preserved, while enabling viable reorganization. No inordinate impediments to any of the interested parties will result. By responsibly legislating the absolute requirement of pre-petition bargaining into the Bankruptcy Code, Congress can neutralize and rectify the thoughtless and insidious distortion of core federal labor policy otherwise inevitably dictated by *NLRB v. Bildisco*.

CONCLUSION

It is now unmistakably clear that Congress must begin to address these myriad, complex issues through responsible legislation. Perhaps the bankruptcy statutes and labor statutes can yet be reconciled and harmonized. The non-viable alternative of continued legislative inaction will mean the collapse of any integrated and meaningful federal labor policy. The present need for an integrated and coherent national labor law jurisprudence could not be more compelling. Instead, however, unwarranted and dangerous exaltation of employer prerogatives through judicial inventiveness and inexcusable legislative dormancy bode the final disintegration of any hope for coherent labor law doctrine. The pragmatic consequences are the potential reduction of organized labor into a bleak Darwinian state, "protected" by a judicially eviscerated and arcane labor statute. Both *Bildisco* and *FNM* cry for responsible legislative action to require bargaining prior to seeking court approval for contract rejection. Labor-management equilibrium must be achieved while simultaneously insuring that business has the ability to compete effectively in world markets. It is the most challenging and indispensable task for our individual and collective future, as employees, as employers, and as a nation.

Perhaps the labor and bankruptcy statutes pertaining to collective bargaining agreements cannot be fully harmonized. Although preferable, reconciliation of contrary statutes should not be the central objective of either the courts or the legislature. Semantic statutory manipulation by any decision maker in any forced, purported reconciliation would be grossly transparent sophistry. The statutory language cannot be forced into any uneasy and artificial congruency without addressing fundamental policy considerations. That type of solution would exalt form at the continuing expense of disintegrating substantive policy. Rather than engage in mere statutory manipulation, it is imperative that the Congress entirely rethink the basic objectives of federal labor policy. The recent bankruptcy-labor conflict is only symptomatic of a far more crucial problem. Many aspects of labor and employment law jurisprudence are in conflict.³⁴⁷ Unless rectified, labor doctrine risks becoming wholly incoherent.

³⁴⁷ For further explication of the author's argument that other major elements of labor and employment law doctrine are internally contradictory, see, e.g., Gregory, *Conflict Between Seniority and Affirmative Action Principles In Labor Arbitration Awards, and Problems of Judicial Review*, 57 TEMPLE L.Q. (forthcoming, summer, 1984) (affirmative action principles have been rigidly subordinated to narrow labor interests, to the ultimate detriment of both considerations); Gregory, *Union Liability For*

It may well be that the policy considerations that historically grounded the major federal labor statutes have become archaic and fossilized. The entire national socio-political-economic calculus has been thoroughly transmogrified over the course of half a century. As the next century fast approaches, a labor policy articulated during an age of infant unionization in heavy manufacturing industries serving national markets may no longer be fully responsive to either labor or management concerns. With fundamental changes from heavy, highly unionized manufacturing industries into high technology, non-unionized services already underway, it may well be that the time has come to formulate and to articulate a new national labor policy.

Policy, if it is anything, is certainly not immutable. If policy is meaningfully to ground praxis, it must continually and fluidly evolve in contextually appropriate fashion. Thus, while the immediate ramifications of the *FNM* and *Bildisco* decisions may radically distort labor-management equilibrium, they have also highlighted the timeliness of the more essential task. These recent decisions, so severely impacting upon labor management relations, compel reexamination of core federal labor policy. Thus, ironically enough, these significant decisions may yet ultimately lead toward a new labor law jurisprudence.

Regardless of the contours of newly vitalized federal labor policy that moves into the next century, some key variables will remain. Given the human condition, the presence of labor and management, employee and employer, remains assured. There may well be more cooperation and facilitation between these interests in the future. Pristine, adversarial distinctions may become increasingly difficult to make or to maintain. Concomitantly, non-unionized employees are already making substantial progress toward greater job security outside the union environment, through such recent developments as the erosion of the traditional employment at will doctrine.

Regardless of the ultimate contours of the new labor law jurisprudence, however, it remains incontrovertible that all persons have the inherent right to be treated with dignity, respect, and concern. Respect for fundamental human rights and their integration, implementation, and protection in all work environments must be at the heart of federal labor policy and of any meaningful jurisprudence.

Bildisco, in the short term, can be legislatively rectified by requiring hard bargaining prior to seeking contract rejection. Such statutory amelioration, however, would only begin the indispensable core task toward totally rethinking and formulating meaningful federal labor policy into the next century.

EDITOR'S NOTE

As this article went to press, Congress passed The Bankruptcy Amendments and Federal Judgeship Act of 1984 that statutorily incorporated several of the recommendations advocated and explained in detail in this article. The legislative activity pertaining to the *Bildisco* decision occurred in the larger context of the two year Congressional struggle to remedy the constitutional difficulties afflicting the appointment and tenure of the bankruptcy court judges stemming from the *Marathon Oil* decision.³⁴⁸ The legislation was not enacted until House and Senate conferees reached agreement at 3 a.m. on Thursday,

Damages After Bowen v. Postal Service: The Incongruity Between Labor Law and Title VII Jurisprudence, 35 BAYLOR L. REV. 237 (1983) (union damages for breach of the union's duty of fair representation have assumed Draconian proportions, while unions have often been wholly immunized from damages for employment discrimination due to a congeries of procedural contortions).

³⁴⁸ See *supra* note 48.

June 28, 1984 following marathon negotiations. Earlier the Senate and House had passed bills dealing with the bankruptcy courts, but the Senate version was silent on the *Bildisco* case. This difference necessitated the joint conference. On Friday, June 29, the House passed the compromise legislation by a vote of 394-0; the Senate passed the legislation by voice vote immediately prior to the Congressional summer and Democratic convention recess. President Reagan signed the bill on July 10, 1984.

According to the labor contract provisions of the comprehensive new bankruptcy legislation pertinent to the *Bildisco* decision, prior bankruptcy court approval will now be required in order to reject the labor contract. Further, the bankruptcy court must first determine that the debtor in possession petitioning for court approval for contract rejection had attempted unsuccessfully to negotiate concessions with the union and that the union had refused without good reason to make the concessions. The bankruptcy court must deem the concessions sought necessary to stave off business collapse. Finally, the bankruptcy court's balance of the general equities must militate clearly in favor of cancelling the contract.

The new legislation applies only prospectively, however, and will not affect cases already filed. Further, the bill sets deadlines for the bankruptcy court to make determinations regarding labor contract rejection, and allows employers to abrogate labor contracts if bankruptcy courts do not observe the deadlines. Although the bill remedies, in part, some of the more egregious aspects of the *Bildisco* decision, the efficacy of the new legislation will be determined by how well the bankruptcy courts apply the equities balance and observe the statutory time constraints for rendering a decision regarding the petition to reject. Spokespersons for the AFL-CIO characterized the *Bildisco* labor contract provisions of the new bankruptcy legislation as "'a victory with a small v' for labor."³⁴⁹ In addition, several responsible officials in judicial administration expressed concerns regarding the possible unconstitutionality of the new legislation, especially regarding the automatic extension of the terms of the current bankruptcy court judges until at least October, 1986. In effect, Congress may have unconstitutionally usurped the constitutional power of the President to appoint federal judges by presuming to legislatively extend the terms of the current judges without presidential reappointment.³⁵⁰ Due to the many reasons elucidated in this article and the concerns now expressed in the immediate wake of the new bankruptcy legislation, it is very clear that the *Bildisco* decision and the Congressional response will have profound impact on pragmatic labor relations and business reorganization and on labor law jurisprudence for several years in the future.

³⁴⁹ Keller, *Conferees Adopt Plan To Overhaul Bankruptcy Field*, N.Y. Times, June 29, 1984, A1, col. 1, D11, col. 1.

³⁵⁰ Keller, *Concerns on Bankruptcy Law*, N.Y. Times, June 30, 1984, § 1 at 38, col. 4.

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