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INTRODUCTION

Many corporations in the United States are parties to collective bargaining agreements.¹ When faced with financial difficulties, a number of these corporations have filed petitions under chapter 11 of the Bankruptcy Reform Act of 1978 ("Bankruptcy Code").² Two questions surrounding bankruptcy petitions have long plagued these businesses and their employees: first, under what circumstances a bankrupt employer may reject a collective bargaining agreement; and, second, whether the employer is free to unilaterally modify the collective bargaining agreement pending a decision by the bankruptcy court allowing it to reject the agreement. These issues present a serious conflict between two federal statutory schemes. While the bankruptcy laws may be interpreted to allow the rejection and unilateral modification of collective bargaining agreements, the National Labor Relations Act ("NLRA") explicitly prohibits such action.³

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¹. A "collective bargaining agreement" is an employment contract that results from negotiations, or collective bargaining, between an employer and its employees' representative.

The Supreme Court has recognized the special nature of collective bargaining agreements. "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate...... A collective bargaining agreement is an effort to erect a system of industrial self-government." United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 580 (1960).


The basic policies of the bankruptcy law are to preserve the funds of the debtor for distribution to creditors and to give the debtor a new start, while the basic policy of the labor law is always to encourage creation and enforcement of collective bargaining agreements. Where continued performance of the bankrupt's obligations to the union complicate the orderly liquidation or reorganization of the bankrupt, these policies conflict.

The urgency of this issue is exemplified by the Supreme Court's recent decision in In re Bildisco. In Bildisco, the Court held that, notwithstanding the NLRA, the bankruptcy laws do permit the rejection of collective bargaining agreements. The Court articulated the standard that must be met before such rejection will be allowed. The Court also held that an employer is not prohibited from unilaterally modifying an existing collective bargaining agreement before permission to reject is granted by the bankruptcy court.

This note will review the history and policies of the federal bankruptcy and labor laws, discuss the decisions of the federal courts of appeals that have addressed these issues, and analyze the two issues in light of the Supreme Court's decision in Bildisco. The analysis will substantiate the Court's conclusion that collective bargaining agreements are subject to rejection in bankruptcy, and discuss how the standard that the Court formulated for rejection strikes the appropriate balance between the bankruptcy and labor laws. This note will argue that unilateral modifications of a collective bargaining agreement before formal rejection should be prohibited and subject to adjudication by the National Labor Relations Board ("NLRB"). This note will suggest that the Court's approval of interim unilateral modifications of collective bargaining agreements may cause an increase in labor unrest.

BACKGROUND

The Bankruptcy Code

The Supreme Court has defined "bankruptcy" as that area of law which regulates the relationship between a debtor and his creditors. Congress enacted the first Bankruptcy Act in 1898 ("Bankruptcy Act"). This Act was replaced recently with the

5. Bankruptcy is "the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." Wright v. Union Cent. Ins. Co., 304 U.S. 502, 513-14 (1938) (footnote omitted) (quoting In re Reiman, 20 F. Cas. (C.C.S.D. N.Y. 1874) (No. 11,673)).
Bankruptcy Reform Act of 1978.\textsuperscript{7}

Provisions in the Bankruptcy Code apply to individuals, businesses, and municipalities.\textsuperscript{8} A corporate debtor experiencing financial difficulties can seek relief under two different chapters of the Bankruptcy Code, chapter 7 and chapter 11. Chapter 7 provides for the liquidation of the debtor's assets for distribution to creditors.\textsuperscript{9} In contrast, chapter 11 allows the debtor to continue under a plan of reorganization.\textsuperscript{10} The goals of chapter 11 are to effect rehabilitation of the financially distressed corporation and to allow creditors a greater return on their claims than they might realize were the debtor to proceed under chapter 7.\textsuperscript{11} Chapter 11 is thus often the preferable route for the debtor, the creditors, and the debtor's employees.\textsuperscript{12}


\textsuperscript{8} Chapter 7 (Liquidation), id. §§ 701-766, is available to corporate debtors. Chapter 9 (Adjustments of Debts of Municipality), id. §§ 901-946, is available to municipal debtors. Chapter 11 (Reorganization), id. §§ 1101-1174, is available to corporate debtors. Chapter 13 (Adjustment of Debts of an Individual With Regular Income), id. §§ 1301-1330, is available to individual debtors.

\textsuperscript{9} Id. §§ 701-766. The Bankruptcy Act included four different reorganization chapters for corporate debtors. These chapters were consolidated into chapter 11 in the Bankruptcy Code. The consolidation does not affect the analysis herein.

\textsuperscript{10} Id. §§ 1101-1174. In the usual chapter 11 reorganization case, the proceeding is commenced by the debtor's filing of a petition for reorganization. Id. § 301. Upon the commencement of the case, an "estate" is created, and the debtor's property becomes property of the estate. Id. § 541(a), (b). After the petition is filed, the bankruptcy court either appoints a trustee, id. § 1104, or a debtor in possession, id. § 1107, which is usually the debtor, id. § 1101(1). The debtor must turn the estate over to the trustee or debtor in possession. Id. § 521(3). Unless the bankruptcy court orders otherwise, the trustee or debtor in possession continues to run the business. Id. § 1108. Any time thereafter, usually after an assessment of the debtor's financial condition, the trustee or debtor in possession will file a plan of reorganization. Id. § 1121. This plan designates the claims against the estate and provides for the manner in which the claims will be satisfied. Id. §§ 1123, 1121-1129.

\textsuperscript{11} "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." H.R. REP. No. 595, 95th Cong., 1st Sess. 220 (1977).

Creditors are grouped according to their claim types for purposes of priority. Secured creditors have first priority up to the value of their security interest. The remainder of their claim is satisfied with the claims of general unsecured creditors. 11 U.S.C. § 506 (1982). See 11 U.S.C. § 507 (1982) (priorities of unsecured claims).

According to one study, priority creditors recover less than 33\% and unsecured creditors recover a median of 8\% of their valid claims when the debtor proceeds through a chapter 7 liquidation. In contrast, when the debtor has completed a successful reorganization, priority creditors usually recover fully on their claims, while unsecured creditors recover a median of 19\% under one-payment plans and 10\% under deferred payment plans. D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 129-30, 142-43 (1971).

\textsuperscript{12} "The debtor, its creditors and employees, and the public at large benefit from the
Section 365(a) of the Bankruptcy Code allows adjustment of the debtor's obligations so as to effect a successful reorganization. It authorizes a trustee in bankruptcy to assume or reject any executory contract of the debtor, aside from certain well-delineated exceptions, subject to court approval. The right to reject executory contracts evolved from the principle that a trustee in bankruptcy may renounce title to and abandon property that is burdensome to the bankrupt estate. The right was extended to executory contracts because it would be unfair to creditors to allow the party with whom the debtor had contracted to reap substantial benefits under the contract, while the other creditors were forced to make substantial compromises of their business's survival.” In re Bildisco, 682 F.2d 72, 77 (3d Cir. 1982).

13. Section 365(a) provides: (a) 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. 11 U.S.C. § 365(a) (1982). This provision is applicable to cases brought under each of the Bankruptcy Code’s operative chapters. See supra note 8.

The procedure under chapter 7 is different than that under chapters 9, 11, and 13. Section 365(d) provides:

(d) (1) 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.

(2) In a case under chapter 9, 11 or 13 of this title, the trustee may assume or reject any executory contract or unexpired lease of the debtor at any time before the confirmation of a plan, but the court, on request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.


Thus, in chapter 7, it is within the trustee's sole discretion to reject any executory contract, because if he does not act within the prescribed 60-day period, the contract is automatically deemed rejected. Assumptions, however, must be formally presented to the court for approval, due to the possible drain on the limited resources of the estate resulting from compliance with § 365(b) (1). See infra note 14.

Because the vast majority of cases involving the rejection of collective bargaining agreements pursuant to § 365(a) are chapter 11 reorganizations, this note will address the issue only in terms of chapter 11.

14. Section 1104 provides for the appointment of a trustee in chapter 11 cases. 11 U.S.C. § 1104 (1982). A trustee is a court-appointed official who is charged with a fiduciary duty towards the estate and the creditors. Id. § 1106. Section 1107 provides in pertinent part that “a debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter.” Id § 1107.

to the issue addressed herein, all references will hereinafter be to “debtor in possession,” unless the context otherwise requires.

Section 365(b)(1), which sets out the requirements for assumption of executory contracts, provides:
claims. This right was first incorporated into the Bankruptcy Act in 1938 as a codification of prior law. The provision was reenacted in the Bankruptcy Code at section 365(a). While the main thrust of the provision was unchanged, Congress added a detailed list of conditions and details to section 365 which were not formerly present in the Bankruptcy Act.

The NLRA

The most troublesome problem that arises in connection with the rejection of executory contracts is in the area of labor relations, an area normally within the sole province of the National Labor Relations Act. Congress, in enacting the NLRA, sought to promote the unhampered free flow of commerce through peace

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—
(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
(C) provides adequate assurance of future performance under such contract or lease.
Id. § 365(b)(1).

Rejection of an executory contract constitutes a material breach for which the nondebtor or contracting party may claim damages. Section 365(g) deals with the effect of rejection. Id. § 365(g). Where the contract has not been previously assumed, the breach relates back to the filing of the petition in bankruptcy, and the injured party will have a general unsecured claim under section 502(g). Id. § 502(g). Where the contract has been previously assumed, the breach will be at the time of rejection, and will have priority status if rejection occurred during the administration of the estate as an administrative expense, under section 507(a)(1). Id. § 507(a)(1). See 2 COLLIER ON BANKRUPTCY § 365.08 (15th ed. 1982) for the consequences of a conversion to chapter 7 under § 1112.

15. In re Minges, 602 F.2d 38, 43 (2d Cir. 1979). See also 2 COLLIER ON BANKRUPTCY § 365.01 (15th ed. 1982).

Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties conferred and imposed upon it by this chapter—
(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.


17. See supra note 13.


and stability of labor relations. To mitigate industrial strife and unrest by equalizing the bargaining power with their employers, employees were given the statutory right to organize and bargain collectively through a duly chosen representative.

As a corollary to these employee rights, section 8(a)(5) of the NLRA imposed upon employers the duty to bargain collectively with their employees' representative. The duty to bargain, as defined in section 8(d), prohibits either party from unilaterally terminating or modifying an existing collective bargaining agreement during its life without complying with the terms of the statute. An employer’s failure to bargain collectively constitutes an unfair labor practice.

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

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or necessary effect of burdening or obstructing commerce.

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.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

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 these 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.

Id. § 151.


22. Section 8(a)(5) provides: "It shall be an unfair labor practice for an employer... to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a)(5) (1982)

23. Id. § 158(d).

24. An unfair labor practice charge is a complaint filed with the National Labor Relations Board, alleging that the NLRA has been violated.
The Conflict Between the Bankruptcy Code and the NLRA: Kevin Steel

The Second Circuit, in *Shopmen's Local Union No. 455 v. Kevin Steel Products*, was the first appellate court to address the conflict between section 313(1) of the Bankruptcy Act, the forerunner of section 365(a) of the Bankruptcy Code, and section 8(d) of the NLRA. The court held that the Bankruptcy Act gave the courts the power to reject collective bargaining agreements. The court noted that the language of section 313(1) was broad, and remarked that in similar circumstances the Supreme Court had read the provisions of the Bankruptcy Act literally. The court conceded that the issue was not a simple one that could be resolved solely by reading the statute. Yet, the court found that the conflict was not irreconcilable, reasoning that when the nature of a bankruptcy proceeding is taken into account, the conflict between the Bankruptcy Act and the NLRA disappears.

The court held that upon the filing of a petition in bankruptcy and the appointment of a debtor to operate the business as a

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25. 519 F.2d 698 (2d Cir. 1975).
26. Kevin Steel filed a petition for reorganization under chapter 11 of the Bankruptcy Act, which is now incorporated into chapter 11 of the Bankruptcy Code. See *supra* note 9 and accompanying text. Before the company filed its petition, the union filed unfair labor practice charges against Kevin Steel. See *supra* note 24. The union alleged that Kevin Steel had violated section 8(a)(1) by offering to an employee a bribe to abandon the union, by firing employees on the basis of union affiliation, and by refusing to sign a new collective bargaining agreement. The NLRB found that Kevin Steel had committed these unfair labor practices, and ordered Kevin Steel to cease these activities and sign the collective bargaining agreement. Instead of complying with the NLRB's order, Kevin Steel successfully moved to reject the collective bargaining agreement in the bankruptcy court. The district court reversed, holding that section 313(1) did not apply to collective bargaining agreements. 519 F.2d at 700-01.
28. The court referred to two Supreme Court decisions in which the Court had interpreted the Bankruptcy Act literally, although a different conclusion would have been reached under the NLRA. The Court had held that employer contributions to a union welfare fund are not wages under section 64(a)(2) of the Bankruptcy Act, even though such fringe benefits are wages under the NLRA, in *United States v. Embassy Restaurant*, 359 U.S. 29, 33 (1959). The Court reached the same conclusion with respect to employer contributions to an annuity plan in *Electrical Indus. Joint Bd. v. United States*, 391 U.S. 224 (1968). *Kevin Steel*, 519 F.2d at 703.
29. 519 F.2d at 703.
debtor in possession, a new entity, separate and distinct from the pre-bankruptcy debtor, is created. The court reasoned that because the debtor in possession is a different entity than the debtor, it is not a party to the debtor’s collective bargaining agreement, and is not bound by the provisions of section 8(d) of the NLRA. This new entity, armed with the right to reject executory contracts, however, is also saddled with new obligations. Among these obligations is the duty to bargain with the employees’ representative. Since the debtor in possession is a party to any collective bargaining agreement that results from these negotiations, section 8(d) would govern the agreement’s termination or modification. In any event, under the new entity theory, unless the debtor in possession expressly assumes or enters into a new collective bargaining agreement, it is not a party to the contract, and consequently does not need to comply with section 8(d).

30. Id. at 704. See supra note 14. The “new entity theory,” as it has been termed, has been accepted by many courts since Kevin Steel. See, e.g., In re Bildisco, 682 F.2d 72 (3d Cir. 1982); Local Joint Executive Bd. v. Hotel Circle, Inc., 613 F.2d 210 (9th Cir. 1980); Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, Inc., 523 F.2d 164 (2d Cir.), cert. denied, 423 U.S. 1073 (1975); Matter of Alan Wood Steel Co., 449 F. Supp. 165 (E.D. Pa. 1978); Matter of Gray Truck Line Co., 34 Bankr. 174 (M.D. Fla. 1983); In re S. Elecs. Co., 23 Bankr. 248 (E.D. Tenn. 1982); In re St. Croix Hotel Corp., 18 Bankr. 375 (V.I. D. 1982).

31. In Hotel Circle, the Ninth Circuit reasoned that while the theory “is not inexorable and is based on a policy choice which emphasizes the changed status of the debtor in bankruptcy for purposes of analyzing its obligation under 8(d),” it is a valuable concept in this area, since it would be “anomalous” to bind the receiver to the collective bargaining agreement when a successor employer is not bound. Hotel Circle, 613 F.2d at 214. Nevertheless, the court found that the policy of giving the debtor a fresh start was a more persuasive reason for not automatically imposing a collective bargaining agreement on the receiver. For present purposes, a receiver under the Bankruptcy Act is identical to a trustee or debtor in possession under the Bankruptcy Code. Bankruptcy courts are now prohibited from appointing receivers. 11 U.S.C. § 105(b) (1982). The new entity theory has not been without criticism, however. See Matter of Brada Miller Freight Sys., 702 F.2d 890 (11th Cir. 1983); In re Price Chopper Supermarkets, 19 Bankr. 462 (S.D. Cal. 1982). See also Note, The Labor-Bankruptcy Conflict: Rejection of a Debtor’s Collective Bargaining Agreement, 80 Mich. L. Rev. 134,142-48 (1981); infra note 76. The Supreme Court has held that the debtor in possession is not a new entity for purposes of rejecting collective bargaining agreements. Bildisco, 52 U.S.L.W. at 4274. See infra note 95.

32. The Kevin Steel court suggested that this new entity’s position may be analogous to that of a successor employer. 519 F.2d at 704. The Supreme Court, in NLRB v. Burns Int’l Sec. Serv., 406 U.S. 272 (1972), set forth the rights and duties of a successor employer under the NLRA. The Court held that “where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent,” sections 8(a)(5) and 9(a) of the NLRA require the successor
The *Kevin Steel* court refused to interpret congressional silence as rendering collective bargaining agreements immune from the provisions of section 313(1), for two reasons.\(^{33}\) First, the court noted that Congress was capable of restricting the scope of the section, as it did with collective bargaining agreements formed under the Railway Labor Act in railroad reorganizations.\(^{34}\) The court refused to assume that the special treatment afforded rail employees should be extended to all employees, because the circumstances and problems of rail employees are distinct from those in other industries.\(^{35}\) Second, the court found it significant

employer to bargain with the employees' representative. 406 U.S. at 281. It did not follow, however, that the successor employer was "bound to observe the substantive terms of the collective bargaining contract the union had negotiated with [the predecessor] to which [the successor] had in no way agreed." *Id.* at 281-82. The duty to bargain arises from the voluntary take-over of a certified bargaining unit, not from the existence of a collective bargaining agreement. *Id.* at 287. Moreover, section 8(d) expressly provides that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (1982). It would be inconsistent with this congressional mandate of bargaining freedom to require the successor to adopt specific contractual provisions against his will. Furthermore, binding the successor employer or the union to the terms of the old collective bargaining agreement:

[M]ay result in serious inequities. 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 agreement may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.


33. Nothing in the Bankruptcy Act or the NLRA, nor in the legislative history of either statute, lends any guidance as to Congress's intent as to the treatment of collective bargaining agreements in the bankruptcy setting. The enactment of the Bankruptcy Code shed no light on the subject. *Kevin Steel*, 519 F.2d at 705.

34. *See supra* note 14 and accompanying text. It is probable that Congress was aware of possible conflicts between the Bankruptcy Act and the NLRA as evidenced by the fact the Congress specifically provided in section 15 of the NLRA, 29 U.S.C. § 165 (1982), and section 272 of the Bankruptcy Act, 11 U.S.C. § 672 (1976) (repealed 1979), that the NLRA shall prevail. Moreover, section 606 of the Bankruptcy Act, 11 U.S.C. § 606 (1976) (codified at 11 U.S.C. § 1109 (1982)), permits a union or other representative of the debtor's employees to be heard on the economic soundness of a plan that affects the employees' interests.

35. The court cited International Assoc. of Machinists v. Central Airlines, Inc., 372
that while Congress had repeatedly amended both the Bankruptcy Act and NLRA, neither statute had been changed to reconcile the clash between them.  

The Kevin Steel court was not persuaded by the union’s argument that if collective bargaining agreements could be rejected under section 313(1), businesses would take unfair advantage of this power by filing petitions in bankruptcy merely to rid themselves of their collective bargaining agreements. In light of the “harsh” consequences which resulted from a bankruptcy proceeding, the court found it unlikely that many businesses would find bankruptcy more attractive than operating under a collective bargaining agreement. Furthermore, experience had shown that the union’s fears were unfounded. Even though lower courts had unanimously held that collective bargaining agreements were subject to rejection, businesses had not rushed to the bankruptcy courts in an attempt to reject their collective bargaining agreements.

Additionally, the court noted that it was within the province of the legislature, not the judiciary, to determine whether collective bargaining agreements should be excluded from section 313(1). Upon further observation, however, the policies behind the two statutes and the nature of employee rights at stake mandated a different approach to collective bargaining agreements than that

U.S. 682 (1962), in support of its proposition that “[t]he distinct problems of [railroad employees] and their importance to the national economy are well recognized.” 519 F.2d at 705. Indeed, the Court in Central Airlines discussed Congress’s concern “with minimizing interruptions in the Nation’s transportation services by strikes and labor disputes and [its] successive attempts to establish effective machinery to resolve disputes...” Central Airlines, 372 U.S. at 687. For a review of the history of the railway labor laws, see Elgin, J. & E.R. Co. v. Burley, 325 U.S. 711 (1945).

The court said that the special situation of rail employees was evidenced by differences between the Railway Labor Act and the NLRA. “[T]he former provides for compulsory arbitration of ‘minor’ disputes and ‘grievances’ by a National Mediation Board, and the latter does not.” Kevin Steel, 519 F.2d at 705.


37. 519 F.2d at 702-03.

38. Id. at 703. Presumably, the court was referring to the stigma attached to the need to “go bankrupt” in the business community, and the need to continue operations under the strict supervision of the bankruptcy court.

39. Id. at 706. See supra note 27 and accompanying text.
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appropriate for ordinary commercial contracts. Thus, instead of basing the decision on whether rejection of the collective bargaining agreement would improve the financial status of the debtor, the court held that rejection should be allowed "only after a thorough scrutiny, and a careful weighing of the equities on both sides."41

Finally, the court directed the bankruptcy court on remand to give careful consideration to the union's argument that the court should require special evidence in conjunction with the motion to reject the collective bargaining agreement in light of the prepetition unfair labor practice charges filed against Kevin Steel.42 This evidence would include proof that Kevin Steel was not improperly motivated by a desire to rid itself of the union,43 together with proof of the company's financial condition, the source of its problems, and the benefit that would be realized by rejection. The bankruptcy court was asked to carefully weigh the equities against rejection, including the loss of intangible employee rights.44

RE A Express

Within a month of its decision in Kevin Steel, the Second Circuit was again called upon to determine the propriety of allowing

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40. The court stated:
In 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.

Kevin Steel, 519 F.2d at 707 (quoting In re Overseas Nat'l Airways, 238 F. Supp. 359, 361-62 (E.D.N.Y. 1965)). It has been suggested that the addition of section 502(c), 11 U.S.C. § 502(c) (1982), to the Bankruptcy Code eliminates this concern. 2 COLLIER ON BANKRUPTCY § 365.03 (15th ed. 1982). But see infra note 132 and accompanying text.

41. Kevin Steel, 519 F.2d at 707 (quoting Overseas Nat'l, 238 F. Supp. at 361).

42. See supra note 26 and accompanying text.

43. There has been some disagreement among the courts about this requirement. Some courts state that Kevin Steel requires the debtor to show that he is not improperly motivated in every case. E.g., Matter of Brada Miller Freight Sys., 702 F.2d 890, 901 (11th Cir. 1983); In re Figure Flattery, Inc., 88 Lab. Cas. (CCH) ¶ 11,850 (S.D.N.Y. 1980). Other courts say such evidence is relevant only where there is evidence of unfair labor practices, which give rise to an inference of improper motivation. E.g., In re Kirkpatrick, 34 Bankr. 767 (E.D. Cal. 1983).

44. Kevin Steel, 519 F.2d at 707.
a debtor to reject a collective bargaining agreement. In *Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc.*, the court reiterated its new entity theory, and determined that it also applied in situations where the collective bargaining agreement was formed under the Railway Labor Act. The court held that collective bargaining agreements formed under the Railway Labor Act should receive treatment identical to those formed under the NLRA. Purporting to restate its position in *Kevin Steel*, the court said that the Bankruptcy Act and the Railway Labor Act could be accommodated by allowing the rejection of a collective bargaining agreement where, after carefully weighing all of the equities involved, a court could conclude that an onerous and burdensome collective bargaining agreement was best for all parties.

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45. *Kevin Steel* was argued on June 11, 1975, and decided on July 24, 1975; *REA Express* was argued on June 27, 1975, and decided on Aug. 27, 1975.

46. 523 F.2d 164 (2d Cir.), cert. denied, 423 U.S. 1017, cert. denied, 423 U.S. 1073 (1975). REA Express filed a petition for reorganization under chapter 11 of the Bankruptcy Act, and moved to reject two collective bargaining agreements governed by the Railway Labor Act ("RLA"). As in the NLRA, employers are prohibited from changing the "rates of pay, rules or working conditions of its employees," 45 U.S.C. § 152 (1949), except as prescribed in the statute. The bankruptcy court disallowed rejection, finding that "this is not the kind of rejection or disaffirmance intended by Congress...." 523 F.2d at 167. The district court reversed, holding that § 313(1) places no limitations on the type of executory contract that can be rejected. *Id.*

47. 523 F.2d at 171. See supra notes 30-32 and accompanying text.

48. 523 F.2d at 167-68. Although the collective bargaining agreement at issue was formed under the RLA, § 77(n), the forerunner of § 1167, did not apply in *REA Express* because the case did not involve a railroad reorganization.

The *REA Express* court purported to adopt the *Kevin Steel* standard, yet the court substantially changed the test by requiring a threshold showing that the business will collapse absent rejection. See infra note 50 and accompanying text. But see Matter of Alan Wood Steel Co., 449 F. Supp. 165, 169 (E.D. Pa. 1978) (*Kevin Steel* and *REA Express* both require a showing that failure to reject a collective bargaining agreement "will make a successful reorganization impossible."). The lower courts were split as to whether to follow *REA Express*. In re David A. Rosoro, Inc., 9 Bankr. 190, 191-93 (D. Conn. 1981); In re Connecticut Celery Co., 106 L.R.R.M. (BNA) 2847, 2851-53 (Bankr. D. Conn. 1980); In re Studio Eight Lighting, Inc., 91 L.R.R.M. (BNA) 2429, 2430 (E.D.N.Y. 1976); Matter of Gray Truck Line, Inc., 34 Bankr. 134, 177-80 (M.D. Fla. 1983); In re Blue Ribbon Transp Co., 30 Bankr. 783, 785 (D. R.I. 1983); In re J.R. Elkins, Inc., 27 Bankr. 862, 862-63 (E.D.N.Y. 1983); In re Commercial Motor Freight, Inc. of Ind., 27 Bankr. 293, 296-97 (Bankr. S.D. Ind. 1983); In re Hoyt, 27 Bankr. 13, 14-15 (D. Or. 1982); In re Braniff Airways, 25 Bankr. 216, 218-19 (S.D. Tex. 1982).

49. The court held that the equities include the interests sought to be protected by the Railway Labor Act. The objectives of the RLA are quite similar to those of the NLRA. They are set out in section 151(a), which provides:

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon
agreement would "thwart efforts to save a failing carrier from collapse." A collective bargaining agreement could be rejected only where the debtor in possession could show that adherence to the collective bargaining agreement would destroy any prospects of rehabilitation.

The court noted that the practical effect of section 313(1) in a chapter 11 case is to force the parties who have executory contracts with the debtor to renegotiate their mutual rights and obligations. This enables the debtor in possession to maintain the business as a going concern, and allows the creditors to recover at least a substantial portion of their claims. The court reasoned that creditors in a chapter 11 proceeding generally must relinquish some of their rights under their respective executory contracts. It advised the unions and employees to do the same, since insistence on strict adherence to the collective bargaining agreement would destroy the debtor's chance to rehabilitate. To act otherwise in such a situation would lead to the demise of the business and frustrate the purposes of the Railway Labor Act itself.

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freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of interpretation or application of agreements covering rates of pay, rules, or working conditions.


50. 523 F.2d at 169. Rephrased, the court's position is that "in view of the serious effects which rejection has on the carrier's employees it 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 and the employees will no longer have their jobs." Id. at 172.

It is difficult to see how a balancing of the equities would ever be a part of the test proposed by the REA Express court. If the debtor in possession failed to make a threshold showing that assumption of the collective bargaining agreement would destroy the prospect of a successful reorganization, a court would never get to the balancing. Alternatively, if the debtor in possession succeeded in making this threshold showing, the collective bargaining agreement should always be rejected, since rejection is preferable to the employees losing their jobs.

51. See supra note 11 and accompanying text.

52. See supra note 49.
IN RE BILDISCO

The Appellate Decision

In In re Bildisco,\textsuperscript{53} the Third Circuit was the first appellate court to address the conflict between the NLRA and the bankruptcy laws under the current Bankruptcy Code.\textsuperscript{54} On April 14, 1980, Bildisco & Bildisco filed a petition for reorganization under chapter 11 of the Bankruptcy Code, and was authorized to operate the business as a debtor in possession.\textsuperscript{55} At that time, nearly half of Bildisco's labor force was covered by a collective bargaining agreement, which was to expire on April 30, 1982. Beginning in January 1980, Bildisco failed to meet certain obligations under the collective bargaining agreement, and, in May, refused to pay wage increases as provided in the agreement.\textsuperscript{56} The debtor in possession moved to reject the collective bargaining agreement in December 1980, claiming that rejection would save the company $100,000 in 1981.\textsuperscript{57} The bankruptcy court allowed rejection on January 15, 1981.\textsuperscript{58}

Meanwhile, during the summer of 1980, the union had filed unfair labor practice charges with the NLRB, complaining of

\textsuperscript{53} 682 F.2d 72 (3d Cir. 1982). Bildisco filed a petition for reorganization under chapter 11, and moved to reject its collective bargaining agreement with the union, claiming that rejection could save the company $100,000 in 1981. The bankruptcy court, unsure of the applicability of pre-Code law, allowed rejection. 682 F.2d at 75 n.3. While the motion was pending before the bankruptcy court, the union filed unfair labor practice charges against Bildisco, alleging that Bildisco had violated section 8(a)(5) of the NLRA by refusing to grant wage increases, to pay pension and welfare contributions, and to turn union dues over to the union. \textit{Id.} at 75. See \textit{supra} note 23. Bildisco failed to answer the complaint. After the bankruptcy court granted the motion to reject, the NLRB entered summary judgment against Bildisco on the unfair labor practice charges. The case before the Third Circuit was a consolidation of the union's appeal from the bankruptcy court's order and the NLRB's application for enforcement of its order that Bildisco comply with the terms of the collective bargaining agreement. \textit{Id.} at 75-76.

\textsuperscript{54} See \textit{supra} note 7 and accompanying text. Several lower courts had already confronted the issues under the new Code. In re Reserve Roofing Florida, Inc., 21 Bankr. 96 (M.D. Fla. 1982); In re Price Chopper Supermarkets, 19 Bankr. 462 (S.D. Cal. 1982); In re Ateco Equip., 18 Bankr. 915 (W.D. Pa. 1982); In re St. Croix Hotel Corp., 18 Bankr. 375 (V.I. D. 1982); In re Land County Sheriff's Ass'n, 16 Bankr. 190 (D. Or. 1981); Matter of David A. Rosow, Inc., 9 Bankr. 190 (D. Conn. 1981). \textit{In re Ateco} was the only case that took the position that pre-Code case law was not controlling under the Bankruptcy Code.

\textsuperscript{55} 52 U.S.L.W. at 4271. See \textit{supra} notes 10, 14.

\textsuperscript{56} See \textit{supra} note 53.

\textsuperscript{57} 52 U.S.L.W. at 4272.

\textsuperscript{58} \textit{Id.}
Bildisco’s pre- and post-petition activities. The NLRB, finding that Bildisco had committed unfair labor practices by unilaterally modifying the collective bargaining agreement and by refusing to negotiate with the union, ordered Bildisco to comply with the terms of the collective bargaining agreement. The appeal before the Third Circuit was a consolidation of the union’s appeal from the bankruptcy court’s order allowing rejection of the collective bargaining agreement and the NLRB’s petition for enforcement of its order.

The court held that collective bargaining agreements formed under the NLRA were not immune from the operation of section 365(a). The court further agreed with the *Kevin Steel* and *REA Express* courts that, due to the nature of collective bargaining agreements, rejection should require the debtor in possession to meet a standard stricter than the business judgment test. The *Bildisco* court recognized, however, that the *REA Express* standard reflected a substantial departure from *Kevin Steel*. Find-
ing the REA Express standard unworkable, the court instead found that the Kevin Steel standard, requiring "thorough scrutiny, and a careful balancing of the equities on both sides," reflected the correct balance between the competing statutory policies.65

The Bildisco court clarified the balancing of equities test by suggesting several factors that should be considered by a bankruptcy court before permitting a rejection of a collective bargaining agreement.66 First, the court held that the debtor in possession must make a threshold showing that the collective bargaining agreement was burdensome to the debtor.67 After the rejection of a collective bargaining agreement, the debtor must bargain with the employees' representative. Since the employees retain their right to strike should negotiations fail, a court should consider the potential impact of a strike on the struggling business.68 In addition, a court should consider the potential impact for two important reasons: First, it may be impossible to predict whether or not reorganization can be successfully accomplished until very late in the proceedings. For example, at the date of oral argument in Bildisco, two years had elapsed since Bildisco filed its petition for reorganization, and it was still uncertain whether the company would be forced into liquidation. Second, "by erecting an excessive evidentiary barrier to rejection," this standard might harm the workers it seeks to protect. Id. at 80. If the debtor cannot convince the court prior to confirmation of the plan that it will be impossible to reorganize while adhering to the collective bargaining agreement, rejection will be disallowed. If the collective bargaining agreement proves to be detrimental in the future, there is nothing the debtor can do except go into a liquidation, causing the employees to lose their jobs. Thus, this test "unduly exalts the perpetuation of the collective bargaining agreement over the more pragmatic consideration of whether the employees will continue to have jobs at all." 682 F.2d at 80.

65. 682 F.2d at 79 (quoting Kevin Steel, 519 F.2d at 707 (quoting Overseas Nat'l, 238 F. Supp. at 361)). See supra note 41.

66. The court cautioned that this list was not intended to be exhaustive. Each case is unique and may require a consideration of additional, or even different, factors. 682 F.2d at 80.

67. The Bildisco court's "burdensome" requirement is distinguishable from the REA Express court's "onerous and burdensome" standard in that the former does not require a showing that reorganization would be impossible without rejection of the collective bargaining agreement. The Bildisco court required only a showing that rejection will assist reorganization.

68. Although this distinction may be unimportant, it is interesting to note that Kevin Steel was rather indefinite on this point, while the Bildisco court phrased this as an absolute requirement. This appeared to be the accepted view before the Supreme Court made clear that the debtor in possession is definitely under a duty to bargain after rejection. See Matter of Brada Miller Freight Sys., 702 F.2d 890 (11th Cir. 1983); Carpenters Local Union No. 2746 v. Turney Wood Prods., 289 F. Supp. 143 (W.D. Ark. 1968); Matter of Gray Truckline Co., 34 Bankr. 174 (M.D. Fla. 1983); In re Blue Ribbon Transp. Co., 30 Bankr. 738 (D. R.I. 1983); In re Concrete Pipe Mach. Co., 26 Bankr. 837 (N.D. Iowa 1983);
of claims for breach on the debtor, as well as the adequacy of relief the employees might realize. In this regard, the court must take into account the sacrifices other creditors were making to insure a successful reorganization. Finally, the court suggested there were other factors to be considered, such as the proportion of employees covered by the collective bargaining agreement, a comparison of their wages and benefits to others in the industry, and the good or bad faith of the debtor, the union, and the employees in dealing with the company's insolvency.

The Bildisco court, unlike the courts in Kevin Steel and REA Express, also dealt with the issue of whether section 8(d) of the NLRA prohibited the debtor in possession from unilaterally modifying a collective bargaining agreement in the interim period between filing the petition and formal rejection. The court noted that because the debtor in possession was a new entity, not a party to the collective bargaining agreement, it was free to modify unilaterally the collective bargaining agreement. Accordingly, the court held that the NLRB erred in finding the debtor

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In re Commercial Freight, Inc. of Ind., 27 Bankr. 293 (S.D. Ind. 1983); In re Southern Elecs. Co., 23 Bankr. 348 (E.D. Tenn. 1982); In re Price Chopper Supermarkets, 19 Bankr. 462 (S.D. Cal. 1982); In re St. Croix Hotel Corp., 18 Bankr. 375 (V. I. D. St. Croix 1982). None of these courts, however, required the debtor in possession to bargain with the union prior to rejection of the collective bargaining agreement. See infra note 135 and accompanying text.

Section 7 of the NLRA grants to employees the right to "engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . " 29 U.S.C. § 157 (1982). This right, along with the debtor's obligation to bargain, remains intact upon rejection of the collective bargaining agreement.

69. See supra note 40 and accompanying text.

70. "The polestar is to do equity between claims which arise under the labor contract and other claims against the debtor." 682 F.2d at 81.

71. Some courts have voiced the opinion that this factor is irrelevant, "since it focuses on the pre-bankruptcy business decisions of the debtor's management which, if made in good faith, are largely beyond the scope of judicial review under the business judgment rule." Matter of Brada Miller Freight Sys., Inc., 702 F.2d 890, 900 n.35 (11th Cir. 1983). Accord In re Blue Ribbon Transp. Co., 30 Bankr. 783, 786 (D. R.I. 1983) ("The argument that the contract is fair on a nationwide basis is irrelevant to the issue before us, i.e., is the contract burdensome to this debtor in possession?" (emphasis in original)); Matter of Allied Supermarkets, 6 Bankr. 968, 978 (E.D. Mich. 1980) (the proper standard is not whether the collective bargaining agreement is unusually burdensome, but whether it is burdensome on the debtor in possession).

72. See infra note 135 and accompanying text. The court made it clear that the burden of persuading the bankruptcy court that the collective bargaining agreement is burdensome and that the equities weigh in favor of rejection is on the debtor in possession. Presumably, if the debtor in possession fails to meet this burden, even if the union presents no evidence to the contrary, rejection will be disallowed.

73. 682 F.2d at 82-84.
in possession guilty of post-petition unfair labor practices.\textsuperscript{74} The court further reasoned that since rejection of an executory contract would relate back to the time immediately prior to the filing of a petition in bankruptcy, no collective bargaining agreement would "effectively exist" after the commencement of the bankruptcy proceeding if the bankruptcy court ultimately allowed rejection.\textsuperscript{75} Thus, the NLRB must await the bankruptcy court's ruling on a motion to reject a collective bargaining agreement before it can proceed on post-petition unfair labor practice charges.\textsuperscript{76}

\begin{footnotesize}
\begin{enumerate}
\item The court concluded that the NLRB's position depends on its "fundamental misconception" that the debtor in possession is an alter-ego of the pre-bankruptcy debtor. \textit{Id.} at 83. "A debtor-in-possession is given powers comparable to those of a trustee, and it is thus an officer of the court." \textit{Id.} at 82. The court agreed with Kevin Steel's analogy of the debtor in possession as a successor employer. See supra note 32.

The court's determination did not affect the NLRB's treatment of pre-petition unfair labor practice charges. The filing of a petition in bankruptcy coupled with a later rejection of the collective bargaining agreement does not render section 8(d) inapplicable to pre-petition activities of the debtor.

\item \textit{Id.} at 84.

\item \textit{Id.}

The most recent appellate decision dealing with the rejection of collective bargaining agreements in bankruptcy is Matter of Brada Miller Freight Sys., 702 F.2d 809 (11th Cir. 1983). In \textit{Brada Miller}, the Eleventh Circuit interpreted the express language of section 365 to include collective bargaining agreements. Moreover, the existence of section 1167 in the Bankruptcy Code demonstrated that Congress was fully capable of removing certain labor agreements from the general power of the bankruptcy courts to allow rejection of executory contracts. See supra note 14. Despite numerous amendments, Congress has not excluded collective bargaining agreements from the scope of section 365(a). See supra notes 6, 36, and accompanying text.

Interestingly, while the \textit{Brada Miller} court agreed with the Second and Third Circuits that a debtor in possession may reject a collective bargaining agreement, it found the new entity theory untenable. In the court's opinion, the theory was merely a legal fiction, developed in an attempt to avoid the dispute between the Bankruptcy Code and the NLRA. The court recognized that "the debtor in possession may constitute a 'new juridical entity' for some purposes," one "obvious example" being the broad powers granted to it under the Bankruptcy Code. 702 F.2d at 895. The debtor, however, is "indistinguishable from the pre-bankruptcy corporation as far as concerns their respective obligations under the collective bargaining agreement and the labor laws that regulate the formation, existence, and termination of such agreements." \textit{Id.}

The greatest problem with the theory, according to the \textit{Brada Miller} court, is its inconsistency with the fact that the debtor in possession, not a "party" to the collective bargaining agreement, must apply to the court for permission to reject the collective bargaining agreement. The court reasoned that if the debtor in possession was really a new entity, and not a party to the contract, then the contract should be deemed rejected upon the filing of a petition in bankruptcy. The statute should then allow the debtor discretionary power to assume the contract of the pre-bankruptcy entity. \textit{Id.} at 895. If a court disallows rejection, a debtor in possession is bound retroactively to the contract from the time of filing the petition. See supra note 14. No legal theory has been advanced to justify binding a non-party to a collective bargaining agreement. In such a situation, the fact
\end{enumerate}
\end{footnotesize}
The Supreme Court Decision
The Standard for Rejection of Collective Bargaining Agreements

The Supreme Court unanimously affirmed the Third Circuit's opinion as to the standard to be applied in allowing the rejection

that the debtor may be liable for breaches of the collective bargaining agreement in the interim between filing its petition and rejection is irreconcilable with the new entity theory. 702 F.2d at 895. See supra note 14. The court argued that the viability of the theory was contingent upon allowing rejection of the contract.

The court pointed to the Second Circuit's attempt to restrict the theory to cases involving rejection of collective bargaining agreements where section 8(d) was alleged to preclude rejection except in accordance with its terms. The court reasoned, however, that no logical distinction could be raised between collective bargaining agreements and other executory contracts that would justify this restriction. "The more the theory is forcibly restricted to a particular legal situation, the more apparent becomes its character as a 'legal fiction.'" 702 F.2d at 896. Nevertheless, the court noted, the analogy drawn between the debtor and a successor employer is not without validity. One justification for not binding successor employers to the substantive terms of collective bargaining agreements applies in the context of a chapter 11 reorganization. Just as binding successor employers to the collective bargaining agreements of their predecessors might restrict the "alienability of business enterprises and therefore frustrate the most efficient use of the nation's resources," it may be impossible for a bankrupt business undergoing a reorganization to attract fresh management and investors if a burdensome collective bargaining agreement cannot be rejected. Id. at 897 (quoting Burns Int'l, 406 U.S. at 287-88). Without such help, it may be impossible to rehabilitate the business, and the goals of chapter 11 would be defeated. See supra note 11 and accompanying text.

Nonetheless, the court held that too many interests were at stake in a chapter 11 reorganization to conclude that the continuation of a collective bargaining agreement should be of paramount importance, immune from the flexibility that section 365(a) provides. Although employees covered by the collective bargaining agreement arguably have interests superior to those of other affected parties, they can best be protected by a balancing test, rather than a blanket prohibition from rejecting collective bargaining agreements. The court agreed with Bildisco that the Kevin Steel standard, advocating "a thorough scrutiny, and a careful weighing of the equities on both sides," best accommodated the myriad of interests involved in a chapter 11 reorganization. See supra note 11. The court substantially recapped the Bildisco court's list of appropriate factors which should be considered in weighing the equities. See supra notes 67-72 and accompanying text. The Brada Miller court also suggested some additional considerations. First, a court should consider the possibility of liquidation, both with and without the rejection, and a weighing of the impact it would have on each party involved. The court cautioned that this is only one factor, and although it may be the most important consideration in some cases, it should not be of such paramount importance as the REA Express court held:

In many instances, the threat of liquidation with its incumbent loss of jobs and default on debts will properly constitute the principal factor in a judge's decision to allow rejection. We mean only to stress that this factor alone should not be decisive absent some consideration of the other interests involved.

702 F.2d at 899 n.26. The Brada Miller court further suggested that the "cost-spreading abilities of the parties" should be considered before allowing rejection of a collective bargaining agreement. In other words, the losses the employees would incur from the rejection of the collective bargaining agreement should be compared to the losses other creditors and the debtor would suffer from its assumption. The court should then determine
of collective bargaining agreements.\textsuperscript{77} The Court agreed that collective bargaining agreements are executory contracts, and that the detailed text of section 365 refutes any inference that, due to their special nature, collective bargaining agreements should be exempt from the ambit of that section.\textsuperscript{78} Nonetheless, the Court held that the special nature of the collective bargaining agreement mandated a standard stricter than that governing the rejection of ordinary commercial contracts.\textsuperscript{79}

The Court found, however, that the stringent \textit{REA Express} standard, which would allow rejection only upon a showing that adherence to the collective bargaining agreement would destroy the debtor's prospects of rehabilitation, was "fundamentally at odds" with the overall scheme of flexibility and equity embodied in chapter 11.\textsuperscript{80} The Court recognized that the rights of employees under collective bargaining agreements were important. Yet the \textit{REA Express} standard unduly subordinated the myriad of competing considerations to the single issue of whether the collective bargaining agreement must be rejected to prevent liquidation. Such a standard presented evidentiary difficulties that

\begin{itemize}
\item \textsuperscript{77} See supra notes 57-66 and accompanying text.
\item \textsuperscript{78} See supra note 14 and accompanying text. As an amicus, the United Mine Workers of America argued to the Court that a collective bargaining agreement is not an executory contract within the meaning of section 365(a). The Supreme Court, however, rejected this argument, recognizing that "at any point during the life of the contract, performance was due by both parties." 52 U.S.L.W. at 4273 n.6.
\item \textsuperscript{79} See supra note 1 and accompanying text.
\item \textsuperscript{80} 52 U.S.L.W. at 4273. See supra note 50 and accompanying text. The NLRB argued that Congress intended to adopt the standard announced in \textit{REA Express}. In the legislative history of section 82 of the Bankruptcy Act, which provided for the rejection of executory contracts in municipal bankruptcies, the report of the House Committee on the Judiciary referred to \textit{Kevin Steel} and \textit{REA Express} for the proposition that a stricter standard than the "business judgment" test was necessary to reject a collective bargaining agreement. H.R. REP. NO. 686, 94th Cong., 2d Sess. 17-18 (1975). The NLRB argued that since section 365(a) is now applicable to municipal bankruptcies, and since Congress has demonstrated an awareness of \textit{REA Express}, the strict standard announced therein should be adopted by the Court. Brief for Appellee at 19, \textit{Bildisco}. The Court disposed of this argument, stating:
\begin{quote}
The reference in the House report to \textit{Kevin Steel} and \textit{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 \textit{REA Express}, since the report indicates no preference for either formulation. At most, the House report supports only an inference that Congress approved the use of a somewhat higher standard than the business judgment rule when appraising a request to reject a collective bargaining agreement.
\end{quote}
\end{itemize}

\textsuperscript{52} U.S.L.W. at 4274.
would interfere with reorganization.\textsuperscript{81}

Rather than hold debtors in possession to the stricter \textit{REA Express} standard, the Court adopted the lower court's balancing of equities test first espoused in \textit{Kevin Steel}.\textsuperscript{82} Before allowing rejection, the Court stated that bankruptcy courts should be satisfied that the debtor in possession had made "reasonable efforts to negotiate a voluntary modification" of the collective bargaining agreement, but that such efforts were not likely to satisfactorily resolve the problem.\textsuperscript{83} Such a requirement, the Court reasoned, was necessary to adequately serve the policies of the NLRA. Section 8(a)(5) of the NLRA placed the debtor in possession under a duty to bargain with the employees' representative.\textsuperscript{84} Moreover, the national labor policy of avoiding labor unrest and encouraging collective bargaining required that employers and unions reach their own agreements free from governmental interference.\textsuperscript{85} The bankruptcy court should step into the bargaining process only when the parties' inability to agree rendered interference necessary to effect a successful reorganization.\textsuperscript{86}

The Court further held that the bankruptcy courts should permit rejection only in furtherance of the chapter 11 policy of successful rehabilitation.\textsuperscript{87} The Court stated that determining whether this goal would be served involved balancing the interests of the debtor, the employees, and the other creditors.\textsuperscript{88} In this respect, the courts should consider the possibility of liquidation absent rejection and the impact this would have on the debtor.\textsuperscript{89} The bankruptcy court should also take into account the reduced value of the creditors' claims that would result from assumption of the collective bargaining agreement, the impact of rejection on the employees, and the "qualitative differences between the types of hardship each may face."\textsuperscript{90}

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\item \textsuperscript{81} 52 U.S.L.W. at 4274.
\item \textsuperscript{82} \textit{Id.} \textit{See supra} note 41 and accompanying text.
\item \textsuperscript{83} 52 U.S.L.W. at 4274.
\item \textsuperscript{84} \textit{See supra} note 22.
\item \textsuperscript{85} \textit{See supra} notes 20, 21, and accompanying text.
\item \textsuperscript{86} 52 U.S.L.W. at 4274. The court emphasized that the bankruptcy court need not determine that the parties have bargained to impasse "or make any other determination outside its field of expertise." \textit{Id.}
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.} The Court stressed the importance of focusing on the ultimate goal of chapter
\end{itemize}
Interim Unilateral Modification of the Collective Bargaining Agreement

The second issue, whether post-petition unilateral modification of a collective bargaining agreement constituted an unfair labor practice, proved more difficult for the Court. In a 5-4 decision, the Court held that the NLRB may not impose unfair labor practice charges on the debtor in possession for unilaterally modifying the collective bargaining agreement in the interim between filing the chapter 11 petition and the bankruptcy court’s order allowing rejection of the collective bargaining agreement.

To hold that such interim modifications constituted an unfair labor practice, the Court said, would undermine the benefit that section 365(a) bestows upon the debtor in possession. The chapter 11 debtor in possession may decide to assume or reject executory contracts at any time until the plan of reorganization is confirmed. Allowing the NLRB to enforce the collective bargaining agreement through unfair labor practice charges would place the debtor in possession under financial pressure to make a speedy decision whether to assume or reject the collective bargaining agreement.

The Court further held that, although the debtor in possession was the same entity as the pre-petition debtor, various provi-
sions of the Bankruptcy Code led to the conclusion that the filing of a petition in bankruptcy rendered the collective bargaining agreement immediately unenforceable. Rejection of an executory contract constituted a breach which related back to the time immediately before the filing of the petition. The automatic stay provisions of the Bankruptcy Code would operate to stay any action against the debtor that was or could have been brought before the commencement of the bankruptcy proceedings. Thus, because rejection related back, any actions based upon such a contract were automatically stayed, and recovery for damages could be had only through the Bankruptcy Code’s administration of claims procedures. Moreover, since rejection of an executory contract was retroactive, compensation for interim services provided by the other party to the contract was an equitable right based on the reasonable value of the services, rather than a contractual right. “The necessary result of the foregoing,” the Court reasoned, was that from the date of filing until formal assumption, the collective bargaining agreement was not an enforceable contract within the meaning of section 8(d) of the NLRA. The practical effect of allowing the NLRB to impose post-petition unfair labor practice charges against the debtor in possession was to force adherence to the collective bargaining agreement. Such a result, the Court said, would directly contravene the relation back and automatic stay provisions of the Bankruptcy Code, and was, therefore, prohibited.

96. *Id.* at 4275.

When the Court does not argue that the automatic stay provision would bar an NLRB proceeding to enforce § 8(d) or that any award in such proceedings would not be recovered through the bankruptcy claims administration procedures, I fail to see why the Court finds these sections relevant to our resolution of the issue before us. 52 U.S.L.W. at 4280 n.17. Although the majority’s reasoning in this part of the opinion is not clear, it is difficult to say that they did not intend to argue that the automatic stay provisions would bar NLRB proceedings.

100. 52 U.S.L.W. at 4275.
101. *Id.*
102. *Id.* The Court also rejected the union’s argument, not advanced by the NLRB, that the debtor in possession must comply with the protracted modification procedures set forth in section 8(d). *See supra* note 23. Since no enforceable collective bargaining agreement exists between filing and rejection, section 8(d) procedures for modification are not applicable, nor is the debtor in possession required to bargain to impasse before seek-
The dissent, led by Justice Brennan, criticized the majority for failing to consider the national labor policies of avoiding economic warfare and encouraging collective bargaining in holding that interim unilateral modifications did not constitute an unfair labor practice. These policies should not be overlooked when the language of the two conflicting statutes do not "clearly compel" such a result.

The dissent took issue with the fact that while the majority found that the collective bargaining agreement would become unenforceable upon the filing of a chapter 11 petition, section 8(d) prohibited unilateral modifications when a collective bargaining agreement was "in effect." In the dissent's view, although enforcement of the collective bargaining agreement was suspended in the interim period, it remained "in effect" within the meaning of section 8(d) for three reasons. First, the collective bargaining agreement would support a claim arising out of the debtor's interim obligations whether it was ultimately rejected or assumed. Second, when the collective bargaining agreement was rejected, the estate would be liable to employees for the reasonable value of the services they rendered in the interim period. The debtor-in-possession, as an employer under the NLRA, must still "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."

Further, the dissent noted that section 8(d) is to be flexibly construed so as to effectuate the policies of the NLRA, and that deference should be given to the NLRB's construction of the NLRA. The majority replied that "while that Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its field of expertise is likewise to be deferred to is novel. We see no need to defer to the Board's interpretation of Congress' intent in passing the Bankruptcy Code."
The dissent noted that the reasonable value was usually found to be the contract rate. Third, courts often referred to executory contracts as remaining in effect until they were formally rejected.

The dissent found that a debtor in possession was an employer within the meaning of the NLRA, and section 8(a)(5) imposed the duty to bargain in good faith on employers. Thus, section 8(d), which incorporated the restraints on unilateral modifications of collective bargaining agreements into the definition of that duty, applied to all employers, including debtors in possession. Since the collective bargaining agreement remained "in effect" in the interim period, and the NLRA specifically imposed the duty to bargain on the debtor in possession, the dissent said that the majority's holding must be further analyzed in light of the competing policy considerations of the NLRA and the Bankruptcy Code.

The dissent noted that the fundamental policy underlying the NLRA was to avoid industrial strife by encouraging collective bargaining. The prohibition against unilateral modifications

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107. 52 U.S.L.W. at 4279 (Brennan, J., dissenting).
108. Id. at 4279 n.13 (Brennan, J., dissenting). The dissent further reasoned:

Even if we could say that the collective bargaining agreement is not 'in effect' and that the notice and waiting period requirements of § 8(d) are inapplicable, it does not necessarily follow that the debtor-in-possession may unilaterally alter terms and conditions of employment. For example, in *NLRB v. Katz*, 369 U.S. 736, 743 (1962), although the parties had not yet concluded their negotiations for an initial collective bargaining agreement, we held that "an employer's unilateral change in conditions of employment under negotiation is... a violation of § 8(a)(5) for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal to negotiate." In addition, it has been widely held that an employer generally may not make unilateral changes in matters that are mandatory subjects of bargaining even after a collective bargaining agreement has expired.

Id. at 4279 n.14 (Brennan, J., dissenting).

109. Section 2 of the NLRA provides in pertinent part: "When used in this Act... The term "person" includes one or more... trustees in cases under title II... The term "employer" includes any person acting as an agent of an employer..." 29 U.S.C. § 152 (1982).

A debtor in possession, by virtue of the Bankruptcy Code, has all the rights and duties of a trustee in bankruptcy. See supra note 14.

110. 52 U.S.L.W. at 4280 (Brennan, J., dissenting).
111. Id. "A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce. Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channelling conflict between labor and management." Id. (quoting First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 674 (1980)). See supra notes 20, 21, and accompanying text.
found in section 8(d) was designed in furtherance of this goal, by replacing economic warfare with agreement. In the dissent’s view, the need for subservience to this policy was not diminished in any way by the filing of a petition in bankruptcy.\textsuperscript{112}

The dissent found that the policies and provisions of the Bankruptcy Code did not alter the conclusion that the commencement of a chapter 11 proceeding did not render section 8(d) inapplicable.\textsuperscript{113} Rather, prohibiting unilateral modifications before formal rejection of the collective bargaining agreement would not jeopardize prospects of successful reorganization. The standard announced by the Court for allowing rejection ensured that where a collective bargaining agreement was so burdensome that even temporary adherence to it would endanger the reorganization, the debtor in possession would be able to reject the contract.\textsuperscript{114} Indeed, permitting pre-rejection unilateral modifications might cause labor unrest, which was likely to decrease chances for a successful reorganization.\textsuperscript{115}

The dissent found unpersuasive the majority’s view that prohibiting interim unilateral modifications would undermine the Bankruptcy Code’s efforts to give the debtor in possession flexibility and breathing space.\textsuperscript{116} Admittedly, such insistence might force debtors in possession to seek early rejection of collective bargaining agreements that would, upon further deliberation, have been assumed. The dissent argued, however, that in the case of collective bargaining agreements, this danger was “large-

\begin{itemize}
\item \textsuperscript{112} 52 U.S.L.W. at 4280 (Brennan, J., dissenting). “I do not think that there is any question that the threat to labor peace stemming from a unilateral modification of a collective bargaining agreement is as great one day after a bankruptcy petition is filed as it was one day before the petition was filed.” \textit{Id.}
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{Id. See supra notes 82-90 and accompanying text.}
\item \textsuperscript{115} 52 U.S.L.W. at 4280 (Brennan, J., dissenting).
\item \textit{Id. at 4280 n.16 (Brennan, J., dissenting).}
\item \textsuperscript{116} \textit{Id. at 4281 (Brennan J., dissenting).}
\end{itemize}
ly illusory.\textsuperscript{117} First, because employees had a stake in successful reorganization, the debtor in possession would probably be able to negotiate a new collective bargaining agreement that would be at least as favorable as the rejected contract. Second, unions might frequently be willing to forestall impending rejection by entering into negotiated settlements for the interim period. Thus, in many cases, requiring compliance with section 8(d) in the interim period would not lead to premature rejection of collective bargaining agreements and, even where it did, the debtor in possession's chances for a successful reorganization were not likely to be endangered.\textsuperscript{118}

\section*{Analysis}

\textit{The Standard for Rejection of Collective Bargaining Agreements}

A debtor in possession's use of the bankruptcy laws to reject a collective bargaining agreement presents a serious conflict between two important federal policies.\textsuperscript{119} The Supreme Court has sought to give as much effect to each of these policies as possible,\textsuperscript{120} and has formulated a standard for rejection which most fully meets this objective.

In \textit{Bildisco}, the Supreme Court correctly held that collective bargaining agreements can be rejected in a chapter 11 proceeding.\textsuperscript{121} The lack of any legislative history directly on point has been a major impediment to the resolution of this question. Inferences drawn from the Bankruptcy Code and the congressional record, however, support the Court's conclusion that collective bargaining agreements are subject to rejection under section 365(a).\textsuperscript{122}

\footnotesize
\begin{flushleft}
\textsuperscript{117} \textit{Id.}

\textsuperscript{118} \textit{Id.} The dissent did agree with the majority that strict compliance with the protracted procedures set forth in section 8(d) is not necessary before the debtor in possession can seek rejection, since such a requirement would make rapid determinations impossible. Nor must the debtor in possession bargain to impasse before moving to reject the collective bargaining agreement. The dissent's position was just that, until formal rejection, the debtor in possession may not unilaterally modify the collective bargaining agreement without compliance with section 8(d). \textit{Id.} at 4278 n.9 (Brennan, J., dissenting).

\textsuperscript{119} \textit{See supra} note 26 and accompanying text.


\textsuperscript{121} \textit{See supra} note 78 and accompanying text.

\textsuperscript{122} \textit{See supra} note 13 and accompanying text. The most convincing evidence is found in the legislative history of section 82 of the Bankruptcy Act, Pub. L. No. 94-260, 90 Stat. 316 (formerly codified at 11 U.S.C. \$ 402 (1975)). \textit{See supra} note 80. Section 82 pro-
Due to the complexity of the issues involved, the reconciliation of section 365(a) of the Bankruptcy Code with the NLRA is a difficult task. The Supreme Court’s resolution of this dilemma, however, successfully gives the maximum possible effect to both statutes. The Court correctly determined that the \textit{REA Express} standard, which placed a very high burden of proof on the debtor in possession, did not meet this goal.\footnote{123} Although the balancing of equities test set forth in \textit{Kevin Steel} was not without shortcomings, the Supreme Court aptly used it as a foundation for a standard which fairly compromised the policies and provisions of the Bankruptcy Code and the NLRA.

Provided that in municipal bankruptcies, which were governed by chapter 11 of the Bankruptcy Act, the court could permit the rejection of executory contracts. In discussing the effect of rejection under this section, Congress noted that in some circumstances, the debtor would be required to renegotiate an executory contract after rejection. A specific example of such a contract is a collective bargaining agreement.

In some instances, it will be necessary for the petitioner to renegotiate a contract which has been rejected with the approval of the court. Such renegotiation and formulation of a new contract would, of course, have to be in accordance with applicable Federal, State or municipal law. For example, if a collective bargaining agreement had been rejected, applicable law may provide a process or procedure for the renegotiation and formation of a new collective bargaining agreement.

\textit{H.R. REP. No. 686, 94th Cong., 2d Sess. 8 (1975).} When the Bankruptcy Act was repealed by the Bankruptcy Code, section 82 became part of section 365. \textit{See supra} note 7 and accompanying text. The legislative history of section 365 does not include any similar commentary. Absent some indication from Congress to the contrary, however, this passage, showing that Congress fully anticipated the rejection of collective bargaining agreements, applies equally to section 365.

Secondly, the Supreme Court correctly noted that section 365 contains a detailed list of conditions and special provisions. These were not present in the Bankruptcy Act, and they reflect the careful scrutiny with which Congress enacted section 365. \textit{See supra} note 14 and accompanying text. The fact that Congress deliberated over this section, yet failed to pay special attention to the rejection of collective bargaining agreements formed under the NLRA, permits an inference that Congress did not intend to single out collective bargaining agreements from the general power to reject executory contracts. This inference is strengthened by the fact that Congress anticipated the rejection of collective bargaining agreements under section 82 only three years earlier.

Significantly, Congress did exempt one specific type of collective bargaining agreement from the operation of section 365. \textit{See supra} note 14. In a railroad reorganization case, the court’s power to allow rejection of collective bargaining agreements formed under the Railway Labor Act is severely limited to provisions other than wages and working conditions. Congress thus recognized the unique circumstances of railroads and their employees, and made a policy choice to afford this group special protection. \textit{See supra} note 36 and accompanying text. To extend this carefully circumscribed protection to all collective bargaining agreements would certainly usurp Congress’s legislative domain.

\footnote{123. \textit{See supra} note 50 and accompanying text. The \textit{REA Express} standard, which requires a threshold showing that the collective bargaining agreement is so onerous and burdensome that successful reorganization will be impossible absent rejection, goes too
The major problem with the *Kevin Steel* formulation was its vagueness. After setting forth its standard for rejection, the *Kevin Steel* court suggested that because the debtor had been charged with pre-petition unfair labor practices, the bankruptcy court should consider special factors, including the employer's motivation, proof of its financial condition, the source of its difficulties, and the benefit that would be gained by rejection.\(^1\)

The Third and Eleventh Circuits sought to rectify this lack of detail by enumerating factors which should always be considered in determining whether rejection will be allowed. The Third Circuit in *Bildisco* held that once the debtor in possession shows that the collective bargaining agreement is burdensome, a court should consider the impact of a strike and claims for breach on the employer, the adequacy of relief the employees might realize, the sacrifices of other creditors, the proportion of employees covered by the collective bargaining agreement, industry-wide comparison of their wages and benefits, and the good or bad faith of the parties in handling the debtor's financial difficulties.\(^2\) The Eleventh Circuit, in *Matter of Brada Miller Freight Systems*,\(^3\) added that a court should consider the possibility of liquidation both with and without rejection, and then compare.

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far to protect the sanctity of collective bargaining agreements and fails to accommodate the overall spirit of flexibility which chapter 11 provides. Under this test, the debtor in possession has a heavy burden to meet early in the bankruptcy proceedings. As the Third Circuit noted, it may be impossible to predict the impact of the collective bargaining agreement on the reorganization with any accuracy until long after the commencement of the case. *See supra* note 64. Very possibly, by the time the effect of the collective bargaining agreement is certain enough to meet this burden, it will be too late to avoid liquidation. This is further complicated by the fact that the union may request the court to set a time limit on the debtor in possession's motion to reject or assume the collective bargaining agreement. *See supra* note 13. The union could thus preclude rejection by strategically forcing the debtor in possession to move for rejection before it is armed with the proof necessary to reject the collective bargaining agreement. Rehabilitation of the business itself, which means the preservation of jobs, is more important than strict enforcement of the collective bargaining agreement.

Further, the *REA Express* standard could result in patent unfairness to the debtor's other creditors. It is a well-established principle that the bankruptcy laws seek to insure equitable treatment of all creditors, without allowing one group to unfairly take advantage of the others. *But see infra* notes 130-33 and accompanying text. "[H]istorically, one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another." *Young v. Higbee Co.*, 324 U.S. 204, 210 (1945). *See also* *Sampsell v. Imperial Paper Corp.*, 313 U.S. 215, 219 (1940); *Boese v. King*, 108 U.S. 379, 385-86 (1882).

124. *See supra* note 41, 42-44, and accompanying text.
125. *See supra* notes 67-72 and accompanying text.
126. 702 F.2d 890 (11th Cir. 1983).
the losses the employees would suffer from rejection to the losses other creditors would incur from assumption to determine which group would best be able to bear those losses.127

The Supreme Court recognized, however, that the Kevin Steel standard, unlike the REA Express standard, provides the flexibility necessary to effectuate a chapter 11 reorganization.128 While the REA Express standard went too far in promoting the policies of the NLRA, the Kevin Steel standard, even as supplemented by Bildisco and Brada Miller, did not go far enough, and therefore failed to protect employee rights as fully as possible.

Collective bargaining agreements are almost always burdensome to the debtor to some degree. Consequently, it is not difficult to show that rejection will assist reorganization. By not fulfilling its obligations under the terms of the collective bargaining agreement, which invariably gives employees more than they would otherwise have,129 the debtor will have more funds available to run the business and to satisfy the claims of other creditors. While it is generally true that creditors should be treated equally,130 this principal must yield to the recognition that employee-creditors are unique in two regards.

First, many of the employee rights that will be cut off by rejection of a collective bargaining agreement are non-monetary rights; primary among these rights is job security.131 Even though the Bankruptcy Code provides that contingent or unliquidated claims shall be estimated for allowance, it is virtually impossible for monetary damages to adequately compensate for these losses.132

Second, the impact of monetary losses on employees caused by the rejection of the collective bargaining agreement is more severe than the impact of such losses on commercial creditors.

127 See supra note 76.
128. See supra notes 80-82 and accompanying text.
129. See supra notes 20, 21, and accompanying text. Since a major premise behind the NLRA is that collective bargaining and protected concerted activity reduce the disparity in bargaining power between employers and employees, it follows that the employees will gain better employment terms from collective bargaining agreements than from individual contracts.
130. See supra note 70 and accompanying text.
131. Collective bargaining agreements generally include provisions relating to wage increases, vacation and sick pay, overtime, contributions to health, welfare, and pension funds, and seniority.
132. See supra note 40.
Commercial creditors can usually absorb financial losses by spreading the risk of loss among their customers. Most employees, however, depend upon their employers for their sole source of income. The employees who suffer losses from the rejection of a collective bargaining agreement are effectively in the class of general unsecured creditors. This is the last group to receive payment on its claims, and it is not unusual for these claims to be largely unsatisfied. Thus, the employees may never recover their losses, causing a devastating impact on their livelihoods.

The Supreme Court added three factors to the balancing of equities test that greatly increase a bankruptcy court’s ability to protect the interests of employees. First, before allowing rejection, a bankruptcy court must find that the debtor in possession has made reasonable efforts to negotiate a voluntary modification of the collective bargaining agreement. This requirement recognizes the special posture of employees as compared to ordinary commercial creditors, and gives them an added measure of protection. It not only creates an opportunity for the parties to reach a compromise free from governmental interference, but also gives the employees a chance to retain some of their rights under the collective bargaining agreement, rather than losing the agreement altogether. Where the union realizes that the business’s financial condition necessitates some concessions, it will more likely be willing to compromise. This gives the employees greater bargaining power than beginning negotiations anew.

Second, in considering the reduced value of creditors’ claims resulting from assumption of collective bargaining agreements and the impact of rejection on employees, the Court held that bankruptcy courts should take into account “any qualitative differences between the types of hardship each may face.” This

133. See supra note 11.
134. See supra note 83 and accompanying text.
135. Although both the Bildisco and Brada Miller courts suggested that the good or bad faith of the debtor in possession and the union in dealing with the effects of the business’s financial difficulties should be a factor in the court’s weighing of the equities, they stopped short of requiring pre-rejection bargaining. See supra notes 72, 76, and accompanying text.
136. See supra note 85 and accompanying text.
137. Partial rejection of a collective bargaining agreement should probably not be allowed, since it would “destroy the internal integrity of the agreement and substantially upset the relative bargaining positions of the parties.” Brainiff Airways, 25 Bankr. at 218.
138. See supra note 90 and accompanying text.
requirement recognizes that the monetary loss of rejection would have a much more detrimental impact on a group of employees than it would on a group of commercial creditors.

Third, as the *Brada Miller* court suggested, the possibility of liquidation, both with and without rejection, should be an important factor in a court's consideration of a motion to reject a collective bargaining agreement.139 This follows the lead of the *REA Express* court by permitting rejection only when necessary to protect the employee rights at stake. This standard removes some of the inflexibility inherent in requiring the debtor in possession to show by a preponderance of the evidence that liquidation will ensue absent rejection. If it appears that even with the collective bargaining agreement, the possibility of liquidation is not present, the equities will weigh heavily against rejection.

*The Application of Section 8(d) to Interim Unilateral Modifications*

The majority, by narrowly focusing on the technical provisions of the Bankruptcy Code, failed to adequately address the issue of whether the filing of a chapter 11 petition immunizes the debtor in possession from the provisions of section 8(d). While it first manifests a strong desire to give as much weight as possible to each of the federal statutes involved, the Court falls short of this objective. In light of both labor and bankruptcy policies and provisions, debtors in possession should be prohibited from unilaterally modifying collective bargaining agreements before formal rejection.

The majority held that since rejection of a collective bargaining agreement constitutes a breach immediately before the date of filing, the automatic stay provisions render the contract unenforceable in the interim period.140 The Court did not, however, consider whether unfair labor practice proceedings before the NLRB fall within the exception to the Bankruptcy Code's automatic stay provisions.141 Under this exception, governmental units are not stayed from enforcing their police or regulatory

139. See supra notes 76, 89, and accompanying text.
140. See supra notes 96-100 and accompanying text.
141. Section 362(b) provides in pertinent part:
powers. The NLRB is a governmental unit. It is the public agent Congress designated to enforce the NLRA. Furthermore, unfair labor practice proceedings are an exercise of the NLRB’s police or regulatory powers. Unfair labor practice proceedings have some of the characteristics of private litigation, since they are initiated by individual persons or groups. Yet, the Supreme Court has stated that “[a] proceeding by the Board is not to adjudicate private rights but to effectuate a public policy.” Thus, NLRB

(b) The filing of a petition under section 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 continuance of an action or proceeding by a governmental unit to enforce such 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(b) (1982). The legislative history clarifies the intended scope of this governmental unit exception.

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.


142. Nathanson v. NLRB, 344 U.S. 25, 27 (1952). The Supreme Court further stated that “a back pay order is a reparation order designed to vindicate the public policy of the statute by making employees whole for losses suffered on account of an unfair labor practice.” Id.

143. NLRB v. Evans Plumbing Co., 639 F.2d 291 (5th Cir. 1981) (NLRB order to reinstate with back pay discriminatorily discharged employees was to enforce federal law regulating the employer-employee relationship and therefore an exercise of police or regulatory powers); Shippers Interstate Serv. v. NLRB, 618 F.2d 9 (7th Cir. 1980) (NLRB proceedings are not subject to the automatic stay provisions in a reorganization case); In re Bel Air Chateau Hosp., 611 F.2d 1248 (9th Cir. 1979) (the conclusion that regulatory proceedings of the NLRB are not subject to the Bankruptcy Act’s automatic stay provisions appears harmonious with the new Bankruptcy Code’s provisions); In re D.M. Barber, Inc., 13 Bankr. 962 (N.D. Tex. 1981) (proceedings by the NLRB are to effectuate public policy and thus are not subject to the automatic stay).

proceedings to enforce a collective bargaining agreement should fall within the exception to the automatic stay provisions and should not be affected by the filing of a chapter 11 petition.\footnote{145. Section 362(b), however, does not go so far as to permit the enforcement of a money judgment against the debtor. See supra note 141. The NLRB would still have to file a claim with the bankruptcy court to satisfy any monetary judgment.}

As the dissent reasoned, the fact that enforcement of the collective bargaining agreement is suspended does not mean that there is no collective bargaining agreement “in effect” within the meaning of the NLRA.\footnote{146. See supra notes 106-08 and accompanying text.} The majority’s conclusion that collective bargaining agreements are unenforceable in the interim period is contingent upon the bankruptcy court ultimately allowing rejection. Since assumption as well as rejection relates back, the debtor in possession could be faced with unfair labor practice charges where rejection is disallowed, because the collective bargaining agreement is retroactively binding throughout the interim period.\footnote{147. American A. & B. Coal Corp. v. Leonardo Arrivabene, S.A., 280 F.2d 119, 124 (2d Cir. 1960); In re Italian Cook Oil Corp., 190 F.2d 994, 996-97 (3d Cir. 1951).} Under the majority’s holding, the debtor in possession is forced to predict the outcome of the motion to reject before he can safely modify the collective bargaining agreement. Not only will the debtor in possession’s interim obligations be unknown until formal rejection or assumption, but these obligations will vary from case to case. The majority’s holding thus creates an arbitrary and uncertain rule of law.

The majority also attached much weight to the fact that the Bankruptcy Code gives a chapter 11 debtor in possession a reasonable time in which to determine whether an executory contract should be rejected or assumed.\footnote{148. See supra notes 93, 94, and accompanying text.} Undoubtedly, requiring adherence to a collective bargaining agreement in this period will put pressure on the debtor in possession to make a somewhat expeditious decision. Yet, as the dissent correctly noted, this is unlikely to endanger the reorganization process.\footnote{149. See supra notes 116, 118, and accompanying text.} The majority emphasized that in balancing the equities, bankruptcy courts must keep in mind that rejection of a collective bargaining agreement should be allowed only in furtherance of the ultimate goal of rehabilitation.\footnote{150. See supra note 87 and accompanying text.} Logically, the same should hold true with any contravention of the policies and provisions of the
In re Bildisco

NLRA. In keeping with the Court's own warning, this attempt to give the debtor in possession flexibility should be subordinated to the NLRA's policy of encouraging and enforcing collective bargaining agreements, since it is not necessary to protect the underlying goal of successful rehabilitation.

The majority's holding fails to give adequate consideration to the fundamental policies and goals of the NLRA. Congress recognized that collective bargaining was necessary to avoid industrial strife and economic warfare. The imposition of the duty to bargain collectively, however, would be meaningless without the further prohibition against unilateral modifications of collective bargaining agreements. The employer's right to abrogate a collective bargaining agreement would not only undermine any protection the NLRA affords employees, but is likely to spur retaliatory action on the part of frustrated employees. As the dissent notes, such a result is ultimately likely to decrease a debtor's chances of rehabilitation.

Moreover, the filing of a petition in bankruptcy does not relieve a debtor in possession, as an employer, of its obligations under the NLRA. Thus, after formal rejection of a collective bargaining agreement, the debtor in possession is still under a duty to bargain collectively with the employees' representative in satisfaction of section 8(a)(5). It is inconsistent with this position to allow debtors in possession to circumvent the prohibition against unilateral modifications, an integral part of the duty to bargain, when circumvention is not necessary to ensure successful reorganization. While the "exigencies of bankruptcy" do render the protracted notice and cooling off requirements of section 8(d) unworkable, an expedited approach to interim modifications would most fairly accommodate the two statutory schemes. Such an approach would protect NLRA policies and safeguard employee rights, without jeopardizing the debtor in possession's prospects of rehabilitation.

The majority opinion now requires the debtor in possession to make reasonable efforts to reach a negotiated settlement with the union before requesting permission to reject the collective

151. See supra notes 20, 21, and accompanying text.
152. See supra note 122 and accompanying text.
153. See supra notes 68, 84.
154. See supra note 22 and accompanying text.
155. See supra note 23.
bargaining agreement. To require the debtor in possession to adhere to the terms of the collective bargaining agreement before a negotiated settlement or formal rejection would not substantially increase the burden. The possibility of an increase in the estate's liabilities caused by this temporary adherence to the collective bargaining agreement is outweighed by the detrimental impact of unilateral modifications on the policies of the NLRA and the employees' welfare.

**BILDISCO'S IMPACT**

The Supreme Court's holding that collective bargaining agreements may be rejected in bankruptcy where the equities weigh in favor of rejection is not likely to have a great impact in the areas of bankruptcy and labor relations. Prior to the Court's decision, most bankruptcy courts were taking a similar approach when confronted with motions to reject collective bargaining agreements. Given the interruptions of a business's operations when it files a chapter 11 petition and the requirement that new agreements be negotiated once rejection is allowed, it is improbable that bankruptcy filings will be increased by employers whose sole desire is to circumvent their collective bargaining agreements. The apparent increase in chapter 11 reorganizations in the past several years is more likely attributable to the condition of the economy rather than to the prospects of rejecting labor contracts.

By sanctioning interim unilateral modifications of collective bargaining agreements, however, the Court has opened the door to the possibility of great unrest in the labor relations area. Under the Court's holding, employers are free to disregard their contractual obligations to employees before it is formally determined by the bankruptcy court whether rejection of the collective bargaining agreement is proper. Employers will be more likely to wait protracted periods of time before deciding whether to move for rejection, increasing the length of time the employees will be without the protection of a collective bargaining agreement. As the dissent noted, the foreseeable result of this situation is an increase in labor unrest by employees in response to their employers' capricious and unfair actions.

156. *See supra* note 83 and accompanying text.
On the other hand, were employers prohibited from unilaterally modifying their collective bargaining agreements before formal rejection, the prospects of labor discord would be substantially diminished. Pursuant to the Supreme Court's decision, employers must attempt to bargain with the union before moving to reject their collective bargaining agreements. With some indication that the employer is trying to reach a mutually satisfactory resolution of its financial difficulties, the impetus behind labor strife would be substantially mitigated.  

**CONCLUSION**

The rejection of collective bargaining agreements in bankruptcy jeopardizes the strong policies underpinning the NLRA. In order to minimize this threat, courts must move cautiously in allowing bankrupt employers to reject their collective bargaining agreements. The standard espoused by the Supreme Court in *In re Bildisco* most fairly accommodates the two statutory schemes while affording greater protection to employees.

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In enacting the new provision, Congress followed portions of the Supreme Court's holding, while overruling others. The amendment recognizes the importance of fair and equitable treatment of the debtor's employees without unduly restricting the opportunity of the bankrupt business to effect a successful reorganization.

Specifically, before moving to reject a collective bargaining agreement, the debtor must make the union an offer which is necessary to reorganization and fair to the employees. From this point until the hearing on the motion to reject the collective bargaining agreement, the debtor must “confer in good faith” with the employees' representative, and attempt to reach a “mutually satisfactory” agreement. *Id.* (to be codified at 11 U.S.C. § 1113(b)(2)).

If the debtor does move to reject the collective bargaining agreement, a hearing, at which all interested parties may be heard, must be scheduled within 14 days of the filing of the motion. *Id.* (to be codified at 11 U.S.C. § 1113(d)(1)). Rejection of a collective bargaining agreement will be allowed only if the debtor has proposed necessary modifications, the employees' representative has rejected the proposal “without good cause,” and, in the Supreme Court's words, “the balance of the equities clearly favors rejection.” *Id.* (to be codified at 11 U.S.C. § 1113(c)).

The Supreme Court's opinion with respect to unilateral interim modifications, however, did not fare so well in Congress. Section 1113 will allow debtors to modify the collective bargaining agreement prior to formal rejection in only two situations. First, if the bankruptcy court fails to rule on a motion to reject the collective bargaining agreement within 30 days of the commencement of the hearing, the debtor may unilaterally terminate or modify any provisions of the collective bargaining agreement pending the court's ruling.
The Court's sanctioning of interim unilateral modifications of collective bargaining agreements, however, disregards national labor policy and fails to adequately protect the employees of bankrupt businesses. Since permitting such modifications is not necessary to ensure successful reorganization, employers should comply with the terms of collective bargaining agreements until voluntary settlement is reached with the unions or formal rejection is granted by the bankruptcy courts.

CHERYL A. KEOE