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Rejection of Collective Bargaining Agreements by Trustees in Bankruptcy

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COMMENTS

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I. Introduction

Federal labor legislation[1] and federal bankruptcy legislation[2] demonstrate congressional awareness of opposing policies at work in two very different areas of the law. The general purpose of the Labor-Management Relations Act[3] is to encourage the creation and enforcement of collective bargaining agreements.[4] Similarly, in the National Labor Relations Act (NLRA), Congress has adopted a policy that fosters arbitration and guarantees certain employee rights.[5] The Railway Labor Act[6] is a specific application of the NLRA to the interstate carrier segment of the economy. Its policy is to resolve labor disputes quickly in order to avoid disruption of interstate commerce.[7]

The Bankruptcy Act,[8] while it contains no express statement of

1. Federal labor legislation is codified in Title 29 of the United States Code, with the exception of the Railway Labor Act, codified in Title 45.

2. Federal bankruptcy legislation is codified in Title 11 of the United States Code.

3. 29 U.S.C. § 141 (1970).

4. That section reads in pertinent part:

> It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Id.

5. For a survey of the historical background out of which the NLRA arose, see C. GREGORY, LABOR AND THE LAW (1946). More detailed analyses appear in J. JENKINS, LABOR LAW (1968) and 1 L. TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940).

6. 45 U.S.C. § 151a (1970).

7. That policy is expressed as follows:

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein . . . (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 the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Id. § 151a.

8. 11 U.S.C. § 1 (1970).

congressional policy, has as its principal purposes preserving a debtor's funds for distribution to creditors and affording the debtor a "new start."[9] Common to bankruptcy proceedings[10] is the power of a trustee or debtor in possession[11] to reject executory contracts entered into by the bankrupt that are deemed onerous and burdensome to the bankrupt estate.[12] Conversely, a petition for rejection of a contract beneficial to the estate will normally be denied by the bankruptcy court.[13] But when rejection is permitted, the executory contract must be rejected in its entirety. The trustee has no authority to sever beneficial sections of the contract and keep them in force.[14]

This comment focuses on section 313(1) of the Bankruptcy Act, the provision within chapter X that allows the trustee in bankruptcy to reject executory contracts. Although the language of that section appears absolute, the courts have added the "onerous and burdensome to the estate" limitation alluded to above. This limitation looks to the *effect* of the executory contract on the estate, and is blind to the *type* of executory contract capable of rejection. "The Bankruptcy Act makes no distinction among the classes of executory contracts."[15] This theory has resulted in the

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9. Costa, *Bankruptcy: The Legal Whipping Boy*, 49 ST. JOHN'S L. REV. 52 (1974-75); Note, *Collective Bargaining and Bankruptcy*, 42 S. CAL. L. REV. 477 (1968-69).

10. Chapters I to VII of the Bankruptcy Act deal with "ordinary bankruptcies" seeking liquidation of a bankrupt's assets and their distribution to creditors. Chapter X provides for the reorganization of corporations that are insolvent or unable to meet their debts as they mature. Corporations that cannot be afforded relief under Chapter XI because rights of secured creditors may be affected are limited to a Chapter X proceeding. Chapter XI provides for arrangements such as settlements, compositions, or extensions of time for payment, which may enable the debtor to continue its business with little court interference. Under Chapter XI, the rights of secured creditors may not be affected. For a general treatment of the various types of bankruptcy proceedings, see G. HIRSCH, ARRANGEMENTS UNDER CHAPTER XI (1968); L. FORMAN, COMPOSITIONS, BANKRUPTCY, AND ARRANGEMENTS (1971).

11. Section 33 of the Bankruptcy Act, 11 U.S.C. § 61 (1970), creates the office of trustee in bankruptcy. The trustee is appointed by the creditors pursuant to § 44 of the Bankruptcy Act, 11 U.S.C. § 72 (1970).

Section 342 of the Bankruptcy Act, 11 U.S.C. § 742 (1970), provides that when no trustee or receiver is appointed in a Chapter XI proceeding, the debtor shall continue in possession of property and have all powers of a trustee.

12. Section 70(b) of the Bankruptcy Act, 11 U.S.C. § 110(b) (1970), provides:

> The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later. . . .

Section 116(1) of the Bankruptcy Act, 11 U.S.C. § 516(1) (1970), is similar to § 313(1), 11 U.S.C. § 713(1) (1970). Section 313(1) provides the following:

> 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.

Executory contracts capable of rejection have been defined as "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Countryman, *Contracts in Bankruptcy*, 57 MINN. L. REV. 439, 460 (1973).

13. *In re* Grayson Shops, Inc., 252 F. Supp. 145 (S.D.N.Y. 1966); 8W. COLLIER, COLLIER ON BANKRUPTCY § 3.15[8] (14th ed. 1976).

14. 8 W. COLLIER, COLLIER ON BANKRUPTCY § 3.15[7] (14th ed. 1976).

15. *In re* Klaber Bros., Inc., 173 F. Supp. 83, 85 (S.D.N.Y. 1959).

assumption that collective bargaining agreements remain executory contracts until the date of their termination, so that agreements are susceptible to rejection pursuant to section 313(1), assuming their onerous and burdensome nature.[16]

The mere prospect of a bankruptcy court rejecting a collective bargaining agreement invariably arouses the ire of labor adherents. The same effect can be seen in the management ranks of financially troubled concerns whenever the prospect of affirmance arises. The labor constituents point to labor legislation as assertively as management points to the Bankruptcy Act, each in support of their seemingly conflicting positions. In the face of these contrary positions, courts have been quick to deny the existence of any "real" conflict between the Bankruptcy Act and the labor acts.[17] But arguments in support of the existence of a conflict are compelling.

If rejection of collective bargaining agreements is allowed the policy of the labor acts may be defeated, since employees may lose benefits attainable only in the context of collective bargaining. On the other hand, failure to reject a truly burdensome labor agreement may contravene the policy of the Bankruptcy Act. Indeed, since the trustee or debtor in possession is a new entity, different from the pre-bankrupt employer,[18] disallowance of rejection may violate section 8(d) of the NLRA, which provides that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession . . . ."[19] Yet, although language in both the Bankruptcy Act and the labor acts would lead one to believe that they were drafted to cope with possible conflicts, the courts steadfastly refuse to acknowledge the conflicts' existence.[20]

16. The few reported cases that have dealt with the question of the power of a trustee in bankruptcy to avoid a collective bargaining agreement are: Carpenters Local 2746 v. Turney Wood Prods., Inc., 289 F. Supp. 143 (W.D. Ark. 1968); *In re* Overseas Nat'l Airways, Inc., 238 F. Supp. 359 (E.D.N.Y. 1965); *In re* Klaber Bros., Inc., 173 F. Supp. 83, 85 (S.D.N.Y. 1959); *In re* Public Ledger, Inc., 63 F. Supp. 1008 (E.D. Pa. 1945), *rev'd in part*, 161 F.2d 762 (3d Cir. 1947). To this list, unchanged since 1968, can be added two recent cases: Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, 523 F.2d 164 (2d Cir. 1975); Shopmen's Local 455 v. Kevin Steel Prods., Inc., 519 F.2d 698 (2d Cir. 1975).

17. Allegations by employees and their unions that federal labor legislation has so preempted the field of labor relations as to take collective bargaining agreements out of the scope of the Bankruptcy Act have, likewise, been summarily rejected. Carpenters Local 2746 v. Turney Wood Prods., Inc., 289 F. Supp. 143 (W.D. Ark. 1968); *In re* Klaber Bros., Inc., 173 F. Supp. 83 (S.D.N.Y. 1959).

18. This point was clearly announced in Shopmen's Local 455 v. Kevin Steel Prods., Inc., 519 F.2d 698 (2d Cir. 1975), and restated in Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, 523 F.2d 164 (2d Cir. 1975).

19. 29 U.S.C. § 158(d) (1970). The Supreme Court has recently held that one succeeding to the business of another is not bound by the substantive terms of the predecessor's collective bargaining contract. Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd., 417 U.S. 249 (1974); NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972).

20. Section 272 of the Bankruptcy Act, 11 U.S.C. § 672 (1970), and § 15 of the Labor-Management Relations Act, 29 U.S.C. § 165 (1970), are cross-referenced, with the provision that the LMRA prevail in cases of conflict. *See* note 17 and accompanying text *supra*.

This comment explores the current status of the power of the trustee in bankruptcy to reject collective bargaining agreements. Recent developments in the "successor employer" or "successorship" doctrine will be discussed to the extent that the Supreme Court has dealt with the propriety of continuing a collective bargaining agreement when a new employer succeeds to a business. Finally, two recent cases are analyzed that have treated this issue and highlighted the divergent policies of the Bankruptcy Act and the labor acts.[21]

II. Survival of Collective Bargaining Agreements in Successorship Cases

A. Origins and Development of the Successorship Doctrine[22]

The successor employer doctrine grew out of the long-standing maxim that one cannot be bound to the terms of a contract to which one is not a party. In reliance on this axiom, employers acquiring the businesses of others have petitioned the courts for relief from the terms of their predecessors' collective bargaining agreements.[23] The validity of this argument was first considered by the Supreme Court in *John Wiley & Sons v. Livingston.*[24] Plaintiff, the successor employer in that case, was the surviving corporation in a merger. In the union's suit to compel Wiley to arbitrate under the collective bargaining agreement between the union and the merged corporation, the Court held that Wiley's obligation to arbitrate was rooted in national labor policy.[25] This holding, which in effect bound one not a party to a contract to its substantive terms, was explained in the following manner:

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. . . . Central to the peculiar status and function of a collective bargaining agreement is the fact . . . that it is not in any real sense the simple product of a consensual relationship.[26]

Eight years later, in *NLRB v. Burns International Security Services, Inc.*,[27] the Supreme Court again addressed the successorship issue. In that case, the guards of Wackenhut Corporation, which provided security services at a California airport, had negotiated a three-year contract between Wackenhut and the United Plant Guard Workers union (UPG). Burns replaced Wackenhut and employed twenty-seven of Wackenhut's guards along with fifteen of its own. UPG demanded that Burns recognize the union and honor the terms of the agreement between UPG and

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21. *See* note 18 *supra.*
22. From this point on, all references to trustee or debtor in possession will be made in the context of a Chapter XI rearrangement proceeding unless otherwise noted.
23. *See* Charles Cushman Co., 15 N.L.R.B. 90 (1939).
24. 376 U.S. 543 (1964).
25. *Id.* at 550-51.
26. *Id.* at 550.
27. 406 U.S. 272 (1972).

Wackenhut. The court held that Burns, the successor, was under a statutorily imposed duty to bargain with the representative of the majority of its employees.[28]

The Court carefully noted that the statutorily imposed duty to bargain in good faith does not carry with it the *Wiley* duty to honor the terms of a predecessor's agreement. "[A]lthough successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective bargaining contract negotiated by their predecessors but not agreed to or assumed by them."[29] *Wiley* was distinguished on the grounds that under the state law applicable to that case, the surviving corporation in a merger is obligated to assume the duties of the merged corporation.[30] The result of *Burns* is that the duty to bargain with the representative of the predecessor's employees arises when a majority of the successor's work force consists of the predecessor's employees.[31]

Two years later the Supreme Court again chose to review the successorship question. *Howard Johnson Company, Inc. v. Detroit Local Joint Executive Board*[32] represents an attempt to eradicate some of the confusion engendered by *Burns* and *Wiley*. Like *Wiley, Howard Johnson* was a suit to compel arbitration against a successor that had acquired the business by purchase. Unlike *Burns*, it was a case in which a majority of Howard Johnson's employees had *not* been employees of the predecessor.[33] Proceeding in the traditional case-by-case approach,[34] the Court construed *Wiley* as having stood for the proposition that arbitration could not be compelled unless there existed a substantial continuity of identity in the business enterprise.[35] The Court then modified that proposition, stating that "this continuity of identity in the business enterprise necessarily includes . . . a substantial continuity in the identity of the work force

28. Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1970), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title." Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (1970), provides that

> [r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . .

29. 406 U.S. 272, 284 (1972).

30. N.Y. STOCK CORPORATION LAW § 90 (McKinney 1951).

31. "[W]here the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's . . . ordering the employer to bargain. . . ." 406 U.S. 272, 281 (1972).

32. 417 U.S. 249 (1974).

33. Of the forty-five employees hired by Howard Johnson after it succeeded to the business, only nine had been employees of the predecessor.

34. [W]e must necessarily proceed cautiously, in the traditional case-by-case approach of the common law. Particularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate.

417 U.S. at 256.

35. *Id.* at 263.

across the change in ownership."[36] Since Howard Johnson had not hired a majority of its predecessor's employees, substantial continuity of identity in the business enterprise was found to be lacking. The *Wiley* duty to arbitrate had therefore been improperly imposed by the lower courts. The *Burns* duty to bargain under sections 8(a)(5) and 9(a) of the NLRA was also inapplicable since the union seeking to compel arbitration was *not* the representative of a majority of the employees hired by the successor.[37]

In its current status, the successorship doctrine imposes no obligation upon one succeeding to the ongoing business of another, absent a substantial continuity of identity in the business enterprise and its work force, to honor collective bargaining agreements of the predecessor. If, however, a majority of the successor's employees were also employees of the predecessor, then if the bargaining unit remains appropriate the successor has a statutory duty to bargain in good faith. Even if the two substantial continuities are found to exist, however, *Wiley* has been so weakened by *Burns* and *Howard Johnson* that its continued vitality is debatable. It is highly questionable whether courts will impose any duty on a successor to honor the substantive terms of a predecessor's collective bargaining agreement.[38]

B. Applicability of the Doctrine to Trustees in Bankruptcy

That labor legislation applies to trustees in bankruptcy is explicit in the Labor-Management Relations Act.[39] It follows that judicial doctrines evolved in interpretation of that legislation are also applicable to trustees. Until recently, however, the applicability of the successorship doctrine to the trustee in bankruptcy was questionable.[40] Those cases that imposed any successor's duties on the trustee did so without reference to the successorship doctrine.[41]

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36. *Id.*

37. *See* note 31 and accompanying text *supra.*

38. For a more detailed analysis of the development of the successorship doctrine, see Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759 (1974-75); Note, *Successor Management's Obligations Under Existing Collective Bargaining Agreements*, 40 MO. L. REV. 304 (1975); Comment, *Collective Bargaining and Bankruptcy*, 42 S. CAL. L. REV. 477 (1968-69); Note, *Labor Law Successorship*, 26 SYRACUSE L. REV. 798 (1975).

39. 29 U.S.C. § 152 (1970) includes trustees in bankruptcy in the definition of "persons" to whom the Act applies.

40. In Shopmen's Local 455 v. Kevin Steel Prods., Inc., 519 F.2d 698 (2d Cir. 1975), the court hinted that the duties of a successor employer may be applicable to the trustee. In Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, 523 F.2d 164 (2d Cir. 1975), that hint was developed fully and the duties expounded by the Supreme Court in *Burns* were held applicable to the debtor in possession.

41. The reason for the paucity of cases was explained by the Second Circuit:

> The issue, of course, has not been litigated frequently. The reasons are not difficult to discern. In a Chapter X or XI proceeding, which is designed to preserve a going business, only a hardy—some might say foolhardy—employer would provoke a strike by trying to terminate an existing labor contract. . . . And in a straight bankruptcy proceeding, which normally results in liquidation, there are usually no jobs or wage rates to preserve for any appreciable period. . . .

Shopmen's Local 455 v. Kevin Steel Prods., Inc., 519 F.2d 698, 703 (2nd Cir. 1975).

Nevertheless, there seems little to preclude the application of that doctrine to the trustee. Trustees most often assume control when there exists continuity of identity in both the business enterprise and the work force. Indeed, the trustee's task is to prevent a change in continuity in the business enterprise. In order to accomplish that task, continuity of the work force is necessary. Thus it is not unreasonable to order a trustee to bargain with the representative of the debtor's employees or, depending on the status of *Wiley*, to honor the substantive terms of the debtor's labor agreement with the employees' union.

The dearth of cases dealing with the divergent interests of the trustee and employees in petitions for rejection of collective bargaining agreements makes any discussion of the propriety of imposing successorship duties on a trustee largely speculative.[42] The few cases that have considered this question have arisen as a result of petitions by trustees to reject collective bargaining agreements. Most of those cases have allowed rejection, rendering moot the question of the imposition of the *Wiley* duty to honor the substantive terms of the predecessor's contract.[43] Even if rejection is permitted, however, there is nothing to impede imposition of the *Burns* obligation of bargaining in good faith, assuming the two substantial continuities are present.[44]

III. Earlier Cases Allowing Rejection of Collective Bargaining Agreements

As stated above, the few cases[45] considering a trustee's power to reject a collective bargaining agreement have generally allowed rejection. That power, however, has been limited in the same manner as the trustee's power to reject other types of executory contracts. The agreement must be onerous, burdensome, or detrimental to the estate of the debtor before the court in its discretion may properly allow rejection.[46]

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42. Seven federal cases consider the power of a trustee to reject collective bargaining agreements. *See* note 16 *supra*. *See also In re* Business Supplies Corp. of America, 72 CCH Lab. Cas. ¶ 13,940 (S.D.N.Y. 1973) (Bankruptcy Court).

43. One of the few cases denying the petition for rejection is *In re* Mamie Conti Gowns, 12 F. Supp. 478 (S.D.N.Y. 1935). Denial was prompted by fears that the petition had been entered solely for the purpose of evading the labor agreement. In another case, *In re* Public Ledger, Inc., 63 F. Supp. 1008 (E.D. Pa. 1945), *rev'd in part*, 161 F.2d 762, 765 (3d Cir. 1947), rejection was disallowed because the court found "no act of the trustees . . . inconsistent with the terms of the contract," and "every act of the trustees in relation to the employees [to be] in complete accord with its terms." Having "assumed" the existing agreement, petitioner was denied the authority to reject.

44. When rejection is not sought by the trustee, of course, the issue does not arise. In such cases, the trustee may be deemed to have assumed the existing agreement, thereby being bound by its terms.

45. *See* note 16 *supra*. The factor held to be determinative in all of those cases was the detrimental nature of the contract to the estate of the bankrupt employer.

46. "If the trustee deems the contract to possess no equity or benefit for the estate he rejects it as burdensome. If, on the other hand, he concludes that the executory contract does not have an equity for the estate he adopts it." *In re* Italian Cook Oil Co., 190 F.2d 994, 996 (3d Cir. 1951) (rejection of contract of sale).

For example, *In re Klaber Brothers, Inc.*[47] presented the sole issue of the power of a trustee to avoid a collective bargaining agreement pursuant to section 313(1) of the Bankruptcy Act. Affirming the order of the referee that the agreement could be rejected, the court held that the only criterion to be considered in passing on the propriety of rejection of *any* executory contract is whether that contract contains provisions detrimental to the estate.[48] Noticeably absent from the court's consideration was any mention of the effect of rejection on employees' rights. With the simple statements that the "referee's determination was fully justified under the circumstances here involved"[49] and "[w]here the contract is detrimental, its rejection should be permitted,"[50] the labor agreement was set aside.[51]

The first case to encourage courts to "step lightly" when considering rejection of collective bargaining agreements was *In re Overseas National Airways.*[52] Rejection was disallowed, based on the express provisions of section 77(n) of the Bankruptcy Act[53] and sections 2 and 6 of the Railway Labor Act.[54] Adhering to the strict language of the applicable acts, the court of appeals concluded that collective bargaining agreements between interstate carriers and employee representatives can be modified only in conformity with the provisions of the RLA. More importantly, however, the court announced its concern for the adverse effects rejection may have on employee rights.

> [T]he Bankruptcy Court, when it *has* the power to reject a collective bargaining agreement, should do so only after thorough scrutiny, and a careful balancing of the equities on both sides, for, in relieving a debtor from its obligations under a collective

47. 173 F. Supp. 83 (S.D.N.Y. 1959).

48. "[T]he power to permit rejection of an executory contract should be exercised where rejection is to the advantage of the estate. Where the contract is detrimental, its rejection should be permitted." *Id.* at 85. The court also dismissed the union's contention that the NLRB had preemptive jurisdiction. The union's reliance on § 15 of the Labor-Management Relations Act, 29 U.S.C. § 165 (1970), which provides that the labor act prevails in cases of conflict with § 272 of the Bankruptcy Act, 11 U.S.C. § 672 (1970), was held to have been misplaced since those sections refer only to union organization.

49. 173 F. Supp. at 85.

50. *Id.* (citing the referee's opinion).

51. In another of the few reported cases in this area, Carpenters Local 2746 v. Turney Wood Prods., Inc., 289 F. Supp. 143 (W.D. Ark. 1968), the court acknowledged that the trustee is bound to operate the business in compliance with the National Labor Relations Act.

> If a union representing employees demands that a new contract be negotiated, it would appear that the trustee must negotiate, and if he refuses to do so, he may be guilty of an unfair labor practice. If a new contract is agreed upon, it may or may not be identical or similar to the original agreement. . . .

Id. at 149. But no concern was expressed for, nor precautions taken against, the possible loss of valuable employee rights attainable only through collective bargaining.

52. 238 F. Supp. 359 (E.D.N.Y. 1965).

53. *Id.* at 360. Section 77(n) of the Bankruptcy Act, 11 U.S.C. § 205(n) (1970) provides: "No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in sections 151 to 163 of Title 45 . . . ."

54. "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 156 of this title." 45 U.S.C. § 152 (1970).

The RLA also provides a detailed procedure to be followed in changing rates of pay, rules, and working conditions. Included in this procedure is a 30-day notice requirement, conferences, and action by the Mediation Board. *Id.* § 156.

> 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.[55]

This is the first case directly to address the competing interests of trustees seeking rejection of collective bargaining agreements and unions seeking their performance. The court realized that there is more at issue than merely the power to reject an executory contract. In recognizing that rights attainable only through the collective bargaining process might be lost forever through rejection of the labor contract, the court presaged the considerations to be given the same issue by courts in later cases.

IV. Recent Developments

A. Overview

Shopmen's Local 455 v. Kevin Steel Products, Inc.[56] and *Brotherhood of Railway, Airline & Steamship Clerks v. REA Express, Inc.*[57] are the first cases considering rejection of collective bargaining agreements by trustees in bankruptcy since *Carpenters Local 2746 v. Turney Wood Products, Inc.*[58] was decided in 1968. *Kevin Steel* is outstanding for its pronouncement of factors to be considered by courts when passing on the propriety of rejecting collective bargaining agreements.[59] *REA Express* is noteworthy for its reconciliation of the different policies underlying the Bankruptcy Act and the Railway Labor Act. Although the two cases arose under different labor acts, *Kevin Steel* under the NLRA and *REA Express* under the RLA, the Second Circuit addressed their common issue with a common approach.[60]

B. Kevin Steel—Facts and Analysis

1. The Facts.—A bankruptcy judge allowed rejection by Kevin Steel, as debtor in possession, of the collective bargaining agreement then in force.[61] In the appeal from this decision, the district court saw the issue

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55. 238 F. Supp. at 361-62.
56. 519 F.2d 698 (2d Cir. 1975).
57. 523 F.2d 164 (2d Cir. 1975), *cert. denied*, 423 U.S. 1017 (1975).
58. 289 F. Supp. 143 (W.D. Ark. 1968).
59. These factors are: (1) whether the employer is motivated merely by a desire to rid itself of the union and its adherents; (2) the company's financial condition; (3) the source of the company's financial difficulties; (4) benefits to be gained by the employer if rejection is allowed; (5) the equities against rejection, including the loss of intangible employee rights. 519 F.2d at 707.
60. In *REA Express* the court relied heavily on the reasoning of *Kevin Steel*, decided only weeks before *REA Express*.
61. Kevin Steel had filed for rearrangement pursuant to Chapter XI. Prior to filing, the company had refused to execute a collective bargaining agreement to which it had agreed in substance before the union's tender. The administrative law judge determined that the refusal

as a "question of how to reconcile the conflicting policies embodied respectively in the National Labor Relations Act and in the Bankruptcy Act or, if such reconciliation should be impossible, [a] question of which policy is here to prevail."[62] The NLRB argued[63] that the Bankruptcy Act's specific exclusion of RLA agreements[64] expressed congressional policy with respect to all labor agreements, and that the omission of specific reference to the NLRA was merely a "legislative oversight."[65] The district court accepted this argument. Concluding that it was more logical to assume that "Congress intended to distinguish collective bargaining agreements as a class from all other contracts than that it intended to make seemingly irrelevant distinctions between different kinds of labor agreements,"[66] the district court held that section 313(1) of the Bankruptcy Act did not allow rejection of collective bargaining agreements.

The circuit court reversed, holding that Kevin Steel was not a "party" within the meaning of section 8(d) of the NLRA[67] and that Kevin Steel was therefore not bound by its agreement prior to bankruptcy nor by the termination restrictions of section 8(d).[68] The argument of the NLRB, which the district court had accepted as "logical,"[69] was rejected on appeal.[70] The court also determined that no irreconcilable conflicts existed between the Bankruptcy Act and the NLRA.[71] Recommending that courts

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to accept the agreement constituted an unfair labor practice and ordered Kevin Steel to execute the agreement, 209 N.L.R.B. No. 80 (March 8, 1974). It was this order that prompted the petition to reject the collective bargaining agreement.

62. 381 F. Supp. 336, 338 (S.D.N.Y. 1974). The court continued:

> We are thus faced with two important policy decisions adopted by the Congress which in this case come into square conflict. The Bankruptcy Law provides that whenever necessary to preserve solvency the Bankruptcy Court may relieve a debtor from the burdens of an executory contract. The [NLRA], on the other hand, provides that no collective bargaining agreement can be set aside except pursuant to the provisions of that law. . . .

Id.

63. The NLRB appeared as intervenor.

64. *See* notes 53, 54 and accompanying text *supra.*

65. 381 F. Supp. at 338. The cases on which the NLRB relied for support of its proposition were John Wiley & Sons v. Livingston, 376 U.S. 543 (1963), and United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 754 (1960).

66. 381 F. Supp. at 338.

67. The section provides that "where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that *no party to such contract* shall terminate or modify" the agreement, except in accordance with certain enumerated procedures. 29 U.S.C. § 158(d) (1970) (emphasis added).

68. A debtor-in-possession under Chapter XI or under Chapter X, a trustee under the latter chapter, or a trustee in a straight bankruptcy proceeding is *not* the same entity as the pre-bankruptcy company. A new entity is created with its own rights and duties. . . . Until the debtor here assumes the old agreement or makes a new one, it is not a 'party' under section 8(d) to any labor agreement with the union and is simply not subject to the termination restrictions of the section.

519 F.2d at 704.

69. *See* note 65 and accompanying text *supra.*

70. [I]t would be wrong to assume that whatever Congress enacted with respect to the labor relations of those employers covered by the Railway Labor Act should automatically be applied to other employers. The distinct problems of the former group and their importance to the national economy are well recognized. . . . and are highlighted by the differences between the [RLA] and the [NLRA].

519 F.2d at 705.

71. We recognize, of course, that the policies animating the two statutes are

carefully scrutinize petitions to reject collective bargaining agreements, the court listed five factors to be considered[72] and remanded the case with instructions that the district court "reconsider carefully the exercise of discretion that it felt it did not have."[73] It appears, then, that the power of a trustee in bankruptcy to reject a collective bargaining agreement is no longer open to question, at least in the Second Circuit. The propriety of exercising that power, however, remains a question that must be answered by examination of the facts of each case.

2. Analysis.—Upon initial analysis *Kevin Steel* stands apart from the earlier cases dealing with collective bargaining agreements and bankruptcy trustees.[74] The court addressed the potential conflict directly, successfully harmonizing the policies at work within the Bankruptcy Act and the labor acts. In so doing, the court remained cognizant of the rights and concerns of both employer and employees. More importantly, the court established guidelines to be followed in passing on the propriety of allowing rejection in any given case.[75]

(a) No direct conflict between section 313(1) of the Bankruptcy Act and sections 8(a)(5) and 8(d) of the NLRA.[76]—In spite of the oft-repeated contentions that the above-cited sections conflict[77] and that in cases of conflict the labor laws prevail,[78] the *Kevin Steel* court arrived at a different conclusion. The company and the debtor in possession are not the same entity. When a trustee or debtor in possession is named, a new entity is created, to which rights and obligations attach.[79] Among those obligations is the duty to comply with the labor acts.[80] But since the debtor in possession is a new entity, it is not a "party" to the existing collective bargaining agreement. Until the old agreement is ratified or a new agreement is entered into, the trustee is not a party to any labor agreement. Section 8(d) of the NLRA is not applicable and no conflict exists between that section and section 313(1) of the Bankruptcy Act.[81]

The court reached a proper decision. A finding that one act preempted

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> different. . . . But it must be remembered that . . . the Bankruptcy Act even in its present form does not authorize a debtor-in-possession to ignore its obligations under the Labor Act.

Id. at 706.

72. *See* note 59 *supra.*

73. 519 F.2d at 707.

74. The district court's decision stands alone in holding that a bankruptcy court lacks the *power* to relieve a debtor from the burdens of a collective bargaining agreement.

75. *See* note 59 *supra.*

76. The NLRB contended that a holding that § 313(1) authorizes rejection of collective bargaining agreements would allow an employer to terminate such an agreement unilaterally, in direct conflict with § 8(d) of the NLRA, which provides procedures to be followed in cases of contract termination. Such a holding would, in the Board's opinion, throw the acts into irreconcilable conflict.

77. *See* cases cited note 16 *supra.*

78. *See In re* Klaber Bros., 173 F. Supp. 83 (S.D.N.Y. 1959); *In re* Business Supplies Corp. of America, 72 CCH Lab. Cas. ¶ 13,940 (S.D.N.Y. 1973).

79. 519 F.2d at 704. A similar proposition, going to the section 8(d) prohibition against compelling a party to come to terms, was discussed in *Burns*, 406 U.S. at 282.

80. National Labor Relations Act § 1, 29 U.S.C. § 151 (1970). *See* note 39 *supra.*

81. 519 F.2d at 704.

the other would have defeated the policy of the preempted act. Reconciliation of the acts, when considered in conjunction with the five factors to be evaluated before rejection is permitted, provides protection for all parties. By limiting rejection of collective bargaining agreements to cases in which disallowance would result in liquidation, the court benefited all. In such cases, if rejection is allowed, the business enterprise will continue, the jobs will remain in existence, and the employees can seek collective bargaining pursuant to the NLRA. In a truly meritorious case, rejection, although it entails some inconvenience and losses for employees, is the *only* viable solution.

(*b*) *Special nature of collective bargaining agreements does not alone exclude them from coverage of section 313(1).*[82]—Analogies made by the NLRB to the special provisions of section 77(n) of the Bankruptcy Act[83] as it relates to the RLA were held to be inappropriate. To hold that section 313(1) excluded from its scope collective bargaining agreements would be tantamount to amending the Bankruptcy Act, a task properly left to the legislature.[84] Given the option of judicially amending the Bankruptcy Act to exclude collective bargaining agreements from the scope of section 313(1) or of judicially accommodating the policies of the Bankruptcy Act and the NLRA, the court opted for the latter. The language of the section imposes no restriction on the type of executory contract that can be rejected. The court was not prepared to modify that language.[85]

(*c*) *Factors to be considered in determining the propriety of rejection.*—The *Kevin Steel* court outlined several considerations for the district court on remand.[86] These considerations ensure that rejection of a collective bargaining agreement will be permitted *only* if the employees are caused no undue hardship by the rejection. They spring from the court's realization that the only means of effectuating the policies of the acts is to construe each in light of the other.[87]

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82. The NLRB contended, in conformity with the district court's holding, that Congress had intended to distinguish colleotive bargaining agreements as a class from all other contracts and that § 313(1) did not apply to collective bargaining agreements.

83. 11 U.S.C. § 205(n) (1970).

84. 519 F.2d at 705. In support of its contention that the special nature of collective bargaining agreements excludes them from the coverage of § 313(1) of the Bankruptcy Act, the NLRB relied on language describing collective bargaining agreements as not "ordinary" contracts and "unique." John Wiley & Sons v. Livingston, 376 U.S. 543 (1964); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

85. The court also applied the successorship principles announced in *Burns*. Although not a "party" to the agreement sought to be rejected within the meaning of section 8(d) of the NLRA, and hence not bound by the restrictions of that section, the successor cannot ignore its responsibilities under the labor act. The court hinted that the obligations of a successor employer may fall upon the debtor in possession: "It may be that the obligations of such a trustee or debtor in possession are analogous to those of a successor employer. . . ." 519 F.2d at 704.

86. *See* note 59 *supra*.

87. The decision to allow rejection should not be based solely on whether it will improve the financial status of the debtor. Such a narrow approach totally ignores the policies of the Labor Act and makes no attempt to accommodate to them. 519 F.2d at 707.

First, the court required that an employer demonstrate that it is *not* petitioning in bankruptcy solely to rid itself of a collective bargaining agreement. The NLRB's contention that allowing rejection would result in an opening of the floodgates to disgruntled employers was thereby foreclosed. While not a new premise,[88] this consideration has become, at least in the Second Circuit, a question of first priority to be answered with convincing proof. By also requiring clear evidence of the petitioning employer's financial condition, the court further ensured that an undeserving employer does not slip out of a labor agreement.[89] Only in cases in which the agreement is burdensome and detrimental to the estate of the employer will rejection properly be allowed. An employer not on the brink of financial ruin suffers no injustice from a denial of rejection.

Secondly, the court suggested that the source of the employer's difficulties be probed, *i.e.*, that care be taken to sort out fraudulent claims, for when business declines and debts begin to mount, it may take only a little "doctoring" of the books to support a bankruptcy petition.[90] A careful review of books and records, along with research into the petitioner's labor relations, will supply the necessary "ounce of prevention" in an area in which the cure is painful and difficult to apply.

As another factor, the court required an investigation of benefits that will accrue to the employer should rejection be permitted. This is certain to be of value. If by rejection the asset-to-liability ratio of the employer will be increased, rejection should be considered as among the appropriate forms of relief. But if rejection will have little beneficial effect on the employer, the propriety of rejection is questionable.[91]

Finally, the court recommended a careful weighing of the equities. Implicit in this recommendation is the suggestion that although rejection of

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88. The employer's motivation caused some concern in Teamsters Local 886 v. Quick Charge, Inc., 168 F.2d 513 (10th Cir. 1948), and in *In re* Mamie Conti Gowns, Inc., 12 F. Supp. 478 (S.D.N.Y. 1935).

89. This is not to imply that the Bankruptcy Act is to have priority over the labor acts, since such a proposition would tend to defeat the policy of the labor acts. It does recognize, however, that the starting point in a petition for rejection of *any* executory contract is a survey of the financial condition of the debtor and the effect on that debtor of the contract sought to be rejected.

90. Although it is questionable whether large multinational corporations would engage in such activity, the small employer operating on a narrow profit margin and troubled with labor unrest might well consider bankruptcy, with its consequent rejection of a burdensome collective bargaining agreement, a viable alternative. In this context, the "floodgates" argument of the NLRB begins to appear more credible.

91. Like the other factors enumerated by the court, this consideration of the benefits to be gained from rejection must be made in light of all other factors. If the financial condition of the employer is such that nothing will aid its recovery, it would appear that the question of allowing rejection becomes moot, since liquidation and distribution of all assets seems likely to follow, along with discharge of all employees. Even when it appears that nothing can save the debtor, the collective bargaining agreement should still be looked to for provisions regarding dissolution or liquidation, which may inure to the benefit of the employees.

An example of this consideration is found in *REA Express*, in which REA alleged that it could meet neither the unemployment provisions of the labor agreement nor the wage scales called for in the agreement. Specific allegations aid the courts in determining the benefits to be gained by rejection.

collective bargaining agreements is within the power of the trustee in bankruptcy, a presumption against the propriety of rejection exists. In announcing this consideration, the court departed from the proposition that the power of a trustee to reject under section 313(1) is limited only by the requirement that the contract be detrimental to the estate. The court made it clear that the power of the trustee is narrowly circumscribed in light of the potential injuries to employees. The implication is that even if the other criteria are satisfied, rejection will be disallowed if, overall, the equities in favor of allowing rejection fail to outweigh the equities in favor of its denial.[92]

C. *REA Express—Facts and Analysis*

1. The Facts.—This case [93] arose from the district court's determination that the collective bargaining agreements at issue were burdensome and that, since section 313(1) of the Bankruptcy Act placed no restriction on the type of executory contract a trustee could reject, they could be rejected.[94] Thus the court reversed the bankruptcy judge's decision that rejection of collective bargaining agreements was not within the overall scheme of chapter XI.[95] The union promptly appealed the reversal on the grounds that the plain language of the Railway Labor Act (RLA) prohibits rejection of collective bargaining agreements made by the debtor-carrier except in the manner prescribed by the RLA.[96] REA alleged that unemployment compensation provisions in the labor agreements would prevent it from adopting and implementing a reorganization plan and that it was unable to meet the full wage scales provided in the agreements.

After reviewing the policies of both the RLA and the Bankruptcy Act,[97] the court concluded that whenever "an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a

92. The slight criticism that can be directed at the court's resolution of the issues is best directed at its failure to consider more carefully some of the factors at work in the problems presented. The quick dismissal by the *Kevin Steel* court of the NLRB's contention that employers might flock to bankruptcy courts to free themselves of the burdens of collective bargaining agreements is one such failure. If employers are willing to shut down an operation completely in order to avoid a union contract, there is little reason to doubt that employers of the same persuasion would take the seemingly less drastic step of petitioning for a Chapter XI rearrangement. It may be true, as the court believed, that "businessmen make the best bargain they can with unions if they want to stay in business." But the businessman who comes away from the bargaining table with less than he had hoped to achieve may see bankruptcy and contract rejection as a favorable alternative to a total plant shut down.

93. 523 F.2d 164 (2d Cir. 1975), *cert. denied*, 423 U.S. 1017 (1975).

94. *Id.* at 167 (citing the district court).

95. *Id.* (citing the bankruptcy court).

96. Railway Labor Act §§ 2, 6, 45 U.S.C. §§ 152, 156 (1970). *See* notes 53 and 54 *supra.*

97. The purpose of these provisions of the RLA . . . is to avoid disruptions of commerce by forcing the parties to exhaust collective bargaining procedures and . . . to encourage use of arbitration and mediation before engaging in self-help, strikes or other forms of unilateral action. . . . [S]ection [313(1)] enables the court to implement the policy of Chapter XI, which is to permit the debtor in possession to deal with the debtor's property in a way that will enable it to survive, by relieving it of executory contracts that would threaten or prevent its survival.

523 F.2d at 168-69.

failing carrier in bankruptcy from collapse," the court may authorize rejection or disaffirmance of the agreement under section 313(1).[98] Despite specific prohibitions in both the Bankruptcy Act and the RLA against termination of collective bargaining agreements except by procedures set forth in the RLA, rejection and termination was allowed and justified on the basis of policy.

2. Analysis.—While the basic issue in *Kevin Steel* and *REA Express* is the same, it is significant that *REA Express* arose pursuant to the Railway Labor Act.[99] The differences between the RLA and NLRA are basic enough to justify different results. A strict reading of section 77(n) of the Bankruptcy Act[100] in conjunction with sections 2 and 6 of the RLA,[101] prior to a reading of the court's opinion, might lead one to the erroneous belief that a conclusion different from that in *Kevin Steel* was reached in *REA Express*. Such is not the case.

Early in the *REA Express* opinion the court construed *Kevin Steel* as having held that "the enforcement of a collective bargaining agreement must yield to the bankruptcy court's power to relieve the debtor's successor in bankruptcy immediately of onerous and burdensome executory contracts."[102] By resort to the policies underlying the Bankruptcy Act and the RLA, in much the same manner as it had done in *Kevin Steel*, the court concluded that a collective bargaining agreement subject to the RLA is governed by the same principles. Policy, not the letter of the law, controlled the outcome of the case.

(*a*) *Apparent conflict in language and purposes of RLA and Bankruptcy Act resolved.*—Insisting that the conflict between the two acts is only apparent, the court reasoned that it is proper to authorize rejection under section 313(1) when, after a careful weighing of the equities, it is found that an onerous and burdensome executory contract (including a collective bargaining agreement) will "thwart" efforts to save a failing carrier in bankruptcy.[103] Indeed, to forbid rejection under these circumstances would defeat the purposes of the RLA, which seeks to avoid disruption of interstate carrier service.[104] Faced with the options of abiding by the letter of the Bankruptcy Act as it applies to the RLA, with a resultant defeat of the policies of both acts, or of looking beyond the letter of the law to seek an accommodation of those policies, the court chose the latter. In the writer's opinion, when total ruin and liquidation is the only alternative to allowing

98. *Id.* at 169. The court continued:
To hold that the RLA precludes rejection under such circumstances would ultimately be to defeat the purpose of the RLA itself, which is to avoid disruption of commerce by insuring that the carrier will continue operations pending resolution of labor disputes. . . .
99. 45 U.S.C. § 151 (1970).
100. *See* note 53 *supra.*
101. *See* note 54 *supra.*
102. 523 F.2d at 168.
103. *Id.* at 169.
104. *Id. See* note 98 *supra.*

rejection of a labor agreement, the Bankruptcy Act must govern and allow a quick rejection of the burdensome contract. Employees will gain little if they retain their agreement while losing their employer.

(*b*) *Application of successorship principles to REA as debtor in possession.—REA Express* is the first case explicitly to apply successorship principles to a trustee in bankruptcy,[105] imposing the *Burns* duty to bargain in good faith[106] and extending the *Burns* rights of successor employers to REA as debtor in possession under the more stringent RLA. Although the successor is under a duty to bargain, there is no correlative duty to refrain from changing the terms of employment prior to the initiation of such bargaining. The new employer has the right unilaterally to set the terms on which it will hire new employees. The only obligations imposed on REA in this regard were the requirements that it give reasonable notice of its proposed terms and that it negotiate in good faith for a reasonable time before putting them into effect.[107] Otherwise, to require union acquiescence to the suggested terms would have the same effect as requiring the debtor to operate under the existing labor agreement.[108]

(*c*) *Considerations on remand.*—Without listing the factors announced in *Kevin Steel*, the court remanded the case "substantially for the reasons stated" in remanding *Kevin Steel*.[109] As in the earlier case, the court emphasized that the power to reject a collective bargaining agreement is not so broad as the power to reject *any* executory contract, holding that rejection should be authorized "only where it clearly appears to be the lesser of two evils and [when it appears] that, unless the agreement is rejected, the carrier will collapse and the employees will no longer have

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105. "These [successorship] principles [as announced in *Burns*] are particularly applicable to the efforts of a trustee or debtor in possession to save a carrier from complete collapse and liquidation." 523 F.2d at 170.

106. [REA] as a new employer is obligated to bargain collectively with the representative of the employees hired by it. The Supreme Court so held with respect to a new employer in a case governed by the NLRA . . . and the result under the RLA is the same.

Id.

107. *Id.* at 171. The court was not troubled by the language of § 6 of the RLA, which sets forth "elaborate and protracted procedures" to be followed before any changes in wages, hours, terms, or conditions of employment can be made. Policy considerations were considered paramount.

Although much of the reasoning of *Burns* was applied to the bankruptcy situation in *REA Express*, the following language from *Burns* was considered not to be controlling:

There will be instances in which it is perfectly clear that the new employer plans to retain all the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

406 U.S. at 294-95. The Second Circuit saw this language as "dictum" and held that this "suggested exception" was limited to situations in which employees are led by the successor "to believe that they will have continuity of employment on preexisting terms." REA had made it clear to the employees that changes in conditions and terms of employment were imminent. 523 F.2d at 171-72.

108. As was mentioned in the discussion of *Kevin Steel* above, rejection of the labor agreement does not leave the employees devoid of protection. REA is a debtor in possession and a *new* employer that has retained substantially all of the employees of the predecessor (pre-bankrupt) employer. As such, it is clearly obligated to bargain collectively with the representative of the retained employees.

109. 523 F.2d at 172.

their jobs.''[110] Thus it would seem that rejection of a collective bargaining agreement is to be allowed as the *final* attempt to save a failing enterprise—a device to be used only if necessary to prevent total collapse of the debtor.[111]

V. Conclusion

Both *Kevin Steel* and *REA Express* represent refinements of, not departures from, the established rule that a trustee in bankruptcy possesses the power to reject a collective bargaining agreement.[112] Both decisions are laudable for their harmonious blending of the policies underlying the Bankruptcy Act and the several labor acts. Although these cases serve as precedent only in the Second Circuit, the remaining circuits would do well to study their rationale and expand upon it when faced with the same issues. It is regrettable that the Supreme Court has denied the petition for certiorari in *REA Express*, for its pronouncement would establish a basis for uniform resolution of future problems in this area of the law.[113]

Caution is mandatory in the court's consideration of both the employer's motivation in filing for bankruptcy and its financial condition. A heavy burden of proof should be imposed on petitioning employers to the extent that employers must demonstrate that forced compliance with the terms of existing agreements will certainly result in collapse. Although rejection of a collective bargaining agreement will often result in injury to employees, some injury is acceptable if necessary to assure employees of continued employment. But if the employer will survive despite continued enforcement of the agreement, the injuries to employees stemming from rejection are not justified.

A final recommendation, perhaps implicit in the holdings of these two cases, is that courts should look first to executory contracts other than the collective bargaining agreement. For example, unexecuted contracts for the purchase of raw materials and equipment should be rejected before rejection of a collective bargaining agreement is contemplated. Only when rejection of such other contracts has failed reasonably to assure the

110. *Id.*

111. The court's failure to distinguish *In re* Overseas Nat'l Airways, 238 F. Supp. 359 (E.D.N.Y. 1965), should be noted. Whether *REA Express* has overruled *Overseas* is open to debate, but there can be little doubt that the unqualified refusal by the *Overseas* court to allow modification or cancellation of a collective bargaining agreement except in conformity with the RLA is at odds with the reasoning of the Second Circuit. *Overseas* was not ignored by the *REA Express* court; it was cited. 523 F.2d at 172. Perhaps because it agreed with the language of *Overseas* regarding protection of employee rights, the circuit court declined to overrule it. A statement clarifying this situation would have been appropriate.

112. The "refinement" of the successorship doctrine, *see* note 108 and accompanying text *supra*, cannot be overlooked.

113. Especially in the field of labor-management relations, urgent pleas for the maintenance of uniformity resound. Suggested amendments to the NLRA which would vest the federal district courts with jurisdiction over unfair labor practices have been attacked on the basis of this "uniformity" argument. *See* H.R. 9214, 94th Cong., 1st Sess. (1975). A general discussion of this topic is found in ABA SECTION OF LABOR RELATIONS LAW 218 (1974).

continued existence of the debtor should rejection of the labor agreement be considered.[114]

Those who favor a strict interpretation of statutory language will probably not be pleased by these decisions, and will doubtless find *REA Express* the more disturbing of the two cases. Yet, of the few cases that have considered the question of rejection of collective bargaining agreements by trustees in bankruptcy, these two cases have given the most detailed and best reasoned analysis. By carefully considering the effects of rejection on all parties, the Second Circuit reached commendable solutions in each case. It is fitting that two apparently conflicting statutes were reconciled by resort to the underlying policies which those statutes were intended to express, without hindrance by the words used to express them.

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114. A "rule of reason" would necessarily apply to this suggested proposal. Executory contracts for materials and services essential to plant operation, would, of course, be outside the scope of the proposal.