NOTES

Labor—Rejection of Collective Bargaining Agreements in Chapter XI Arrangement Proceedings—*Iron Workers Local 455 v. Kevin Steel Products, Inc.*[1] and *Brotherhood of Railway Clerks v. REA Express, Inc.*[2]—Kevin Steel Products, Inc. (Kevin Steel or the Company), a steel fabricator and erector, and a debtor-in-possession in Chapter XI[3] arrangement proceedings, sought to reject a collective bargaining agreement with Shopmen's Local 455, International Association of Bridge, Structural and Ornamental Iron Workers (the Union). The Company argued that the agreement was an onerous "executory contract" under section 313(1)[4] of the Bankruptcy Act.[5] The bankruptcy court granted the Company's petition.[6] On appeal by the Union[7] the district court reversed,[8] concluding that section 77(n) of the Bankruptcy Act,[9] which prohibits any bankruptcy judge or trustee from changing the wages or working conditions of railroad employees except in accordance with the provisions of the Railway Labor Act, evidenced a generalized Congressional intent to distinguish collective bargaining agreements as a class from those contracts which may be cancelled under section 313(1) of the Bankruptcy Act.[10] The absence of a specific exception for industrial labor was "explainable as legislative oversight."[11]

Kevin Steel appealed this decision to the Court of Appeals for the Second Circuit which reversed the district court and HELD: Section 313(1) permits the bankruptcy judge, after a careful weighing of the equities on both sides, to authorize the rejection of a collective bargaining agreement in Chapter XI arrangement proceedings.[12] The

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[1] 519 F.2d 698, 89 L.R.R.M. 3133 (2d Cir. 1975).

[2] 523 F.2d 164, 90 L.R.R.M. 2579 (2d Cir. 1975). The Unions' separate petitions for certiorari were denied. 44 U.S.L.W. 3342 (U.S. Dec. 9, 1975) (Brotherhood of Railway Clerks). 44 U.S.L.W. 3412 (U.S. Jan. 20, 1976) (International Association of Machinists).

[3] Bankruptcy Act §§ 301-399, 11 U.S.C. §§ 701-99 (1970).

[4] 11 U.S.C. § 713(1) (1970) provides in relevant part: "Upon the filing of a petition, the court may . . . (1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate . . . ."

[5] 519 F.2d at 700, 89 L.R.R.M. at 3134.

[6] *In re* Kevin Steel Prods., Inc., [1973-1974 Transfer Binder] Bankr. L. Rep. ¶ 65,159, at 74,825 (S.D.N.Y. 1974).

[7] Appeal to the district court was taken pursuant to Bankruptcy Act § 39, 11 U.S.C. § 67(c) (1970); Bankruptcy Rules 801-814.

[8] Iron Workers Local 455 v. Kevin Steel Prods., Inc., 381 F. Supp. 336, 339, 87 L.R.R.M. 2311, 2313 (S.D.N.Y. 1974).

[9] 11 U.S.C. § 205(n) (1970).

[10] 381 F. Supp. at 338, 87 L.R.R.M. at 2313.

[11] *Id.*

[12] The Second Circuit consolidated Kevin Steel's appeal with the National Labor Relations Board's (NLRB) petition for enforcement of its order resolving unfair labor practice charges brought by the Union against Kevin Steel. 519 F.2d at 701, 89 L.R.R.M. at 3134. The NLRB found the Company had violated sections 8(a)(1), (3) and

court first found that such collective bargaining agreements are encompassed in the broad language of section 313(1) which permits the rejection of "executory contracts." According nearly literal application to section 313(1), the court relied primarily on the breadth of the statutory language[13] together with the congressional failure to carve out an exception for industrial labor despite the frequent opportunity to do so.[14] The court also determined that it should not extend section 77(n)'s special treatment of railroad labor contracts to cover all collective bargaining agreements because railroad employees often received special treatment in recognition of their importance to the national economy.[15] Since section 77(n) showed "that Congress knew how to remove labor agreements from the scope of a general power to reject executory contracts," the absence of a similar provision for all labor contracts indicated that Congress intended to authorize the rejection of ordinary collective bargaining agreements.[16]

The court also concluded that section 313(1) need not give way to the terms of section 8(d) of the National Labor Relations Act[17] in order to avoid a direct conflict between the Bankruptcy and Labor Acts.[18] Instead, the court concluded that the effect of the two statutes could be reconciled.[19] Section 8(d) was designed to prevent the unilat-

(5) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1), (3), (5) (1970), by inducing an employee to abandon the Union, by illegally discharging employees and by refusing to execute the aforementioned collective bargaining agreement. Kevin Steel Prods., Inc., 209 N.L.R.B. 493, 499, 86 L.R.R.M. 1361, 1361-62 (1974). When Kevin Steel failed to comply, the Board applied to the Second Circuit for enforcement of its order. The court's holding clearly precluded any enforcement of the section 8(a)(5) portion of the NLRB's order which had been held in abeyance pending the outcome of the bankruptcy proceeding. *Id.* at 701, 89 L.R.R.M. at 3134.

In view of the partial consent judgment entered with respect to the Board's petition for enforcement, the court noted it was not deciding whether the debtor must reinstate discriminatorily discharged employees with back pay; nor was it dealing with the status of monetary claims for pre-bankruptcy violations of the Labor Act. *Id.* at 706 n.20, 89 L.R.R.M. at 3138 n.20.

[13] *Id.* at 703, 89 L.R.R.M. at 3136.

[14] *Id.* at 705, 89 L.R.R.M. at 3138.

[15] *Id.*

[16] *See id.* at 704-05, 89 L.R.R.M. at 3137-38.

[17] 29 U.S.C. § 158(d) (1970). Under § 8(d), no "party" to a collective bargaining agreement

> shall terminate or modify such contract, unless the party desiring such termination or modification—
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> (1) serves a written notice upon the other party to the contract . . .
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> (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;
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> (3) notifies the Federal Mediation and Conciliation Service within thirty days . . .
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> (4) continues in full force and effect . . . 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 . . . .

[18] 519 F.2d at 704, 89 L.R.R.M. at 3137.

[19] *Id.* at 700, 89 L.R.R.M. at 3133-34.

eral termination of collective bargaining agreements. However, its restrictions on their termination and modification are directed to "parties" of the collective bargaining agreement.[20] The court found that the debtor-in-possession, until it assumed the old collective bargaining agreement or made a new one, was not a "party" subject to section 8(d).[21] The court reasoned that the debtor-in-possession was instead a new legal entity with obligations possibly analogous to those of a successor employer.[22] Since a successor employer "is generally not bound by the existing labor agreement,"[23] the court suggested that the debtor-in-possession likewise should not be bound to the agreement. Instead, the obligations of the debtor-in-possession should be merely to bargain with the representative of the majority of its employees and, once it signed an agreement with the Union then to comply with the Labor Act.[24]

The court did recognize that even though there was no direct conflict between the terms of the Labor and Bankruptcy Acts, the policies behind the two statutes were different.[25] Nevertheless, the court found unpersuasive the Union's policy argument that bankruptcy proceedings would become a vehicle for the rejection of troublesome collective bargaining agreements.[26] Instead, the court found ample inhibition to such abuse in the harsh consequences of bankruptcy and the practical need for businesses to make the best labor bargain possible to survive.[27]

The court then remanded to the district court for a determination of whether the bankruptcy court had properly exercised the authority to reject the collective bargaining agreement.[28] For a standard on remand, the court appeared to approve that advanced by the Union which necessitated a showing of several factors, including proper motivation and "convincing proof of both the Company's financial condition" and the benefit to be gained by cancelling the contract.[29] In addition, the court noted that the district court should scrutinize the bankruptcy judge's exercise of discretion to determine that the balance of the equities clearly favored rejection.[30]

Four weeks later, the Court of Appeals for the Second Circuit followed the *Kevin Steel* rationale in *Brotherhood of Railway Clerks v. REA Express, Inc.*[31] In this case, REA Express, Inc. (REA), a corporation engaged in the surface and air transport of express shipments,

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[20] Section 8(d) is quoted at note 17 *supra*.
[21] 519 F.2d at 704, 89 L.R.R.M. at 3137.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 706, 89 L.R.R.M. at 3138.
[26] *Id.* at 705-06, 89 L.R.R.M. at 3138.
[27] *Id.* at 706, 89 L.R.R.M. at 3138.
[28] *Id.* at 706, 707, 89 L.R.R.M. at 3139, 3140.
[29] *Id.* at 707, 89 L.R.R.M. at 3139.
[30] *Id.*
[31] 523 F.2d at 164, 90 L.R.R.M. 2579 (2d Cir. 1975).

and a debtor-in-possession in Chapter XI arrangement proceedings, sought under section 313(1) of the Bankruptcy Act to reject two collective bargaining agreements.[32] Both of the collective bargaining agreements were subject to the provisions of the Railway Labor Act (RLA),[33] which prohibit any carrier, including, *inter alia*, a debtor-in-possession of a carrier[34] from rejecting a collective bargaining agreement without following a protracted statutory procedure.[35] The bankruptcy court denied permission to reject the labor contracts[36] but was reversed immediately by the district court.[37]

On appeal by the Unions, the Court of Appeals for the Second Circuit HELD: A bankruptcy court may authorize the rejection of a collective bargaining agreement under section 313(1) of the Bankruptcy Act where withholding such permission would thwart the economic rehabilitation of a failing carrier.[38] The court sought to reconcile the apparent conflict in the terms of the RLA and the Bankruptcy Act in accordance with the underlying policies of the statutes.[39] The RLA was designed to keep labor disputes from disrupting commerce by requiring carriers to continue operations pending negotiations.[40] Although the debtor-in-possession, as a "carrier," was literally required to follow the Act's negotiation procedure, the court determined that requiring such negotiation would be futile in the case of a carrier without sufficient resources to maintain the status quo.[41] Forcing it to adhere to the existing collective bargaining agreement would simply trigger its collapse, thereby causing the very economic disruption which the RLA sought to avert.[42] Thus, the court determined that the Bankruptcy Act should govern where the carrier had insufficient resources to continue operations indefinitely at existing levels and labor costs pending negotiation.[43]

After thus reconciling the effect of the two statutes, the court

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[32] *Id.* at 166-67, 90 L.R.R.M. at 2580.

[33] 45 U.S.C. §§ 151-188 (1970).

[34] *Id.* § 151.

[35] 523 F.2d at 168, 90 L.R.R.M. at 2581. 45 U.S.C. § 152 Seventh (1970) provides:

> "No carrier . . . 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 section 156 of this title."

45 U.S.C. § 156 (1970) sets out procedures for negotiation of contract changes under the auspices of the National Mediation Board and specifies that, pending the exhaustion of these procedures, "rates of pay, rules, or working conditions shall not be altered by the carrier . . . ."

[36] 523 F.2d at 167, 90 L.R.R.M. at 2580.

[37] REA Express, Inc. v. Brotherhood of Railway Clerks, 89 L.R.R.M. 2495, 2496 (S.D.N.Y. 1975).

[38] 523 F.2d at 169, 90 L.R.R.M. at 2582.

[39] *See id.*

[40] *Id.*

[41] *See id.*

[42] *Id.*

[43] *Id.*

sought to define the specific obligations of the debtor-in-possession. Citing *Kevin Steel,* the court determined that the debtor-in-possession, as a "new juridical entity," was not bound by the terms of the collective bargaining agreement.[44] Although obligated to bargain collectively with the representative of the majority of his employees,[45] the debtor-in-possession did not have to adhere to terms presently in effect pending negotiations.[46] For this proposition, the court relied on *NLRB v. Burns International Security Services, Inc.*,[47] where the Supreme Court held that a successor employer was not obligated to adhere to the predecessor's contract pending negotiations.[48] The court suggested that the *Burns* principles, which favor granting to the new employer the freedom to alter labor arrangements in order to avoid inhibiting the free flow of capital, were particularly appropriate where the debtor-in-possession was seeking to rehabilitate an enterprise as in the Chapter XI situation.[49] In effect, then, the debtor-in-possession's sole obligation to the employees of the debtor was to bargain collectively.

Finally, as in *Kevin Steel,* the court remanded for a consideration of whether the bankruptcy court correctly found the contracts sufficiently onerous to warrant rejection.[50] The Second Circuit indicated that the bankruptcy court should cancel collective bargaining agreements only where the alternative was the collapse of the carrier.[51]

Kevin Steel and *REA Express* are the first cases to reach the appellate level which deal with the rejection of collective bargaining agreements in bankruptcy proceedings.[52] This note will examine the conclusion that the debtor-in-possession is not bound by the termination restrictions of the relevant labor legislation, as a "party" under the NLRA in *Kevin Steel* or as a "carrier" under the RLA in *REA Express.* As part of this examination, it will consider whether the duties of the debtor-in-possession are, in fact, analogous to those of a successor employer. The note will then focus on section 313(1) of the Bankruptcy Act to determine whether it clearly authorizes the rejection of

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[44] *Id.* at 170, 90 L.R.R.M. at 2582-83.

[45] *Id.* at 170, 90 L.R.R.M. at 2583.

[46] *Id.* at 171, 90 L.R.R.M. at 2584.

[47] 406 U.S. 272 (1972).

[48] *Id.* at 287-91.

[49] 523 F.2d at 170, 90 L.R.R.M. at 2583.

[50] *Id.* at 172, 90 L.R.R.M. at 2584-85.

[51] *Id.* at 172, 90 L.R.R.M. at 2584.

[52] With one exception, all of the district courts confronting the issue have determined that the Bankruptcy Act authorizes the rejection of collective bargaining agreements. No district court has thereafter refused to reject a labor contract as a result of finding it insufficiently burdensome. *See In re* Business Supplies Corp. of America, 72 CCH Lab. Cas. ¶ 13,940, at 27,978 (S.D.N.Y. 1973); Carpenters Local 2746 v. Turney Wood Prods., Inc., 289 F. Supp. 143, 149, 69 L.R.R.M. 2977, 2981 (W.D. Ark. 1968); *In re* Klaber Bros., 173 F. Supp. 83, 85, 44 L.R.R.M. 2176, 2177 (S.D.N.Y. 1959). In *In re* Overseas Nat'l Airways, Inc., 238 F. Supp. 359, 360, 58 L.R.R.M. 2427, 2428 (E.D.N.Y. 1965), the court held that collective bargaining agreements subject to the Railway Labor Act could not be rejected in bankruptcy. See discussion at note 87 *infra.*

collective bargaining agreements as "executory contracts." In attempting to identify congressional intent, the note will examine the statutory language and the import of section 77(n), which prevents a bankruptcy court from changing the wages and working conditions of railroad employees except in accordance with the terms of the RLA. Finally, three possible resolutions of the labor-bankruptcy policy conflict will be considered: (1) requiring the debtor-in-possession to arbitrate the extent to which it should be bound under the debtor's collective bargaining agreement; (2) re-examining the rule which requires contracts to be either assumed or rejected *in toto* under section 313(1); and (3) imposing a test to determine those situations in which the bankruptcy court should exercise its discretion to permit the rejection of collective bargaining agreements under section 313(1). The note concludes that the first alternative, requiring arbitration, best protects the rights of labor unions without conflicting with the policies or clear intent of the Bankruptcy Act.

I. THE STATUS OF THE DEBTOR-IN-POSSESSION

A. *The Debtor-in-Possession as a "Party" Under the NLRA*

Under section 8(d) of the NLRA, a "party" to a collective bargaining agreement shall not terminate or modify an existing collective bargaining agreement without complying with the negotiation procedure specified in the Act.[53] Thus, the unilateral rejection of a labor agreement under section 313 (1) of the Bankruptcy Act constitutes a clear violation of the NLRA, unless it can be said that the debtor-in-possession is not a "party" to the debtor's collective bargaining agreements. The *Kevin Steel* court concluded that the debtor-in-possession was "not the same entity as the pre-bankruptcy company."[54] Therefore, it was not a party to any labor agreement with the Union until it assumed the old agreement or made a new one.[55] The court thus sidestepped any direct conflict between the Labor and Bankruptcy Acts.

Analysis of the court's conclusion requires an examination of the status of a debtor-in-possession during an arrangement. Arrangements under Chapter XI of the Bankruptcy Act are designed to rehabilitate the debtor.[56] Chapter XI provides corporations and individuals with procedures, short of bankruptcy, for applying their assets

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[53] Section 8(d) is quoted at note 17 *supra*.

[54] 519 F.2d at 704, 89 L.R.R.M. at 3137.

[55] *Id.* It might appear that once the court had decided that the debtor-in-possession was not a "party" to the collective bargaining agreement, there was no need to determine whether it could reject the labor agreement under section 313(1). However, if the term of the collective bargaining agreement continued beyond the term of the arrangement, it seems that the debtor, *qua* debtor, would be required, as a party, to reassume the collective bargaining agreement. This would defeat the purposes of the arrangement.

[56] Nicholas v. United States, 384 U.S. 678, 687 (1966).

equitably to unsecured debts. The debtor files a petition proposing an arrangement[57] which, when accepted in writing by all the creditors affected, may be confirmed by the court.[58] The confirmation of an arrangement discharges the debtor from the debts provided for by the arrangement[59] and is binding upon all the creditors of a debtor.[60] During the arrangement proceedings, the court has exclusive jurisdiction of the debtor and his property.[61]

An arrangement also may provide for the continuation of the debtor's business.[62] In such a case, the debtor continues in possession of his business assets if no receiver or trustee is appointed.[63] The role of the debtor-in-possession is multifaceted. He is a custodian of property under the court's control[64] and hence analogous to a receiver, trustee or other court officer.[65] As such, he cannot continue to operate the business,[66] lease or sell property[67] or borrow money[68] without specific authorization from the court. He also has the duty to report to the court on his management of the business[69] and he is not entitled to divert any income from the operation of the business to his own use.[70]

His position as a court officer also accords him rights he did not have as a debtor. He can defend suits brought by creditors in which the judgment debtor has defaulted[71] and acquire property free of secured creditors' liens which would have been binding on the debtor.[72] In addition to his rights and duties as a court officer, the debtor-in-possession is also a trustee acting in the debtor's interest and thereby is vested with various property rights and rights of action which the debtor may have had.[73] Finally, the debtor-in-possession is a representative of the creditors. For example, he may object to the al-

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[57] Bankruptcy Act § 321, 11 U.S.C. § 721 (1970) (in a pending bankruptcy proceeding); *id.* § 322, 11 U.S.C. § 722 (if no bankruptcy proceeding is pending).

[58] *Id.* § 361, 11 U.S.C. § 761.

[59] *Id.* § 371, 11 U.S.C. § 771.

[60] *Id.* § 367(1), 11 U.S.C. § 767(1).

[61] *Id.* § 311, 11 U.S.C. § 711.

[62] *Id.* § 357(5), 11 U.S.C. § 757(5).

[63] *Id.* § 342, 11 U.S.C. § 742.

[64] *Id.*

[65] Schokbeton Indus., Inc. v. Schokbeton Prods. Corp., 466 F.2d 171, 174-75 (5th Cir. 1972).

[66] Bankruptcy Act § 343, 11 U.S.C. § 743 (1970).

[67] *Id.* § 313(2), 11 U.S.C. § 713(2).

[68] *Id.* § 344, 11 U.S.C. § 744.

[69] *Id.* § 343, 11 U.S.C. § 743.

[70] *In re* Austin, 55 F. Supp. 462, 464 (E.D.N.Y. 1944).

[71] Gramil Weaving Corp. v. Raindeer Fabrics, Inc., 185 F.2d 537, 540 (2d Cir. 1950).

[72] *In re* Sequential Information Sys., Inc., [1970-1973 Transfer Binder] Bankr. L. Rep. ¶ 63,848, at 73,404 (1970).

[73] *See* American Express Warehousing, Ltd. v. Trans-America Ins. Co., [1962-1966 Transfer Binder] Bankr. L. Rep. ¶ 61,359, at 69,993 (S.D.N.Y. 1965).

lowance of improper claims.[74] He is charged generally with the duty of administering the business primarily for the benefit of the creditors,[75] and they may require him to exercise his powers for their benefit.[76]

Thus, it seems clear that the debtor-in-possession is not the same legal entity as the pre-bankruptcy employer. However, because courts will not allow an employer to escape his labor obligations by undergoing a technical change in identity, legal identity may not be the correct test for identifying "parties" bound by section 8(d). For example, where one employer, though a separate legal entity, is, in fact, the alter ego of another, it may be found to have assumed the other's obligations under a collective bargaining agreement.[77]

Therefore, the validity of *Kevin Steel*'s conclusion depends on whether the rights, duties, and powers of a debtor-in-possession are sufficiently different from those of the debtor to warrant the finding that the debtor-in-possession is a different economic entity, and not simply the beneficiary of a purely paper transaction. This argument becomes most difficult where the employer emerges from the arrangement with management, control and operations intact.[78] Nevertheless, the court's conclusion appears correct in view of the dual status of the debtor-in-possession as agent of the creditors and bankruptcy court. At the same time, however, the court's focus on the

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[74] American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A., 280 F.2d 119, 122 (2d Cir. 1960).

[75] *In re* Austin, 55 F. Supp. 462, 463 (E.D.N.Y. 1944).

[76] 8 COLLIER ON BANKRUPTCY, ¶ 6.32[1], at 929 (14th ed. 1975).

[77] Oilfield Maintenance Co., 142 N.L.R.B. 1384, 1387, 53 L.R.R.M. 1235, 1238 (1963). The Board's conclusion that a construction company established to take over the business of another construction firm was the alter ego of its predecessor rested on findings that (1) both companies were owned and controlled by the same persons, (2) the business of the predecessor was carried on without a break by the other company who serviced the same customers, and (3) both firms had the same personnel. 142 N.L.R.B. at 1385, 53 L.R.R.M. at 1237. *Cf.* NLRB v. Burns Int'l Sec. Servs., 406 U.S. 272 (1972), where the Court noted that "in a variety of circumstances involving a merger, stock acquisition, reorganization or assets purchase[,] [t]he Board might properly find as a matter of fact that the successor has assumed the obligations under the old contract." *Id.* at 291.

There is some suggestion that the debtor-in-possession will be deemed a "disguised continuance" of the debtor for the purpose of remedying the debtor's unfair labor practices. *See* NLRB v. Coal Creek Coal Co., 204 F.2d 579, 580, 32 L.R.R.M. 2098, 2099 (10th Cir. 1953). This equation of the debtor and the debtor-in-possession would not necessarily be controlling in the section 8(d) context. The law of the labor contract has a function and development quite separate from the law of unfair labor practices. Morris & Gaus, *Successorship and the Collective Bargaining Agreement: Accommodating* Wiley *and* Burns, 59 VA. L. REV. 1359, 1364 (1973). *Kevin Steel* expressly noted that it did not decide whether the debtor-in-possession must remedy the debtor's unfair labor practices. 519 F.2d at 706 n.20, 89 L.R.R.M. at 3138 n.20.

[78] Title to its assets revests in the debtor upon confirmation of the arrangement, *In re* Gelardin, Inc., 41 F. Supp. 17 (E.D.N.Y. 1941), unless the court retains jurisdiction not only of the debtor but also of its assets. *In re* Irving Electrical Supply Co., 41 F. Supp. 16 (S.D.N.Y. 1941), *aff'd sub nom.* Vogel v. Mohawk Electric Sales Co., 126 F.2d 759 (2d Cir. 1942).

"party" status of the debtor-in-possession seems unfortunate. It binds the court to view his obligations in extreme terms—the debtor-in-possession either *was* or *was not* a party to the *entire* agreement.[79] This approach limits the court's ability to consider the possibility of binding the debtor-in-possession in a more limited way, for example, by requiring him to arbitrate the issue of the extent to which he should be bound under the debtor's collective bargaining agreement.

B. *The Debtor-in-Possession as a "Carrier" Under the RLA*

The debtor-in-possession is clearly a "carrier" subject to the RLA. Section 1 of the RLA defines "carrier" as including "any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier' . . . ."[80] The Railway Labor Act, section 2 Seventh, subjects any "carrier, its officers, or agents"[81] to the Act's comprehensive restrictions[82] on contract termination. Thus, under the literal language of the RLA, the debtor-in-possession in *REA Express*, as a judicial entity in possession of the business of a carrier was bound to exhaust the protracted statutory procedures for resolving disputes over proposed changes in a collective bargaining agreement. The bankruptcy court, which authorized the rejection of REA's labor contracts therefore acted in direct conflict with the express terms of the RLA.

In *REA Express*, the court resolved the literal conflict by examining the underlying policies of the two statutes and concluded that refusing to allow the rejection of collective bargaining agreements in bankruptcy actually defeated the central purpose of the RLA.[83] The futility of forcing a carrier to negotiate where it lacked the resources to maintain the status quo pending negotiation and the consequent collapse of a carrier forced to assume a collective bargaining agreement would cause the very economic disruption which the RLA sought to avert.[84] Thus, as in *Kevin Steel*,[85] the court in *REA Express* concluded that the debtor-in-possession was not subject to the termination restrictions of the relevant labor legislation.[86] Ironically, however, the *Kevin Steel* court reached that result through a narrow interpretation of the statutory language largely to the exclusion of consideration of the conflicting policies. In *REA Express*, by contrast, the court stressed policy considerations to avoid binding the debtor-in-possession to a clearly applicable statutory term.

The court's holding, in addition to contravening the plain statu-

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[79] *See* 519 F.2d at 704, 89 L.R.R.M. at 3137.
[80] 45 U.S.C. § 151 First (1970).
[81] *Id.* § 152 Seventh.
[82] *Id.* § 156.
[83] 523 F.2d at 169, 90 L.R.R.M. at 2582.
[84] *Id.*
[85] 519 F.2d at 704, 90 L.R.R.M. at 3137.
[86] 523 F.2d at 168-69, 90 L.R.R.M. at 2581-82.

tory language,[87] is not consistent with relevant case law. Courts not only have refused to find the RLA unworkable in the reorganization context, but also have required exhaustion of its procedures in the resolution of disputes growing out of carrier's collective bargaining agreements not rejected by a receiver[88] or trustee.[89] *REA Express* sought to distinguish this type of case on the ground that the receiver who implicitly assumed the carrier's labor agreement thereby became a party bound by its terms.[90] However, this distinction is irrelevant in the RLA context, where the receiver (or debtor-in-possession), already a "carrier," undertakes no additional obligations by conforming to the terms of a collective bargaining agreement without disaffirmance.[91]

Moreover, the courts' resolution of an analogous situation suggests that the court too quickly acceeded to the carrier's plea for rejection of the entire collective bargaining agreement. REA claimed that it could not possibly comply with the RLA's directive to maintain the status quo pending exhaustion of the statutory procedure because it could not continue to operate without drastic curtailment and consolidation of its operations.[92] Similarly, carriers who resume operations during a strike with a substitute labor force have claimed that the impossibility of complying with agreements tailored to more sophisticated employees should free them from the RLA's procedures.[93] In response, courts have granted the carrier a closely confined and supervised power to make "reasonable and necessary changes," but have required it to "respect the continuing status of the collective bargaining agreement."[94] This compromise approach better effectuates the policies of the RLA than the unilateral rejection of the entire contract authorized in *REA Express*.

C. *The Debtor-in-Possession as a Successor Employer*

Wholly apart from considerations of conflicting statutory language is the question of whether the debtor-in-possession is a succes-

[87] Nor is the conflict averted by reliance on § 77(n) of the Bankruptcy Act, 11 U.S.C. § 205(n) (1970), which immunizes the wages and working conditions of "railroad employees" from unilateral change by a bankruptcy judge or trustee. The RLA applies to the employees of "carriers," a broader class than "railroad employees" protected by section 77(n). At least one court has not recognized the distinction. *In re* Overseas Nat'l Airways, Inc., 238 F. Supp. 359, 360, 58 L.R.R.M. 2427, 2427-28 (E.D.N.Y. 1965).

[88] Burke v. Morphy, 109 F.2d 572, 575 (2d Cir.), *cert. denied*, 310 U.S. 635 (1940).

[89] *In re* Penn Cent. Transp. Co., 347 F. Supp. 1356, 1367 (E.D. Pa. 1972).

[90] 523 F.2d at 170 n.5, 90 L.R.R.M. at 2583 n.5.

[91] Thus, reliance on *Kevin Steel* was inappropriate because the RLA directs its contract termination restrictions to "carriers" rather than "parties." Nevertheless, the "party" language was cited by the court in *REA Express*, 523 F.2d at 170, 90 L.R.R.M. at 2582-83.

[92] 523 F.2d at 167, 90 L.R.R.M. at 2580.

[93] Brotherhood of Railway Clerks v. Florida E. Coast Ry., 384 U.S. 238, 245-46 (1966).

[94] *Id.* at 246, 248.

sor employer.[95] Courts have discounted the need to develop abstract definitions of successorship because the concrete question of a new employer's legal obligations varies from case to case according to the particular labor policies and legal obligation at issue.[96] However, the threshold criterion to a finding of successorship generally has been continuity of identity in the business enterprise,[97] which, in turn, has two aspects: substantial continuity of the workforce across the change in ownership[98] and similarity in the employing industry.[99] Because it does not affect the finding of similarity in the employing industry, courts previously have found the manner in which the new employer assumes control of the enterprise to be irrelevant.[100] "The refusal to adopt a mode of analysis [distinguishing] among mergers, consolidations and purchases of assets is attributable to the fact that, so long as there is continuity in the 'employing industry,' the public policies underlying the doctrine will be served by its broad application."[101] Thus, the debtor-in-possession who continues the debtor's business and hires all or most of its employees satisfies the threshold requirements of continuity in the business enterprise.

The next question is the extent of the duties imposed by successorship principles on debtors-in-possession. Successorship has arisen in four contexts: duty to bargain,[102] duty to remedy unfair labor practices,[103] duty to arbitrate[104] and duty to adhere to the substantive terms of a collective bargaining agreement.[105] Although *Kevin Steel* discussed three of these duties,[106] neither it nor *REA Express* mentioned the duty to arbitrate. The court in both *Kevin Steel* and *REA*

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[95] The analogy is not an original one. It has been suggested previously that the rejection or modification of collective bargaining agreements of a bankrupt corporation should be governed by principles developed in the labor law of successorship. *See* Comment, *Collective Bargaining and Bankruptcy*, 42 S. CAL. L. REV. 477, 490-91 (1969).

[96] Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 262-63 n.9 (1974); *see* Acheson v. Falstaff Brewing Corp., 523 F.2d 1327, 1329, 90 L.R.R.M. 2333, 2334 (9th Cir. 1975).

[97] *See* Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 263-64 (1974); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964).

[98] Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 263 (1974).

[99] Perma Vinyl Corp., 164 N.L.R.B. 968, 969, 65 L.R.R.M. 1168, 1169 (1967), *enforced sub nom.* United States Pipe and Foundry Co. v. NLRB, 398 F.2d 544, 68 L.R.R.M. 2913 (5th Cir. 1968); *see* United Steelworkers of America v. United States Gypsum Co., 492 F.2d 713, 726, 85 L.R.R.M. 2962, 2971 (5th Cir.), *reh'g denied per curiam*, 498 F.2d 334, 87 L.R.R.M. 2075 (5th Cir.), *cert. denied*, 419 U.S. 998, *re'hg denied*, 419 U.S. 1097 (1974).

[100] *See* Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182-83 n.5 (1973). *But see* Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 257 (1974).

[101] Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182-83 n.5 (1973).

[102] NLRB v. Geronimo Serv. Co., 467 F.2d 903, 81 L.R.R.M. 2407, 2408 (10th Cir. 1972).

[103] Golden State Bottling Co. v. NLRB, 414 U.S. 168, 171 (1973).

[104] *Wiley*, 376 U.S. 543, 547 (1964).

[105] NLRB v. Burns Int'l Sec. Servs., 406 U.S. 272, 285 (1972).

[106] 519 F.2d at 704, 705 n.20, 89 L.R.R.M. at 3137, 3138 n.20.

Express did recognize the debtor-in-possession's obligation to bargain collectively with the union.[107] However, the court in *Kevin Steel* explicitly noted that it was not deciding whether the debtor-in-possession had a duty to remedy the debtor's unfair labor practices, even though there was an outstanding judgment of unfair labor practices against the Company.[108]

Kevin Steel also concluded that because the debtor-in-possession was not a party to the collective bargaining agreement it did not have a duty to adhere to the agreement's substantive terms.[109] In reaching this conclusion, the court relied on the principles of successorship law which militate against binding a successor employer to his predecessor's contract.[110] Indeed, the court reasoned that declaring the debtor-in-possession a party to the outstanding labor contract would leave it in a worse position than a successor.[111] Similarly, the court in *REA Express* relied on *NLRB v. Burns International Security Services, Inc.*[112] to support its conclusion that the debtor-in-possession was not obligated to adhere to the terms of the existing labor agreement pending negotiations.[113] The court found the *Burns* principles particularly applicable to the arrangement setting.[114]

In *Burns*, the predecessor, whose service contract had expired, was succeeded by Burns International Security Services, the low bidder for the new contract.[115] The Supreme Court held that while Burns had a duty to bargain with the predecessor's union, it did not follow that the successor employer also had the duty to adhere to the substantive terms of the collective bargaining agreement.[116] Both economic and labor policies led to this result.

> 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 . . . old collective bargaining contract may make these changes impossible and may discourage . . . the transfer of capital.[117]

Similarly, the labor policy of free collective bargaining precluded compelling a party to adhere to substantive contractual obligations.[118]

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[107] *Kevin Steel,* 519 F.2d at 704, 89 L.R.R.M. at 3137; *REA Express,* 523 F.2d at 170, 90 L.R.R.M. at 2583.

[108] 519 F.2d at 706 n.20, 89 L.R.R.M. at 3138 n.20.

[109] *See id.* at 704, 89 L.R.R.M. at 3137.

[110] *Id.*

[111] *Id.*

[112] 406 U.S. 272 (1972).

[113] 523 F.2d at 170, 90 L.R.R.M. at 2583.

[114] *Id.*

[115] 406 U.S. at 275.

[116] *Id.* at 281-82.

[117] *Id.* at 287-88.

[118] *See id.* at 282-83.

In *Burns*, the Court found that these considerations outweighed the labor policy of preventing industrial strife which might result from the abrogation of an existing collective bargaining agreement.[119]

The Court distinguished[120] *John Wiley & Sons, Inc. v. Livingston*[121] where the successor had been required to arbitrate under the predecessor's contract.[122] *Wiley* arose out of a merger situation where state law imposed the obligations of the disappearing corporation on the survivor of the merger.[123] In contrast, *Burns* did not involve a sale of assets or any other commercial transactions between the successor and predecessor.[124]

The *REA Express* and *Kevin Steel* courts' reliance on the *Burns* principles was well-placed. In fact, the economic policies against imposing a duty to adhere to the substantive terms of the agreement are even more compelling in the arrangement situation. *Burns* favored maximizing a more efficient owner's freedom to rearrange a marginal enterprise.[125] In an arrangement, the transfer to the debtor-in-possession is not simply a matter of fostering a greater relative efficiency. Rather, the transfer is a response to the extreme situation of an enterprise on the brink of total failure.

Furthermore, unlike the *Burns* situation, the rights of creditors are involved in arrangement proceedings. In *Burns*, the predecessor and successor were competitors, bidding for the same contract.[126] When the predecessor's contract expired, the rights of its creditors presumably were unaffected. In contrast, the practical effect of an arrangement is to force all creditors of the debtor to renegotiate their rights.[127] As the court noted in *REA Express*, there is no reason why a union should be permitted to insist on *strict* compliance with its collective bargaining agreement, thereby further weakening the position of the creditors.[128]

In conclusion, blind enforcement of the labor policy of protecting employees from sudden changes in the employment relationship[129] may be counterproductive in an arrangement situation. Requiring the debtor-in-possession to assume the entire outstanding collective bargaining agreement might trigger the collapse of the enterprise thereby foreclosing altogether the possibility of further employment.[130] Thus, the policy considerations against saddling the

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[119] *See id.* at 285.
[120] *Id.* at 285-86.
[121] 376 U.S. 543 (1964).
[122] *Id.* at 548.
[123] *Id.* at 547-48.
[124] *Id.* at 286.
[125] *Id.* at 287-88.
[126] *Id.* at 275.
[127] *REA Express*, 523 F.2d at 169, 90 L.R.R.M. at 2582.
[128] *Id.* at 169-70, 90 L.R.R.M. at 2582. *Partial* compliance provides a more equitable alternative. See text at note 196 *infra*.
[129] *Wiley*, 376 U.S. at 549.
[130] *REA Express*, 523 F.2d at 170-71, 90 L.R.R.M. at 2583.

debtor-in-possession with the substantive terms of the collective bargaining agreement parallel those of *Burns* and it appears that the court's conclusion with regard to this particular duty was correct.

II. SECTION 313(1) OF THE BANKRUPTCY ACT

The second section of this note will examine section 313(1) of the Bankruptcy Act, first enacted in 1938 as part of the Chandler Amendments,[131] to determine whether it authorizes the rejection of collective bargaining agreements as "executory contracts."[132]

A. Kevin Steel's *Analysis of Section 313(1)*

The *Kevin Steel* court first examined the literal breadth of section 313(1) and determined that the statutory language, permitting rejection of the debtor's "executory contracts," on its face encompassed collective bargaining agreements.[133] While Congress has used the broad term "contracts," in other contexts, to include collective bargaining agreements,[134] *Kevin Steel's* rationale for here adopting the inclusive reading in the face of conflicting labor policies is not persuasive. The court found precedent for a literal reading of the Bankruptcy Act in *United States v. Embassy Restaurant.*[135] In that case, the Supreme Court interpreted the section according priority to "wages . . . due to workmen"[136] literally to exclude various fringe benefits.[137] But *Embassy Restaurant* is not strictly analogous to *Kevin Steel* and therefore does not mandate the broad literal interpretation of "executory contracts" to include labor agreements. The Supreme Court expressly indicated that it resolved the issue of priority within the confines of the Bankruptcy Act and was not interpreting the NLRA,[138] whereas *Kevin Steel* construed both statutes to avoid irreconcilable conflict. In actuality, section 2 (15) of the Bankruptcy Act[139] serves as a more appropriate analogy because its construction necessarily involves interpretation of a countervailing labor statute. A leading authority has suggested that this section, which gives the reorganization court authority to issue injunctions in protection of its exclusive jurisdiction of the debtor and its property, should be interpreted narrowly in view of the

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[131] Act of June 22, 1938, ch. 575 § 313(1), 52 Stat. 840, *as amended,* 11 U.S.C. § 713(1) (1970). The relevant portion of section 313(1) is quoted at note 4 *supra.*

[132] In *In re* San Francisco Bay Expo., 50 F. Supp. 344, 347 (N.D. Cal. 1943), the court defined "executory contracts" within the meaning of the Bankruptcy Act as those which call for performance *in futuro.* The term is nowhere defined within the Act.

[133] 519 F.2d at 703, 89 L.R.R.M. at 3136.

[134] Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1970), provides that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court . . . ."

[135] 359 U.S. 29 (1959).

[136] Bankruptcy Act § 64(a), 11 U.S.C. § 104(a) (1970).

[137] 359 U.S. at 35.

[138] *Id.* at 33.

Norris-LaGuardia Act's[140] restrictions on labor injunctions.[141] Similarly, section 313(1) should be interpreted narrowly to exclude collective bargaining agreements.

Kevin Steel next examined the implications of section 77(n) of the Bankruptcy Act[142] which prohibits any bankruptcy judge or trustee from changing the wages or working conditions of railroad employees except in the manner prescribed in the RLA. The district court adopted the NLRB's position that section 77(n) evidenced a congressional policy toward labor agreements generally, rather than an intent "to make seemingly irrelevant distinctions between different kinds of labor agreements."[143] Therefore, the lower court concluded that section 313(1) should be read to include an implied exception for all collective bargaining agreements.[144] However, the court of appeals rejected this approach on two grounds. First, the congressional conception of the special character of railroads, highlighted by differences between the NLRA and the RLA, did not warrant the extension to labor generally of Bankruptcy Act provisions tailored to railroad employees.[145] Second, in light of the close scrutiny given the Bankruptcy Act by Congress, the court considered it unlikely that "legislative oversight" accounted for the absence of a similar exception for labor generally.[146] Furthermore, the court determined that only the legislature should remedy the "oversight" where the remedy affected two important statutes.[147]

However, while section 77(n) does not necessarily evidence congressional policy toward labor generally, it is suggested that the failure to include a similar exception for all labor likewise does not indicate an affirmative legislative intent to authorize rejection of all other collective bargaining agreements. It seems more reasonable to confine the interpretative ramifications of section 77(n) to section 77,[148] which deals solely with the reorganization of railroads. The legislative history indicates that Congress enacted section 77(n) in response to the failure of equity receivers to comply with the provisions of the RLA.[149] In effect, section 77(n) incorporates the RLA by reference. It does not carve out, as *Kevin Steel* suggested,[150] an exception to a general power

[139] 11 U.S.C. § 11 (15) (1970).

[140] 29 U.S.C. § 101-115 (1970).

[141] 6 COLLIER ON BANKRUPTCY. ¶ 309[1], 479-81 n.17 (14th ed. 1972).

[142] 11 U.S.C. § 205(n) (1970).

[143] Iron Workers Local 455 v. Kevin Steel Prods., Inc., 381 F. Supp. 336, 338, 87 L.R.R.M. 2311, 2313 (S.D.N.Y. 1974).

[144] *See id.*

[145] 519 F.2d at 705, 89 L.R.R.M. at 3138.

[146] *See id.*

[147] *Id.*

[148] 11 U.S.C. § 205(n) (1970).

[149] 76 Cong. Rec. 2927 (1933) (remarks of Senator LaGuardia). Section 77 was passed in 1933 and not reconsidered when Congress enacted the Chandler Amendments. Act of March 3, 1933, ch. 204, 47 Stat. 1474.

[150] 519 F.2d at 704, 89 L.R.R.M. at 3137.

to reject collective bargaining agreements as "executory contracts." Within the framework of section 77 there is no interrelationship between subsection (n) and subsection (b)(5)[151] which authorizes the reorganization plan to provide for the rejection of "contracts of the debtor which are executory in whole or in part." Its implications, therefore, are less conclusive than would have been the case had the relevant section permitted the unilateral rejection of all the railroad's contracts, *except* those with its employees. Thus, it is submitted that the absence of a similar provision for labor generally does not suggest an intent to authorize the rejection of collective bargaining agreements, because the presence of section 77(n) does not indicate that bankruptcy courts otherwise possessed such authority.

In summary, then, there is no conclusive evidence that Congress, in enacting section 313(1), intended to provide for the cancellation of collective bargaining agreements. Nor is there any indication of an intent to protect labor agreements from the reach of section 313(1). Therefore, it is submitted that courts should look both to relevant labor legislation and the common law for guidance in the proper treatment of collective bargaining agreements in bankruptcy because they offer solutions consistent with the rehabilitation of an enterprise in an arrangement and with the special character[152] of collective bargaining agreements.

B. *The Sui Generis Nature of the Collective Bargaining Agreement*

In previous cases dealing with the rejection of collective bargaining agreements in bankruptcy, the argument as to the breadth of section 313(1) focused on the issue of whether a collective bargaining agreement is sui generis and not a "contract" within the meaning of the statutory language.[153] Though many authorities, in different contexts, have asserted that collective bargaining agreements are unique,[154] the district courts generally have not distinguished between collective bargaining agreements and other executory contracts under section 313(1).[155] The *Kevin Steel* court alluded to this issue only in passing. The court accepted the premise that collective bargaining agreements are unique, but not the conclusion that Congress there-

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[151] 11 U.S.C. § 205(b)(5) (1970).

[152] *See* text at notes 153-78 *infra*.

[153] *See* cases cited at note 155 *infra*.

[154] *See generally* Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955). For the suggestion that *Burns* represented a reversal of this trend, *see* Morris & Gaus, *Successorship and the Collective Bargaining Agreement: Accomodating* Wiley *and* Burns, 59 VA. L. REV. 1359, 1386-87 (1973).

[155] *See In re* Business Supplies Corp. of America, 72 CCH Lab. Cas. ¶ 13, 940, at 27,978 (S.D.N.Y. 1973); Carpenters Local 2746 v. Turney Wood Prods., Inc., 289 F. Supp. 143, 147, 69 L.R.R.M. 2977, 2980 (W.D. Ark. 1968); *In re* Overseas Nat'l Airways, Inc., 238 F. Supp. 359, 361, 58 L.R.R.M. 2427, 2429 (E.D.N.Y. 1965).

fore could not have intended that the provision for the rejection of contracts apply to them.[156]

However, this issue deserves more consideration. The 1938 Chandler Amendments preceded both the enactment of section 8(d) of the NLRA[157] dealing with termination of a collective bargaining agreement by a party and the landmark Supreme Court cases distinguishing collective bargaining agreements from ordinary contracts.[158] As a result, the literal terms of section 313(1) of the Bankruptcy Act must be accommodated to the subsequent relevant law: "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."[159]

The Supreme Court began distinguishing collective bargaining agreements from ordinary contracts of employment in the 1944 decision of *J.I. Case Co. v. NLRB*,[160] where it likened a collective bargaining agreement to a comprehensive trade agreement or tariffs established by a carrier.[161] Subsequently, in 1947, Congress enacted section 301 of the Labor Management Relations Act[162] to provide for suits in federal court for "violation of contracts between an employer and a labor organization."[163] The Supreme Court, in *Textile Workers Union v. Lincoln Mills*[164] interpreted section 301 as not only a grant of jurisdiction, but also a mandate to develop substantive federal labor law.[165] Thus, in *Lincoln Mills,* the Court severed the law of collective bargaining agreements from that of ordinary contracts.[166] *John Wiley & Sons, Inc. v. Livingston*[167] further widened the distinction. The Supreme Court there required the successor to arbitrate under the predecessor's collective bargaining agreement, recognizing that ordinary contract principles would not bind an unconsenting successor to the prior agreement.[168]

Beyond the simple breadth of the statutory language, there is no conclusive evidence that Congress intended to authorize the rejection of labor agreements under section 313(1). Therefore, the sui generis nature of a collective bargaining agreement should prevail in the bankruptcy context as well and prevent the rejection of labor agree-

156 519 F.2d at 704, 89 L.R.R.M. at 3137.

157 Act of June 23, 1947, ch. 120, § 8(d), 61 Stat. 142; see note 17 *supra.*

158 *Wiley,* 376 U.S. at 550; United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580 (1960); J.I. Case Co. v. NLRB, 321 U.S. 332, 334-45 (1944); *cf.* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1956).

159 Boys Mkts. Inc. v. Retail Clerks Local 770, 398 U.S. 235, 250 (1970).

160 321 U.S. 332 (1944).

161 *Id.* at 334-35. *See generally* Morris & Gaus, *supra* note 154, at 1361-64.

162 29 U.S.C. § 185 (1970).

163 *Id.* § 185(a).

164 353 U.S. 448 (1957).

165 *Id.* at 456-57.

166 *See id.* at 456-57; Morris & Gaus, *supra* note 154, at 1362-63.

167 376 U.S. 543 (1964).

168 *Id.* at 550.

ments as "executory contracts." The character of a collective bargaining agreement as a tariff agreement—"a generalized code to govern a myriad of cases"[169]—is completely inconsistent with the scheme of statutory remedies provided by the Bankruptcy Act for any person injured by the rejection of an executory contract.[170] The statutory remedies triggered by the rejection of "executory contracts" are tailored only to those contracts which translate easily, on breach, into money damages. However, "[a] collective bargaining agreement is an effort to erect a system of industrial self-government."[171] Money damages are inadequate relief for its collapse which affects the intangible rights[172] of employees in many shops; a result far more radical than the relatively simple renegotiation of rights undertaken by all creditors in an arrangement proceeding. Nor, as the *Kevin Steel* court suggested,[173] do other sections of the Bankruptcy Act redress this imbalance. Section 64(a)(2) gives priority to "wages not to exceed $600 to each claimant . . . earned within three months before . . . the commencement of the proceeding . . . ."[174] Section 17(a)(5) lists wages earned within the last three months as a debt not affected by a discharge.[175] While these sections provide some relief for the rejection of a simple employment contract, they do not compensate for the non-monetary aspects of a collective bargaining agreement such as seniority or pension rights. Moreover, the section according priority has been interpreted very narrowly.[176]

Similarly, extra-statutory protection does not compensate for the inadequacy of statutory remedies. The strike is not necessarily a practical limitation on the employer's termination of an existing labor contract. The paucity of cases on the subject[177] may reflect the unions' restraint and willingness to accept new terms, rather than the employers' caution in the face of a possible strike. In addition, even if the union did take this risk of toppling the enterprise, there is some indication that the bankruptcy court, despite the Norris-LaGuardia Act, might issue an injunction to protect its exclusive jurisdiction over the debtor and its property.[178]

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[169] United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578-79 (1960).

[170] Bankruptcy Act § 353, 11 U.S.C. § 753 (1970) provides that any person injured by the rejection of an executory contract shall be deemed a creditor for the purposes of an arrangement.

[171] United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580 (1960).

[172] Courts have been particularly concerned with the loss of employees' intangible rights. *See Kevin Steel*, 519 F.2d at 707, 89 L.R.R.M. at 3139, *citing In re* Overseas Nat'l Airways, Inc., 238 F. Supp. 359, 361-62, 58 L.R.R.M. 2427, 2429 (E.D.N.Y. 1965).

[173] 519 F.2d at 703-04, 89 L.R.R.M. at 3137.

[174] 11 U.S.C. § 104(a)(2).

[175] *Id.* § 35(a)(5).

[176] *Embassy Restaurant*, 359 U.S. at 35.

[177] *See* cases cited at note 52 *supra*.

[178] *See In re* Cleveland & Sandusky Brewing Co., 11 F. Supp. 198, 207 (N.D. Ohio

In summary, then, the statutory framework for the rejection of "executory contracts" is inconsistent with the very nature of collective bargaining agreements. In light of this inconsistency, courts should require more conclusive evidence of legislative intent before interpreting section 313(1) to provide for the rejection of collective bargaining agreements in bankruptcy.

III. POSSIBLE RESOLUTIONS OF THE LABOR-BANKRUPTCY POLICY CONFLICT

Assuming that the debtor-in-possession should not be bound to all the substantive terms of the debtor's collective bargaining agreement,[179] several alternatives to total rejection are open to a court attempting to resolve carefully the conflict between labor and bankruptcy policies in the context of a Chapter XI arrangement proceeding. A court might: (1) require the debtor-in-possession to arbitrate the extent to which it should be bound under the debtor's collective bargaining agreement; (2) allow the bankruptcy judge to give different treatment to different parts of the agreement by creating an implied exception for collective bargaining agreements to the rule[180] that contracts may only be assumed or rejected *in toto* in bankruptcy; or (3) assuming such an implied exception is not created, establish a discretionary test to determine those situations in which the bankruptcy court should permit the rejection of the entire collective bargaining agreement.

Neither *Kevin Steel* nor *REA Express* considered the possible imposition of the duty to arbitrate.[181] The first alternative—requiring the debtor-in-possession to arbitrate the extent to which it is bound under the debtor's collective bargaining agreement—is suggested by a full exploration of the successorship analogy. In *Wiley*, the Supreme Court, relying on the central role played by arbitration in effectuating national labor policy,[182] held that the disappearance by merger of the corporate employer did not automatically terminate all rights of employees under the existing labor agreement.[183] Instead, in appropriate

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1935). *But see* 6 COLLIER ON BANKRUPTCY, ¶ 309[1], at 479-81 n.17 (14th ed. 1972); text at notes 139-41 *supra*.

[179] This conclusion follows from successorship principles, discussed in text at notes 109-130 *supra*.

[180] 8 COLLIER ON BANKRUPTCY. ¶ 3.15[7] at 206 (14th ed. 1975); *cf.* Schokbeton Indus., Inc. v. Schokbeton Prods. Corp., 466 F.2d 171, 175 (5th Cir. 1972).

[181] This may have been because the unions in both cases framed the question of contract survival too categorically. *See generally* Morris & Gaus, *supra* note 154, at 1379-80. Thus, they might have done better to argue the middle ground: that the debtor-in-possession was obligated, not to assume the entire collective bargaining agreement, but to arbitrate the extent to which he was bound by it. *But see* Local 30, ILGWU v. Hers Apparel Indus., Inc., 2 BANKR. L. REP. ¶ 65,725, at 75,435-36 (S.D.N.Y. 1975).

[182] 376 U.S. at 549-50.

[183] *Id.* at 548.

circumstances,[184] the Court would require the successor to arbitrate under the agreement of its predecessor.[185] *Wiley* has continuing vitality[186] despite the holding in *Burns* that the NLRB may not bind a successor employer to its predecessor's contract terms.[187] Significantly, *Burns* has not been interpreted as vitiating the central role of the arbitral process in effectuating national labor policy.[188] Furthermore, the transfer to a debtor-in-possession in an arrangement is more comparable to the situation in *Wiley* than in *Burns* because the employer, as well as the employees, participate, however passively, in the transaction.[189] Thus, *Wiley* may serve as analogous precedent for requiring arbitration in the arrangement situation where the debtor-predecessor in effect has disappeared as an effective employer by losing all control to the debtor-in-possession.

Significant benefits would follow from requiring arbitration in the arrangement context. An arbitrator has a degree of flexibility possessed neither by the NLRB nor by the bankruptcy court.[190] This arbitral flexibility could protect the rights of labor without unduly constraining the rehabilitation efforts of the debtor-in-possession. Moreover, *successorship* arbitration is particularly flexible. In ordinary arbitration, the arbitrator uses his own knowledge of the enterprise and the bargaining history of the collective bargaining agreement to cover gaps in the contract.[191] But, in the successorship situation "the arbitrator may find that equities inherent in changed circumstances require an award . . . at variance with some term or terms of that contract."[192]

The arbitrator, then, being sensitive to the nature of a collective bargaining agreement as an instrument of self-government, could afford the unions more protection than they presently receive under section 353 of the Bankruptcy Act.[193] For example, he could revamp

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[184] These circumstances were present in *Wiley*, which involved a merger situation in which the predecessor corporation disappeared into the merged corporation. The requisite similarity and continuity of operation across the change of ownership was evidenced by the wholesale transfer of employees from the predecessor to the successor corporation. 376 U.S. at 551.

[185] *Id.* at 548.

[186] *See* Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 256 (1974); United Steelworkers of America v. United States Gypsum Co., 492 F.2d 713, 726, 85 L.R.R.M. 2962, 2971-72 (5th Cir.), *reh'g denied per curiam*, 498 F.2d 334, 87 L.R.R.M. 2075 (5th Cir.), *cert denied*, 419 U.S. 998, *reh'g denied* 419 U.S. 1097 (1974); *1974-1975 Annual Survey of Labor Relations and Employment Discrimination Law*, 16 B.C. IND. & COM. L. REV. 965, 1025-30 (1975).

[187] *Burns*, 406 U.S. at 291.

[188] *United States Gypsum*, 492 F.2d at 726, 85 L.R.R.M. at 2971-72.

[189] *See generally* St. Antoine, *Judicial Caution and the Supreme Court's Labor Decisions, October Term 1971*, 6 U. MICH. J.L. REF. 269, 275 (1973).

[190] *See id.* at 727, 85 L.R.R.M. at 2972.

[191] Morris & Gaus, *supra* note 154, at 1377-78.

[192] United Steelworkers of America v. Reliance Universal, Inc., 335 F.2d 891, 895, 56 L.R.R.M. 2721, 2723 (3d Cir. 1964).

[193] 11 U.S.C. § 753 (1970). *See* text at notes 169-76 *supra*.

those portions of the collective bargaining agreement whose survival would impede the rehabilitation efforts of the debtor-in-possession, while retaining others, such as seniority provisions, in accordance with the equities of the situation. Thus, requiring the debtor-in-possession to arbitrate would reconcile the conflicting labor and bankruptcy policies more equitably than allowing the rejection of the entire contract under section 313(1).

There are, however, drawbacks to requiring arbitration in the arrangement situation. These stem from bifurcating the responsibility between the arbitrator and the bankruptcy court for the renegotiation of the debtor's liabilities. This may result, for example, in unnecessary duplication in a situation where time may be of the essence to an enterprise on the brink of disaster.[194] Furthermore, it may add an element of uncertainty to a situation in which it is crucial for both the bankruptcy court and the arbitrator to appraise accurately the financial status of the debtor-in-possession. It is difficult for either the bankruptcy court or the arbitrator to proceed without knowing the full impact of the other's actions.

Nevertheless, these difficulties may be less problematic than first appears for two reasons. First, the arbitrator could bind the debtor-in-possession only where consistent with the rehabilitation of the enterprise, thus affecting the bankruptcy court's renegotiation of the debtor's other liabilities only indirectly. Second, the arbitrator who decides which substantive terms of a collective bargaining agreement are binding on the debtor-in-possession creates no more uncertainty or practical problems for the bankruptcy court than are already inherent in the arrangement situation. It should be remembered that the enterprise continues operations during an arrangement. Thus, even where the entire collective bargaining agreement is rejected, the parties will be bargaining to arrive at the terms of a labor agreement which will be put into effect during the arrangement. Furthermore, there is authority for the proposition that the debtor-in-possession may enter into certain collective bargaining agreements without the authorization of the bankruptcy court.[195] As a result, even where arbitration is not imposed, the efforts of the bankruptcy court and the creditors may be subject to the uncertain impact of an unauthorized and newly negotiated collective bargaining agreement. Thus, the disadvantages to requiring arbitration in the arrangement context appear minimal in comparison with the benefit of advancing important national labor policies.

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[194] *See REA Express*, 523 F.2d at 170-71, 90 L.R.R.M. at 2583.

[195] *In re* Wil-low Cafeterias, 111 F.2d 429, 431 (2d Cir. 1940). *See also* Wolf v. Weinstein, 372 U.S. 633. The Court there cites *In re* Wil-low Cafeterias for the proposition that "the salary of a non-officer employee need not even be approved *in advance* of his employment." 372 U.S. at 648-49 n.14 (emphasis in original). However, courts will not recognize contracts made by a debtor-in-possession outside the authority conferred upon him. *In re* Avorn Dress Co., 79 F.2d 337 (2d Cir. 1935). Thus, the bankruptcy court could avoid this problem by requiring specific approval of labor agreements.

A second possible means of resolving the conflict between labor and bankruptcy policies involves creating an implied exception for collective bargaining agreements to the general rule[196] that, in bankruptcy proceedings, contracts must be cancelled in their entirety or not at all. At least one commentator has suggested the possibility that different provisions of a collective bargaining agreement might deserve different treatment by the bankruptcy court.[197] In practical effect, this alternative parallels the imposition of arbitration in that both approaches result in the retention of some and the rejection of other substantive provisions of the collective bargaining agreement. The major difference is that under the first alternative, the arbitrator makes this determination, whereas, under the second, this responsibility is assumed by the bankruptcy judge. Allowing the bankruptcy judge to decide which provisions survive would have two possible advantages over the imposition of arbitration.

It is arguable that the imposition of a duty to arbitrate would be more directly in conflict with the literal statutory language. Arbitration implies that the contract itself survives.[198] This notion of contract survival conflicts with the concept of "rejection" authorized under section 313(1). This conflict is avoided under the second alternative which merely suggests that some of the contract's substantive provisions, and not the contract itself, carry over into the arrangement situation. Furthermore, allowing the bankruptcy judge to decide which provisions carry over avoids the problem of splitting this responsibility between the arbitrator and the bankruptcy court.

Nevertheless, neither of the above arguments seems sufficiently compelling to derogate from the central role played by arbitration in effectuating national labor policy.[199] Nor do they overcome a chief disadvantage—the loss of the arbitrator's experience and sensitivity to the bargaining history of the enterprise. Therefore, the imposition of a duty to arbitrate seems preferable.

A third alternative assumes that the Bankruptcy Act authorizes the rejection of collective bargaining agreements only in their entirety, and attempts to define the circumstances under which that authority should be exercised. This was the approach taken in both *Kevin Steel* and *REA Express,* though neither court considered the foregoing alternatives. The court in *Kevin Steel* stressed that the rejection decision should not be based solely on whether it will improve the financial condition of the debtor.[200] The Union there advocated that the bankruptcy judge should require, prior to weighing the equities against rejection: (1) a showing that the employer's motive is not simply to rid

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[196] *See* note 180 *supra.*

[197] Witmer, *Collective Labor Agreements in the Courts,* 48 YALE L.J. 195, 223 (1938).

[198] As the duty to arbitrate is founded on a contract, "a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *Wiley,* 376 U.S. at 547, 550.

[199] *See Wiley,* 376 U.S. at 549-50.

[200] 519 F.2d at 707, 89 L.R.R.M. at 3139.

itself of the Union; (2) "convincing proof of the company's financial condition"; and (3) evidence as to the source of the company's financial difficulties.[201] The court impliedly adopted these considerations as the test for allowing rejection on remand.[202]

The test for allowing rejection set forth by the *REA Express* court had an even higher threshold: rejection should be authorized "only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the carrier will collapse . . . .[203]

The tests advanced in *Kevin Steel* and *REA Express* as standards for allowing rejection represent substantial advances over previous holdings, many of which did not articulate appropriate considerations,[204] or spoke only vaguely of the need to balance equities.[205] It is submitted that the difficulty in assessing the presence of an improper motive under the *Kevin Steel* test may be overcome by adopting the stricter *REA Express* test, which minimizes such considerations. However, even the stricter *REA Express* test may be a reconciliation of the conflicting policies in name only, and, in fact, offer little protection to a union. For example, it is significant that no court since the Chandler Amendments has refused to find that a labor agreement was sufficiently onerous to warrant rejection.[206] Furthermore, it will be difficult for the unions to rebut the employer's evidence of economic plight, particularly as the successorship analogy may induce bankruptcy courts to apply loosely the *REA Express* standard in view of persistent judicial refusal[207] to bind the successor to the substantive terms of his predecessor's labor agreement. Similarly, a charitable reading of this standard seems likely in view of the inflexibility of the alternative. If contract survival is an all-or-nothing proposition, the bankruptcy court will be predisposed to authorize its rejection because of the likelihood that adherence to *all* the terms of the contract will impede the arrangement.[208] Thus, the discretionary standards set forth in *Kevin Steel* and *REA Express* afford labor uncertain protection. In the absence of more affirmative evidence that the Bankruptcy Act

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[201] *Id.* The Union argued for this standard against a background of pre-bankruptcy unfair labor practices committed by Kevin Steel. However, this does not mean that the courts will refuse to give the standard more general application. For example, in *REA Express,* where there was no issue of unfair labor practices, the court adopted a more stringent standard. *See* text at note 203 *infra.*

[202] *See id.*

[203] 523 F.2d at 172, 90 L.R.R.M. at 2584.

[204] *See, e.g., In re* Business Supplies Corp. of America, 72 CCH Lab. Cas. ¶ 13,940, at 27,979 (S.D.N.Y. 1973); Carpenters Local 2746 v. Turney Wood Prods., Inc., 289 F. Supp. 143, 149, 69 L.R.R.M. 2977, 2980 (W.D. Ark. 1968); *In re* Klaber Bros., 173 F. Supp. 83, 85, 44 L.R.R.M. 2176, 2177-78 (S.D.N.Y. 1959).

[205] *E.g., In re* Overseas Nat'l Airways, Inc., 238 F. Supp. 359, 361-62, 58 L.R.R.M. 2427, 2429 (E.D.N.Y. 1965).

[206] *See* note 52 *supra.*

[207] *See* text at notes 115-24 *supra.*

[208] To avoid this problem, the bankruptcy court could apply the standard stringently. If it found that the employer could not meet the standard, it might thereafter require arbitration.

authorizes the rejection of entire collective bargaining agreements, the imposition of a duty to arbitrate seems preferable because it allows a more even balance of the competing labor and bankruptcy policies. The arbitrator, far from detracting from the rehabilitation efforts of the debtor-in-possession, may in fact make a positive contribution which facilitates the rehabilitation of the enterprise.[209]

CONCLUSION

In both *Kevin Steel* and *REA Express,* a debtor-in-possession in Chapter XI arrangement proceedings petitioned the bankruptcy court for permission to reject the debtor's collective bargaining agreements. Three central questions were presented: (1) may a bankruptcy judge permit the rejection of a collective bargaining agreement without creating direct conflict with the contract termination restrictions of the relevant labor legislation; (2) does section 313(1) of the Bankruptcy Act clearly authorize the cancellation of collective bargaining agreements; and (3) what constitutes the most equitable reconciliation of the competing labor and bankruptcy policies.

Both cases avoided the problem of direct conflict between the Bankruptcy Act and the applicable labor statute. *Kevin Steel* concluded that the debtor-in-possession was not a "party" subject to the contract termination restrictions in section 8(d) of the National Labor Relations Act. Similarly, *REA Express* determined that the literal statutory definition of "carrier" should not apply to the debtor-in-possession because its application would defeat the central purposes of the Railway Labor Act. Each court then buttressed its reasoning by analogizing to successorship principles, which have precluded binding an unconsenting successor to the substantive terms of its predecessor's collective bargaining agreement. In view of the peculiar status of the debtor who continues in possession during an arrangement and the clear relevance of successorship principles, the court's conclusion that a bankruptcy judge may permit the rejection of a labor contract without creating direct conflict with the NLRA appears correct. The result under the RLA is more tenuous.

Both cases also concluded that section 313(1) of the Bankruptcy Act, which permits the rejection of the debtor's "executory contracts," authorizes the cancellation of his collective bargaining agreements. It appears that the evidence of legislative intent is, however, far less clear than was suggested by the courts. In effect, the decisions amount to little more than a determination to read the statutory language literally in the absence of any indications that a different interpretation was intended. It is suggested, however, that developments after the enactment of section 313(1), which draw ever-wider distinctions between contracts and collective bargaining agreements, point to the il-

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[209] *See* text at notes 190-193 *supra.*

logic of treating collective bargaining agreements as "executory contracts" under section 313(1).

Finally, *Kevin Steel* and *REA Express* each established a standard to guide the district court on remand in its determination of whether the bankruptcy court had properly exercised the authority to reject the collective bargaining agreement. Neither court discussed two possible alternatives: requiring the debtor-in-possession to arbitrate the extent to which he was bound by the debtor's labor agreement, or allowing the bankruptcy judge to give different treatment to different provisions of the collective bargaining agreement, rejecting some and causing others to survive. It is suggested that a full examination of the successorship analogy would indicate that the imposition of a duty to arbitrate provides the most equitable resolution of the competing labor and bankruptcy policies.

It is unlikely, however, that courts will venture from the previous trend in the district courts, which have freely allowed the rejection of collective bargaining agreements in bankruptcy. Thus, courts probably will follow *Kevin Steel* and *REA Express,* whose standards for the exercise of the court's discretion may prove to afford labor insufficient protection and may, in turn, tempt employers to use arrangement proceedings as a vehicle for divesting themselves of troublesome labor contracts.

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