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The Bankruptcy Dynamics of Collective Bargaining Agreements, 19 J. Marshall L. Rev. 301 (1986)

Richard L. Merrick

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THE BANKRUPTCY DYNAMICS OF COLLECTIVE BARGAINING AGREEMENTS

RICHARD L. MERRICK*

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I. OVERVIEW

As the management of a financially troubled business comes to recognize that its only opportunity for economic survival lies in a Chapter 11¹ reorganization case under the Bankruptcy Code,² two fundamental truths become self-evident. The first is the general proposition that only debts existing before the filing of the bankruptcy case petition, or attributable to the prepetition period, may be scaled down and eliminated by a prorata payment, and that costs arising after the filing of the petition, or attributable to the postpetition period, must be paid in full. The second is the general fiscal proposition that expenses of the company must be reduced and that labor costs are the largest or one of the largest cost factors.³ If not the largest cost item in absolute terms, labor expense will be the largest cost item over which management has a degree of control, the remainder of the costs being determined largely by external market forces.⁴

Although more than 80% of the national labor force is not represented by labor unions,⁵ a significant percentage of the companies that constitute the major Chapter 11 cases have work forces comprised in part of members of labor unions. This article will focus on methods of reducing the labor costs respecting the organized employees. Much of what is said will also apply to unorganized employees. With the exception of section 157(d)⁶ and

1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 1101-1174 (1982). Section 365(a) provides that "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 & Supp. II 1984). Further, section 1107(a) states that "subject to any limitations on a trustee serving in a case under this chapter . . . a debtor in possession shall have all the rights . . . of a trustee serving in a case under this chapter." 11 U.S.C. § 1107 (1982 & Supp. II 1984).

2. The Bankruptcy Code consists of two distinct parts. First, the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 11 U.S.C. § 101-151302 (1982). Second, the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 330 (codified in scattered sections of Titles 11 & 28 of the United States Code). For an analysis of this act, see Recent Development, *The Bankruptcy Amendments and Federal Judgeship Act of 1984: A Step Backward in Reducing Jurisdictional Delay*, 19 J. MAR. L. REV. 219 (1985).

3. Labor costs represented 87% of gross revenues in *In re Carey Transp.*, 13 BANKR. CT. DEC. (CRR) 150 (Bankr. S.D.N.Y. 1985), and between 87% and 100% of gross revenues in *In re Allied Delivery Sys.*, 49 Bankr. 700 (Bankr. N.D. Ohio 1985).

4. It is virtually routine that the work force will be reduced before or after the case is filed, or both. The timing of the terminations may have a significant impact on employee claims.

5. Medoff, *Study for AFL-CIO on Public's Image of Unions*, 247 BNA Daily Labor Rep., Dec. 24, 1984.

6. 28 U.S.C. § 157(d) (Supp. II 1984) provides that "the district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. § 157(d) (Supp. II 1984) (emphasis added). The federal constitution pro-

section 1113,⁷ the Judicial Code and Bankruptcy Code treat both

vides that "Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Some examples of Congressional action within its commerce power include the Labor-Management Relations Act, 29 U.S.C. §§ 141-87 (1982), the National Labor Relations Act, 29 U.S.C. §§ 8-151 (1982), and the Employee Retirement Income Security Program, 29 U.S.C. §§ 1001-146 (1982).

7. 11 U.S.C. § 1113 (Supp. II 1984) was added to the Bankruptcy Code by the Bankruptcy Amendments and Federal Judgeship Act of 1984. Pub. L. 98-353, 98 Stat. 330, which became effective on July 10, 1984 with respect to cases filed on or after that date. Collier's Comment to the section incorrectly states that "Section 1113 substantially . . . overrules the 5-4 portion [of *Bildisco*]." COLLIER ON BANKRUPTCY 548 (pamphlet ed. 1985). In the case of *In re Bildisco*, 682 F.2d 72 (3d Cir. 1982), *aff'd*, 465 U.S. 513 (1984), the issue was whether Section 8(d) of the NLRA controls rejection procedure; the decision that Section 8(d) does not control still stands. Section 1113 established a new postpetition hearing procedure for labor unions.

The text of section 1113 provides:

Rejection of collective bargaining agreements.

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not

types of employees in the same manner.

One factor, which is frequently overlooked in bankruptcy cases and proceedings, is that the Bankruptcy Code speaks in antagonistic absolute terms. It defines the rights of parties in relation to each other in the absence of consent. The only section in which there is a requirement of negotiation is section 1113. The National Labor Relations Act,⁸ on the contrary, does not impose substantive terms on

rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employees to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

11 U.S.C. § 1113 (Supp. II 1984). What section 1113 did not do may be as important as what it did do. It did not address the issue of unilateral modification as an unfair labor practice, nor did it address the issue of a prepetition unilateral modification. It did, however, establish a procedure for postpetition modification without the consent of the union. The amendment is susceptible to constitutional attack on two grounds, lack of uniformity and violation of due process. The lack of uniformity challenge arises from the constitutional provision that "The Congress shall have Power . . . to establish . . . uniform laws on the subject of Bankruptcies throughout the United States; . . ." U.S. CONST. art. II, § 8, cl. 4.

The contracts or conditions of employment of unorganized employees immediately can be modified unilaterally by the employer without following any procedure other than notifying the employees. The bargaining agreements of organized employees cannot be modified for months and as a result of a court order which has followed a series of negotiating sessions in which the employer has had to have supplied detailed financial information. The court cannot approve the rejection without making the three specific findings of subsection (c).

The results achieved in *American Provision Co.*, 12 BANKR. CT. DEC. (CRR) 558 (Bankr. D. Minn. 1984), in which the unorganized employees bear the total amount of the payroll reduction may be anticipated to become common. At a minimum, the organized employees will receive months of additional protection before they have to suffer a payroll deduction.

8. 29 U.S.C. § 151 (1982) provides, among other things, for the National Labor Relations Act and the National Labor Relations Board to be referred to, respectively, as the NLRA and the NLRB. The impact of federal labor law on various aspects of bankruptcy proceedings other than section 365(a) will not be discussed in detail, other than to say that a duty to bargain continues after court approval of a rejection. Where there is an organized workforce, the probabilities are that the employer will be

the parties' relationship. Indeed, the NLRA specifically provides that the parties are not required to agree to contractual provisions.⁹

The NLRA deals with procedural rights and obligations on the basic premise that if the employer and the union are required to negotiate, they will define their own relationship. The public interest is that there shall be a relationship. This is one of many examples that the bilateral labor-management approach of the NLRA differs from the multilateral approach of the Bankruptcy Code. One can imagine that in a multiparty bankruptcy it frequently will be impossible to obtain a unanimous consent of the requisite majority of each class or even a majority consent by classes of all of the disparate interests. Thus, it is necessary that the respective substantive interests be delineated in the statute.

Four major potential tensions exist between labor law¹⁰ and bankruptcy law:

1. The first, which will be discussed at length in this article and which has been the subject of considerable court decision and academic comment for twenty years, is the conflict between sections 8(a)(5) and 8(d) of the National Labor Relations Act¹¹ and section 365 of the Bankruptcy Code¹² (formerly sections 70(b) and 313(1) of the Bankruptcy Act),¹³ concerning the rejection of a collective bargaining agreement in a bankruptcy case;
2. The second, which has received a moderate amount of attention in court decisions and academic comment, is the conflict between section 1 of the Norris-LaGuardia Act¹⁴ and section 105 of the Bankruptcy Code¹⁵ (formerly section

a corporation. For purposes of federal labor law, a corporation is considered to be an "individual." The principles discussed in this article apply equally to a debtor who is an "individual" or a partnership.

9. 29 U.S.C. § 158(d) (1982).

10. The term "labor law" will be used in a colloquial sense to cover those national laws which regulate the relationship between management and labor. That term will exclude those laws which are designed to have a broad national policy impact, such as minimum wage, wages on government contracts, overtime, safe working conditions, and environmental hazards because those laws apply equally to unorganized employees.

11. 29 U.S.C. § 158(a)(5) & 158(d) (1982).

12. 11 U.S.C. § 365(a) (1982). See *supra* note 1 for a partial text of section 365(a).

13. Bankruptcy Act of 1898, 30 Stat. 544 (repealed 1978).

14. 29 U.S.C. § 101 (1982). Section 101 provides that "no court of the United States . . . shall have jurisdiction to issue any restraining order or temporary injunction in a case involving or growing out of a labor dispute : . . . except in strict conformity with the provisions of this chapter. . . ." *Id.*

15. Section 105 of the Bankruptcy Code states that "[t]he Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (1982 & Supp. II 1984). Under the prior bankruptcy act, however, the bankruptcy court was not a freestanding court but was a

- 2(15) of the Bankruptcy Act)¹⁶ concerning the ability of a bankruptcy court to enjoin various activities which threaten to frustrate a reorganization;
3. The third, which has received neither judicial nor academic comment, is the conflict between section 9 of the National Labor Relations Act¹⁷ and section 1109(b) of the Bankruptcy Code,¹⁸ as well as general bankruptcy principles of permitting a party in interest to vote his claim. The absence of a vote by the employees is compounded by a fact that the union, in representing (a) itself, (b) benefit fund trustees, and (c) the employees frequently is in the position of advancing its own interests ahead of those of either or both of the other two, or in advancing the interest of the fund trustees ahead of those of the employees.
 4. The fourth, which has received neither judicial nor academic comment, is the conflict between section 10(c) of the National Labor Relations Act¹⁹ and section 726(b) of the Bankruptcy Code.²⁰ NLRB awards of years of back pay to employees of a liquidated corporation cause the burden of an unfair labor practice to fall upon the general unsecured creditors.

A discussion of the last two of these four tensions will be abbreviated. The representation issue is not likely to be raised in a bankruptcy case. Even for purposes of Chapter 11 proceedings only, any attempt to alter the position of the union as the sole representative of the employees, not answerable to them nor to any other entity in the real sense, would generate so much emotion that it could effectively derail the rehabilitative purposes of the reorganization case in question.²¹ Any attempt by a bankruptcy court to permit employees

division of the district court, where the injunctive powers resided. Section 105 is derived from the All Writs Statute of other federal courts, 28 U.S.C. § 1651 (1982), and is appropriate for an independent court. The jurisdictional issues are further discussed in Recent Development, *The Bankruptcy Amendments and Federal Judgeship Act of 1984: A Step Backward in Reducing Jurisdictional Delay*, 19 J. MAR. L. REV. 219 (1985).

16. Bankruptcy Act of 1898, § 11(15), 30 Stat. 544 (repealed 1978).

17. 29 U.S.C. § 159 (1982).

18. 11 U.S.C. § 1109(b) (1982).

19. 29 U.S.C. § 160(c) (1982). That section authorizes the NLRB to "take such affirmative action including restatement of employees with or without back pay as will effectuate the policies of the act." *Id.*

20. 11 U.S.C. § 726(b) (1982 & Supp. II 1984).

21. The issue was present but not addressed in the case of *In re Carey Transp.*, 13 BANKR. CT. DEC. (CRR) 150 (Bankr. S.D.N.Y. 1985). A "Drivers' *Ad Hoc* Committee" was formed by a majority of the drivers who disagreed with the official union position. Apparently a *modus vivendi* was reached in which both the union and the Committee made proposals and arguments without either one attempting to be the sole spokesman of the employees.

to express their preferences with respect to modifications in a collective bargaining agreement would risk the introduction of an explosive and distracting side issue. The monolithic stature of organized labor rests largely upon the fact that the union has been and for NLRA purposes *is* the sole voice of the organized employees under all circumstances.

With respect to the fourth tension mentioned above, the NLRB takes the position that it is excluded from the automatic stay of section 362(a)²² of the Bankruptcy Code by virtue of the exemption of section 362(b)(4).²³

There is no dispute where unfair labor practices relate to anti-union activity, but the NLRB does not distinguish between remedial enforcement and wage collection, nor does it observe fundamental bankruptcy principles. The NLRB recently limited a debtor's responsibility for back pay to the period that the debtor was still engaged in business, but charged interest during the pendency of the bankruptcy case.²⁴ In earlier cases involving defunct corporations, the back pay award was open-ended and served as a punishment of the creditors.²⁵

22. 11 U.S.C. § 362(a) (1982 & Supp. II 1984) provides that "except as provided in subsection (b) . . . a petition filed . . . operates as a stay, applicable to all entities. . . ."

23. 11 U.S.C. § 362(b) (1982 & Supp. II 1984) provides that: "The filing of a petition . . . does not operate as a stay—(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" *Id.*

The legislative history of section 362(b)(4) consists of a description by the chairman of the House subcommittee, Don Edwards, that the section "is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate."

24. *In re Ohio Container Serv.*, 277 N.L.R.B. No. 25 (1985). Under section 726(a), interest is paid on unsecured claims only if there is an undistributed surplus remaining after the payment in full of all claims. 11 U.S.C. § 726 (1982).

25. *NLRB v. Killoren*, 122 F.2d 609, 612 (8th Cir. 1941) (back pay awards and rehiring were ordered by the NLRB against a closed business). The court stated that "[t]he mere fact that an employer may cease to do business certainly does not end the public interest involved in seeing that a back pay award under the Act is satisfied." *Id.* These back pay awards were at the expense of the general creditors who had no part in the management decision which was the basis for finding an unfair labor practice. The specific performance nature of a typical NLRB award of back pay plus reinstatement is in contrast with the breach of contract award which a bankruptcy court can award. A bankruptcy court can give the NLRB award full faith and credit only if the business is continuing to function at a level which will support that amount of increase in labor costs. See *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39 (3d Cir. 1942). See also Recent Cases, *Bankruptcy—Proof of N.L.R.B. Back Pay Award as Wages*, 20 TEX. L. REV. 474 (1942); Recent Cases, *Bankruptcy—N.L.R.B. Back Pay Award as Provable Claim*, 90 U. PA. L. REV. 100 (1942); Recent Decisions, *Bankruptcy—Back Pay Awards of NLRB Are Provable Debts and Entitled to Priority*, 28 VA. L. REV. 407 (1942).

There is a fifth tension which is similar in substance but not in form to the four described, and that is the internal inconsistency within the Bankruptcy Code and the Judicial Code created by section 1113²⁶ and section 157(d),²⁷ both added in the summer of 1984 by the legislative freak, the Bankruptcy Amendments and Federal Judgeship Act ("BAFJA").²⁸ Section 1113 affords organized employees of a debtor a legislative procedural protection which is not available to unorganized employees.²⁹ Section 157(d) permits unions to remove disputes from a bankruptcy court to a district court, a procedure which also is not available to non-union employees. There has been neither judicial nor academic comment on these subjects. One can imagine that, because of a general reluctance of district courts to increase their own case loads by taking on matters which are conventional bankruptcy court issues historically, the district courts will tend to disregard the mandatory requirement of section 157(d) that the reference to the bankruptcy court shall be withdrawn and that the proceeding be heard by the district court.

The central theme of this article is that as a consequence of a labor law orientation in the district courts and courts of appeals, the priorities of wages and employee benefits have been enlarged to the detriment of creditors with lower priorities or with none. The terms "prepetition" and "postpetition" will be used throughout to describe acts or actions of debtors or creditors. To the extent that a transaction occurs an instant or more before a bankruptcy petition has been filed, it is prepetition. To the extent that a transaction occurs simultaneously with or subsequent to the filing of a petition, it is postpetition. In addition, by virtue of section 365(g)(1)³⁰ of the Bankruptcy Code, rejection of a collective bargaining agreement that takes place postpetition will be deemed to have occurred prepetition if the bankruptcy court approves the rejection.

The terms "monetary" and "non-monetary" will be used to classify different types of provisions contained in collective bargain-

26. See *supra* note 7.

27. See *supra* note 6.

28. See *supra* note 2. The Bankruptcy Amendments and Federal Judgeship Act is discussed in Recent Development, *The Bankruptcy Amendments and Federal Judgeship Act of 1984: A Step Backward in Reducing Jurisdictional Delay*, 19 J. MAR. L. REV. 219 (1985). For a more definitive discussion of the bankruptcy procedures discussed under the new act, see Kamp, *Court Structure Under the Bankruptcy Code*, 90 COM. L.J. 203 (1985).

29. *In re Mile Hi Sys.*, 13 BANKR. CT. DEC. (CRR) 387 (Bankr. D. Colo. 1985), suggests that with respect to the rejection of collective bargaining agreements, section 1113 is a legislative substitute for the rejection mechanics of section 365, applicable to other executory contracts. The opinion did not treat the priority issue of section 365(g)(1).

30. 11 U.S.C. § 365(g) (1982) provides in part: "[T]he rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—(1) . . . immediately before the date of the filing of the petition. . . ." *Id.*

ing agreements. Monetary provisions include those relating to wages, vacation pay, severance pay, sick leave pay and fringe benefits. One customary NLRB award for an unfair labor practice respecting a monetary provision calls for a current payment of money (e.g., back pay) by the employer to or for the benefit of a designated employee or employees. The United States Supreme Court's decision in *NLRB v. Bildisco & Bildisco*³¹ discussed only monetary provisions. Non-monetary provisions of a collective bargaining agreement cover working conditions, discharge, grievance procedure, representation, job protection, arbitration, and all others in which the remedy for an unfair labor practice is not solely the payment of money but frequently includes an injunction or an order of reinstatement or rehire.³² Modifications of non-monetary provisions other than job protection and arbitration are uncommon in bankruptcy proceedings.³³

Before discussing the historical background of federal labor law and bankruptcy law, the focus first must be placed on the structure of priorities.³⁴ This is so because priorities, and not allowance, is the crux of the issue.³⁵ Specifically, the issue is whether a claim should

31. 465 U.S. 513 (1984).

32. "Monetary" and "non-monetary" have been used in a slightly different sense elsewhere in situations in which the emphasis is on the nature of the compensation and not the nature of the award. Under that nomenclature, wages, vacation pay, and severance pay are monetary and virtually everything else is non-monetary. The terms "mandatory" and "permissive" will be used to differentiate between bargaining areas under the National Labor Relations Act. Mandatory provisions are conditions of a bargaining agreement about which the parties must bargain. Subjects such as wages, hours, and terms and conditions of employment are key issues of a labor agreement and the central core of the NLRA. Peripheral issues which may be covered in a bargaining agreement but which are not essential to a functioning relationship are called "permissive." Permissive provisions, other than health and retirement provisions for terminated employees, usually do not have a major cost impact upon the employer. For that reason they are not likely subjects for rejection in a section 1113 hearing before the bankruptcy court.

33. See *supra* note 8.

34. In very rough terms, a failure to permit rejection will tend to ratchet wage and benefit claims upward by two priority levels for wages, and three priority levels for fringe benefit plans; they become administrative expenses instead of third or fourth priority claims.

35. "507(a) The following expenses and claims have priority in the following order:

- (1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.
- (2) [Rarely applicable and then only in a involuntary case. For practical purposes wages are a second priority.]
- (3) Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay—
 - (A) earned by an individual within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
 - (B) to the extent of \$2,000 for each such individual
- (4) Fourth, allowed unsecured claims for contributions to an employee benefit plan—

be afforded only the priority given to it by Congress in the Bankruptcy Code, or whether it should be given a higher priority because of labor law principles, that is, a judicial priority.³⁶

The mechanics of section 1113 can be gleaned from the text of the statute.³⁷ The section has no legislative history in the normal sense. It was a measure initiated in the House of Representatives and sponsored by Congressmen with recognized labor ties³⁸ as an antidote to *Bildisco*.³⁹ It was opposed by a majority in the Senate.⁴⁰

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- (A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
 - (B) for each such plan, to the extent of—
 - (i) the number of employees covered by each such plan multiplied by \$2,000; less
 - (ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other benefit plan.

11 U.S.C. § 507 (1982 & Supp. II 1984). The statement is incorrect in Collier's 1985 Pamphlet Edition Legislative History, "Paragraph (4) overrules *United States v. Embassy Restaurant*, [359 U.S. 29 (1958)], which held that fringe benefits were not entitled to wage priority status." Fringe benefits continue not to be entitled to *wage priority status*, which is Section 507(a)(3). Now they are entitled to *employee benefit priority status*, which is Section 507(a)(4). The advantage of the addition of subparagraph (4) to the benefit funds is obvious. The principal advantage to the bankruptcy court is that it reduces the conflict of interest situations of the unions, which under the Bankruptcy Act, not only were simultaneously representing themselves, the employees, and the fund trustees, but also were having union dues and welfare payments compete with wages for the \$600 limitation of the second priority.

Should unions seek either 3rd or 4th priority status for union dues they will be in a double conflict of interest position if simultaneously they attempt to represent the employees or fund trustees. In fact, whether or not the union represents itself, because it would be the real party in interest on a claim for union dues, it would appear to be improper for it to represent either the employees or the fund trustees. Employee benefits are limited by the \$2,000 aggregate maximum, but because the earning period is 180 days, the benefits earned in the 91-180 day period at a 4th priority would be paid ahead of wages earned from 91-180 days before the filing. The latter would be a general unsecured claim.

36. See *Nathanson v. NLRB*, 344 U.S. 25, 28-29 (1952), which states:

The Board argues that the interest of the United States in eradicating unfair labor practices is so great that the back pay order should be given the additional sanction of priority in payment. Whether that should be done is a legislative decision. *The contest is no longer between employees and management but between various classes of creditors.* The policy of the National Labor Relations Act is fully served by recognizing the claim for back pay as one to be paid from the estate. The question whether it should be paid in preference to other creditors is a question to be answered from the Bankruptcy Act.

Id. (emphasis added).

37. *Supra* note 7.

38. Neither the labor proponents nor any of the dozen other special interest groups had sufficient power to enact its proposal as a separate piece of legislation, yet many were strong enough individually or collectively to block passage of bankruptcy legislation, which was essential because all enabling authority of judges was due to terminate June 27, 1984.

39. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

40. Sen. Thurmond [Chairman of the Senate Judiciary Committee]. "With re-

The article will describe various ways in which judicial failure to differentiate between conventional bilateral contracts and collective bargaining agreements has worked to the disadvantage of unsecured creditors by creating judicial priorities for employees and for benefit funds.

This article is intended to focus attention upon one small segment of the relationship between labor law and bankruptcy law, not the entire relationship nor even the total relationship within the bankruptcy court. Accordingly, this article will focus on the relationship between the two laws in the bankruptcy court with respect to the rejection of collective bargaining agreements in Chapter 11 cases.⁴¹ The article will indicate that *Bildisco* culminated a trend toward a bankruptcy dominance, suggested at the Third,⁴² Ninth⁴³ and Eleventh⁴⁴ Circuit levels in contrast with the labor law bias of the Second Circuit.⁴⁵ It will not discuss the mechanics of section 1113 in detail, but will consider a bypass to the delays which it imposes and to the obstacle to confirmation that the precedent of *Straus-Duparquet, Inc. v. Local Union No. 3*,⁴⁶ presented in the Second Circuit. The article will touch on the constitutionality of section 1113 of the Bankruptcy Code⁴⁷ and section 157(d) of the Judicial Code,⁴⁸ both added in June, 1984.⁴⁹ The political atmosphere in the federal courts causes the subject not to warrant extensive comment.

gard to the labor provisions of this bill, let me first say that, were it not for the critical need to pass this bankruptcy bill, I could not have agreed to these provisions in subtitle J of this title. I believe that the *Bildisco* decision was correctly decided and did not require legislative action by Congress. Unfortunately, the House injected this issue into the bankruptcy debate very late in the process. They also made it quite clear that the bankruptcy bill, if there was to be one, would contain a labor provision acceptable to organized labor." 130 CONG. REC. S8888 (daily ed. June 29, 1984) (statement of Sen. Thurmond).

41. See *supra* note 1.

42. *In re Bildisco*, 682 F.2d 72 (3d Cir. 1982), *aff'd*, 465 U.S. 513 (1984).

43. *Local Joint Executive Bd., AFL-CIO v. Hotel Circle, Inc.*, 613 F.2d 210 (9th Cir. 1980).

44. *In re Brada-Miller Freight Sys.*, 702 F.2d 890 (11th Cir. 1983).

45. See, e.g., *Truck Drivers Local Union No. 807 v. Bohack*, 541 F.2d 312 (2d Cir. 1976), *cert. denied*, 439 U.S. 825 (1978); *Brotherhood of Ry., Airline, and S.S. Clerks v. REA Express, Inc.*, 523 F.2d 164 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976); *Shopman's Local Union No. 455 v. Kevin Steel Prods.*, 519 F.2d 698 (2d Cir. 1975).

46. 386 F.2d 649 (2d Cir. 1967). *Accord In re W.T. Grant*, 620 F.2d 319 (2d Cir. 1980), *cert. denied sub nom. Rodman v. Rinier*, 446 U.S. 983 (1980); *In re Unishops, Inc.*, 553 F.2d 305 (2d Cir. 1977); *McCloskey v. Division of Labor Law Enforcement*, 200 F.2d 402 (9th Cir. 1952). *Contra In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976), in which it was said that "[i]f one claimant is to be preferred over others, the purpose should be clear from the statute . . ." *Id.* (citing *Nathanson v. NLRB*, 344 U.S. 25 (1952)).

47. See *supra* note 7.

48. *Supra* notes 2 & 6.

49. *Supra* note 2.

The article will not deal with the correlation of the Employee Retirement Income Security Act (ERISA)⁵⁰ and section 365, nor with the correlation of the Internal Revenue Code and section 365, because of the impossibility of making succinct and accurate summaries of the points of tension in so broad a survey. ERISA was enacted to assure American workers that the pension benefits for which they had worked for years would be available to them at retirement age in spite of financial ill fortunes of their long time employers.⁵¹ Although ERISA was designed primarily to protect pension rights, the language is so broad that it covers virtually every common employee compensation device other than cash wages.⁵² ERISA can be understood best by dividing its provisions between those which are pension related and those which are not pension related.

With respect to the latter, ERISA has few teeth.⁵³ It has report-

50. The following two acts will be referred to collectively as "ERISA":

- (1) Employee Retirement Income Security Act of 1974 (also called Pension Reform Act of 1974), Pub. L. 93-406, 29 U.S.C. §§ 1001-1368 (1982), and
- (2) Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 98-399, 29 U.S.C. §§ 1381-1461 (1982).

51. "The Employee Retirement Income Security Act has proved to be as important and effective a social and political statement concerning the rights and benefits of America's workers and their families as has ever been made." (Francis X. Lilly—Solicitor of Labor) Lilly; *The Employee Retirement Income Security Act*, 35 LAB. L.J. 603-70 (1984). See also *Donovan v. Dillingham*, 688 F.2d 1367, 1370 (11th Cir. 1982). "Congress enacted ERISA to protect working men and women from abuse in the administration and investment of private retirement plans and employee welfare plans. Broadly stated, ERISA established minimum standards for vesting of benefits, funding of benefits, carrying out fiduciary responsibilities, reporting to the government and making disclosure to participants." *Id.* at 1370.

52. ERISA's definitional section provides in part:

(1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries . . .

(A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident disability, death or unemployment, or vacation benefits . . . or

(B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002 (1982). Moreover, section 186(c) states that the prohibition against payment by an employer to an employee representative shall not apply "with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits . . ." 29 U.S.C. § 186(c)(6) (1982). These sections, and the rest of ERISA, "apply to any employee benefit plan if it is established or maintained . . . (1) by any employer engaged in commerce or in any industry or activity affecting commerce." 29 U.S.C. § 1003 (1982).

53. "Ordinarily, a claimant who suffers because of a fiduciary's failure to comply with ERISA's procedural requirements is entitled to no substantive remedy." *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 183 (1985). There are significant liabilities for fiduciaries who breach their duties, but those are held to run to the plan and not to the individual participants within a plan. *Massachusetts Mut. Life Ins. Co. v. Russell*, 105 S. Ct. 3085 (1985).

ing requirements under which a Form 5500 report describing each benefit plan is to be filed with the applicable Internal Revenue Service Center within 210 days of the end of the plan year of that plan⁵⁴ and a description of plan changes is to be filed within 60 days of a plan change.⁵⁵ The volume of reports filed is so large in relation to the clerical staff available to analyze them that it is unlikely that any compliance actions based upon the reports will be undertaken in time to accomplish any remedial purpose.⁵⁶

Pension rights, on the contrary, are protected by the Pension Benefit Guaranty Corporation (PBGC),⁵⁷ a federal agency which has some superficial resemblances to the Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, and other federal guarantors of debtor obligations to frequently small and unsophisticated creditors. Among the reporting requirements for pension plans is one that compels notice of termination of a pension plan to be given to the PBGC ten days before the proposed termination date and to the union on or before the date that it is given to the PBGC.⁵⁸ It would be logically inconsistent for an employer to attempt to negotiate the termination of a pension plan with a union after the employer has given notice to the PBGC and to the union that it intends to terminate the plan unilaterally.

The exposition to follow which explores a possible strategy of prepetition unilateral modification of collective bargaining undertaking does not apply to a provision which relates to the creation, continuation, maintenance, or funding of a pension plan or other form of retirement plan. A prepetition unilateral modification which does not follow required PBGC procedures violates that law and constitutes an unfair labor practice. A prepetition rejection procedure also does not apply to a change in provisions for which the appropriate remedy would be other than breach of contract damages.

Also the article will not discuss the relationship between ERISA and a retirement plan termination which does follow the procedures of section 1113. The debtor should calculate that outcome before filing a Chapter 11 petition. If the debtor should happen to have been solvent within 120 days of what is determined to be the termination date of the plan, the debtor's liabilities to the PBGC might be substantial⁵⁹ and would have a section 507(a)(7) priority.⁶⁰ Obviously,

54. 29 U.S.C. §§ 1023-24 (1982). *See also* 29 C.F.R. §§ 2520.103 and 104 (1985) (regulations clarifying this section).

55. 29 U.S.C. § 1024(a)(1)(D) (1982).

56. *See supra* note 51.

57. 29 U.S.C. §§ 1301-1381 (1982).

58. *Id.* § 1341; 29 C.F.R. § 2616.3 (1985).

59. 29 C.F.R. § 2616.4 (1985).

the procedures for terminating a plan under ERISA are more detailed and comprehensive than those of section 1113. One can imagine that bankruptcy procedures would prevail over those of ERISA if termination of the pension plan were required to keep the business operating, but the *substantive* provisions of ERISA still would have to be met. It is possible that one termination date might be established for purposes of liability to the PBGC and another for establishing bankruptcy priorities.

The consequences of rejecting a collective bargaining agreement frequently become obscured by the intrusion of emotional or social attitudes respecting the rights of workers, with the result that basic bankruptcy precepts are not discussed in a logical context. A productive conclusion on this economic issue cannot be achieved from an argument expressed in moral or ethical terms. As a political question, the postpetition rejection of a collective bargaining agreement is neither right nor wrong; it is neither proper nor improper. It is a statutory procedure that will provide a financial benefit to a specific group and a corresponding detriment to others. Congress appeared to have established the degree to which a priority creditor should benefit by the priority listing in section 507,⁶¹ but that limit can be exceeded by placing the creditor in a higher priority classification. The standards that courts have enunciated in the past, particularly in the Second Circuit, demonstrate a bilateral labor-management analysis rather than a multilateral bankruptcy approach. *Bildisco* may be a major step in reversing that trend. The bankruptcy approach can be demonstrated most readily by consideration of two cases involving employee fringe benefits, in neither of which was the rejection of a collective bargaining agreement an issue.

II. PRIORITIES—VACATION PAY AND SEVERANCE PAY

*In re Public Ledger*⁶² represents the nearly unanimous view on the question of priorities to be awarded respecting vacation pay in lieu of paid vacations. *Straus-Duparquet, Inc. v. Local Union No. 3*⁶³ represents the Second Circuit rule respecting the priority to be accorded a severance pay provision. Both *In re Public Ledger* and *Straus-Duparquet* related to a debtor corporation which had filed for reorganization but had been unsuccessful in that attempt and was no longer doing business. The issue in each case was what priority should be applied to specific employee compensation claims. Be-

60. See *supra* note 35 for a partial text of 11 U.S.C. § 507 (1982 & Supp. II 1984).

61. 29 U.S.C. § 1368(c)(2) (1982).

62. 161 F.2d 762 (3d Cir. 1947).

63. 386 F.2d 649 (2d Cir. 1967).

cause there were no controversial labor-management overtones to obfuscate the issue, it could be recognized as being an adversarial relationship between employees and unsecured creditors. If employee claims were allowed high priorities, those payments would come from funds which otherwise would have been available to general creditors.

Both cases arose under the Bankruptcy Act,⁶⁴ which had priority provisions respecting employees' wages that were generally similar to those under the present Bankruptcy Code,⁶⁵ although somewhat narrower. Then, as now, wages earned postpetition were entitled to a first priority as expenses of administration.⁶⁶ Wages earned during the three months immediately preceding the filing of a petition were entitled to a second priority with a limited dollar ceiling. Wages earned before the three month priority period or exceeding the dollar ceiling were treated as general unsecured claims. Then, as now, valid claims of any class could not be paid until all superior priority claims had been paid in full. Consequently, a tug-of-war frequently took place between creditors with different alleged levels of priorities.

*In re Public Ledger*⁶⁷ arose from the reorganization attempt of a Philadelphia newspaper that lasted for 59 days, during which time the newspaper continued to be published. The bargaining agreements with both the Newspaper Guild and the Typographical Union

64. Bankruptcy Act of 1898, 30 Stat. 544 (repealed 1978). The priority provision of the old act read as follows:

The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; . . . (2) wages and commissions, not to exceed \$600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on commission basis, whole or part time, whether or not selling exclusively for the bankruptcy; . . ."

11 U.S.C. § 104(a) (1976) (repealed 1978). See also Forman, *Priority of Union Welfare Funds as Wages in Bankruptcy*, 62 COM. L.J. 321 (1957); Note, *Bankruptcy, Wage Claim Priority for Union Welfare Funds*, 26 FORDHAM L. REV. 561 (1957); Note, *Bankruptcy—Priorities—Status of Employer Contributions to Union Welfare Funds*, 57 MICH. L. REV. 403 (1959); Note, *Wage Claim Priority—Union Welfare Fund's Right to Priority for Unpaid Employer Contributions Under Section 64(a)(2)*, 42 MINN. L. REV. 295 (1957); Note, *Bankruptcy, Claims Against and Distribution of Estate Priority—Wages Due to Workmen*, 35 N.D.L. REV. 232 (1959); Note, *The Priority of a Severance Pay Claim in Bankruptcy*, 27 U.C.L.A. L. REV. 722 (1980); Note, *Bankruptcy—Priority of Wages—Employer's Contributions to Welfare Funds Are Not Entitled to Priority of Wages to Workmen*, 13 VAND. L. REV. 376 (1959); Note, *Union Retirement and Welfare Plans: Employer Contributions as "Wages" Under Section 64(a)(2) of the Bankruptcy Act*, 66 YALE L.J. 449 (1957).

65. The current priority provision can be found at 11 U.S.C. § 507 (1982 & Supp. II 1984). See *supra* note 35 for a partial text of that section.

66. Compare *supra* note 35 with *supra* note 64.

67. 161 F.2d 762 (3d Cir. 1947).

included a provision calling for paid vacations, or in the alternative, vacation pay in lieu of vacation time. The significance of the case is the manner by which the court apportioned the vacation pay between the period of administration, the three months preceding the filing of the petition, and the period preceding the three month priority period.

The Typographical Union's bargaining agreement provided two weeks vacation (ten days with pay) for all employees who had worked the entire year, and one day's vacation with pay for each twenty-six days worked to employees who had been employed less than the entire year. The court allowed as an administrative expense 59/365 of two weeks' pay for the employees who had worked all of 1941, and two days' pay for those who had not worked the entire year of 1941. The court allowed as a second priority, subject to the \$600 limitation, one-fourth of two weeks' pay for those who had worked all of 1941 and one day's pay for each twenty-six days worked for the shorter term employees. Any remaining balance due was a general unsecured claim.

The Typographical Union's agreement also had a severance pay provision that required a situation holder to be given two working days' notice before being laid off. No notice was given. The court termed this provision severance pay, although giving notice would have avoided an obligation to pay any more than the regular wages for the notice period. Because the severance pay did not vary with length of service, the court held that it was all earned and accrued during the Chapter X⁶⁸ operation and was an administration expense. The distinction made between vacation pay and severance pay was that a fractional portion of the vacation pay was earned every day that a person worked and so properly was allocable over his employment period. The severance pay provision did not relate to tenure and so was not allocable.

The distinction was more vivid in the treatment of severance pay under the Newspaper Guild contract: two weeks' pay was allowed for more than six months service and less than one year, with upward adjustments for longer service. The court held that the employee was earning a portion of his severance pay every day that he worked, and, therefore, it was allocable; 59 days' worth would be an administrative expense, three months' worth would be a second priority expense subject to the \$600 limit, and the balance would be a general unsecured claim. Outside the Second Circuit, *Public Ledger's* logical analysis has been universally adopted respecting vacation pay and generally adopted respecting severance pay.

68. 11 U.S.C. §§ 501-676 (1976) (repealed by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 1101-1174 (1982)).

Straus-Duparquet, however, established the Second Circuit rule, which places a serious burden on an attempted reorganization of a company that has an operative severance pay plan at the time it files its Chapter 11 proceeding. One month after *Straus-Duparquet* filed for reorganization, it discharged the employees who filed claims for vacation pay and severance pay.

The vacation pay provision allowed for 2 weeks paid vacation after 12 months employment, and 3 weeks paid vacation for employees of 15 years or more. The court followed the generally accepted principle that vacation pay is earned on a daily basis, and apportioned the pay between administrative expense, second priority, and general unsecured claims according to the periods over which the vacation pay had been earned.

The severance pay provision gave one week's severance pay to employees who had been with the company between one and three years, and two week's severance pay to those who had been employed over three years. The court held that the entire severance pay was an expense of administration in spite of the difference in treatment accorded by the contract between those who had worked three years or more and those who had worked less than three years. On this point, the court gave the following edict:

Severance pay was properly held to be an expense of administration. Severance pay is not earned from day to day and does not 'accrue' so that a proportionate part is payable under any circumstances. After the period of eligibility is severed, the full severance pay is due whenever termination of employment occurs. . . .

Since severance pay is compensation for termination of employment and since the employment of these claimants was terminated as an incident of the administration of the bankrupt's estate, severance pay was an expense of administration and is entitled to priority as such an expense.⁶⁹

The court assumed its own result and did not even address the fact that a person with a longer period of employment would receive a greater amount of severance pay. It looked only at the event that triggered the payment and not at the event that determined the amount of the payment. The extreme impact of the result from the viewpoint of controlling administrative expenses will prompt imaginative Second Circuit debtors' attorneys and creditors' attorneys alike to look for methods of eliminating severance pay plans prior to filing Chapter 11 petitions.⁷⁰

69. *Straus-Duparquet*, 386 F.2d at 651.

70. Particularly in the Second Circuit, severance pay can be a major detriment in the outcome of a plan because it is given a first priority. In the *W.T. Grant* liquidation, severance pay of \$10,331,000 to 26,545 employees constituted 24.5% of the expenses of administration, including taxes. *In re W.T. Grant*, 620 F.2d 319 (2d Cir.), cert. denied *sub nom.* *Rodman v. Rinier*, 446 U.S. 983 (1980).

III. BANKRUPTCY LAW—LABOR LAW RELATIONSHIP

The central theme of this article is the relationship between bankruptcy law and federal labor law. The key to this relationship, frequently misunderstood, is that federal labor law is founded upon the concept of a continuing bilateral adversarial negotiation between labor and management, while bankruptcy law is founded upon the concept of a determinate multilateral contest among creditors. Bankruptcy law's primary function is to equitably divide a debtor's assets among his creditors.⁷¹ Whether the distribution is *pro rata*, *per capita*, hotchpot, or a combination of these, there must be a rational basis of distribution.⁷²

Many lawyers and most laymen do not recognize that the theoretical purpose of a reorganization proceeding is to maximize the distribution to unsecured creditors.⁷³ The recapture of preferential payments by the debtor-in-possession is designed to equalize the distribution to the laggard creditors with that to the diligent and the favored.⁷⁴ Non-specialists mistakenly think of a voluntary Chapter 11 as a method for a corporation's owners to unjustly maintain control of a debt-free corporation. Rather, the powers of the debtor-in-possession are substantially the same as those of a trustee. Those powers exist because, in theory, the debtor-in-possession needs them, just as a trustee would, for the benefit of the corporate creditors generally.

Ever since the Bankruptcy Act of 1841, wages have been entitled to a priority in relation to most other debts of an employer.⁷⁵ The rationale behind this policy was primarily that the working man and his family depended upon this single source of payment; whereas other creditors, who were in business, had a number of different customers and were not so reliant upon payment from a single origin. Also, a wage earner was unlikely to have any other capital to sustain him, while persons in business were likely to have other

71. American bankruptcy law has as its direct antecedent a statute adopted in the middle years of the reign of Henry VIII. See An Act against such persons as do make bankrupts, 34 & 35 Hen. 8, ch. 4 (1543).

72. See Merrick, *Constitutional Chaos*, 2 N. ILL. L. REV. 167, 228 (1982).

73. *Id.* at 188-93.

74. *Id.* at 178.

75.

Year	Priority	Wage Priority		Statute
		Amount	Period	
1841	3d	\$25	6 months	5 Stat. 440
1867	4th	\$50	6 months	14 Stat. 517
1898	4th	\$300	3 months	30 Stat. 544
1926	4th	\$600	3 months	44 Stat. 662
1938	2d	\$600	3 months	52 Stat. 840
1979	3d	\$2,000	3 months	Pub. L. 95-598

assets upon which they could depend. Priorities for wages were created before there were any state or federal welfare programs, social security, unemployment compensation, aid to dependent children, food stamps, or other forms of economic relief for the oppressed. Thus, the wage earner and his family were much more dependent upon his wages than would be true today. In addition, the principle of wage priority antedated the frequency of two wage-earners in a single family, time and one-half for overtime, pension plans, profit-sharing plans, severance plans, and other benefits.

Like many lawyers and laymen, labor unions and the NLRB do not think of the debtor-in-possession as being a statutory fiduciary for all of the creditors. Rather, they think of the debtor-in-possession as being the same recalcitrant with whom they have had to contend in the past. This bilateral antagonism presents an atmosphere in which it is difficult to achieve rapid compromise solutions. More importantly, it blinds the union and the NLRB to the reality that the union has now become engaged in a multilateral conflict. The union is no longer engaged in a mere two-way skirmish, debtor against creditor, or labor against management, but rather in a free-for-all in which each group of creditors is adverse to every other group of creditors as well as to the debtor.⁷⁶ The bankruptcy court's role is to balance the interests of all the adversaries and produce a fair and equitable result. Modifications of a collective bargaining agreement have bilateral significance, but that is relatively unimportant in the overall objective of bankruptcy.

Whenever non-productive costs are treated as expenses of administration, it drains the earnings and capital base of corporations undergoing reorganization and diminishes the likelihood of successful rehabilitation. It is for this reason that the creditors, as well as the debtor, have a vital interest in the priorities which are granted to claims of any kind.⁷⁷ If the real bankruptcy issue is a contest between the union and the unsecured creditors over what priorities are to be given claims for employees wages and fringe benefits, then the issue of good faith bargaining between the union and the debtor to negotiate cost reductions should not have been a criterion in determining whether rejection should be allowed. That is a labor law is-

76. In the case of *In re Wheeling-Pittsburgh Steel Corp.*, 13 BANKR. CT. DEC. (CRR) 328 (Bankr. W.D. Pa. 1985), the basic confrontation appears to have been between the Steelworkers and the banks. The banks would not extend loans unless the Steelworkers took a deeper cut in wages than had been negotiated with the company, or the banks obtained a security interest in the unencumbered assets. The employees, however, were major unsecured creditors because of wage concessions which they had made over a period of years, for which they were to receive both stock and evidence of indebtedness.

77. See *supra* note 35.

sue, not a bankruptcy issue.⁷⁸ Recalcitrance on the part of the debtor should not be imputed to the creditors, although it generally is because courts view the controversy as being between the union and the employer. Similarly, the NLRB may assess backpay awards against a defunct corporation because of unfair labor practices that management committed while the business was operating.⁷⁹ This imputes fault to creditors who had no voice in the management decision that led to the unfair labor practice complaint and hearing.⁸⁰ In the past, the unsecured creditors had a right to be heard and had the most at stake in rejection hearings, but seldom participated actively. Under section 1113, unsecured creditors continue to have the most at stake but have no express right to be heard.⁸¹

IV. COLLECTIVE BARGAINING AGREEMENTS

In order to balance the economic power of the employer with the limited resources of the individual worker and to guarantee to society that labor disputes would not unduly disrupt the flow of goods through interstate commerce, the Supreme Court⁸² and finally Congress⁸³ over a period of years formulated the national labor policy that has guided our country for the past 50 years.⁸⁴ Last amended in 1959, the National Labor Relations Act seeks to minimize the disruption that strikes cause by encouraging the collective bargaining process. With this process, workers are guaranteed free-

78. See *infra* notes 206-07 and accompanying text.

79. The NLRB policy of issuing make-whole orders which can be enforced only against creditors who had no part in the unfair labor practice commission may have ceased in February, 1985. *Edward Cooper Painting Inc.*, 273 NLRB No. 25 (1985). Based upon *Bildisco*, the *Cooper Painting* majority discontinued NLRB hearings postpetition, and discontinued measuring damages postpetition.

80. As was noted in the *Cooper Painting* dissent, "My colleagues [other members of the NLRB] do not dispute that the Board traditionally has imposed full remedies for prepetition unfair labor practices with no qualification imposed because of subsequently filed bankruptcy proceedings." *Id.* at n.79 (Hunter, J. dissenting).

81. See 11 U.S.C. § 1109(b) (1982), which states: "A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or an indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter."

82. See, e.g., *Loewe v. Lawlor*, 208 U.S. 274 (1908); *In re Debs*, 158 U.S. 564 (1895).

83. The following congressional enactments constitute some of the myriad of labor law initiatives developed in the past century: The Wagner Act, with the Taft-Hartley and Landrum-Griffin Amendments, collectively known as the National Labor Relations Act, 29 U.S.C. § 151 (1982); Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1982); Railway Labor Act, 44 Stat. 477 (1926), 45 U.S.C. §§ 161-63 (1982); Sections 6 and 20 of the Clayton Act, 38 Stat. 731 & 738 (1914), 15 U.S.C. §§ 17 & 29 (1982); Erdman Act, 30 Stat. 424 (1898).

84. Latham, *Legislative Purpose and Administrative Policy Under the National Labor Relations Act*, 4 GEO. WASH. L. REV. 433, 433-74 (1935); Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining*, 50 HARV. L. REV. 1071, 1071-77 (1935).

dom of association and self-organization in order to designate representatives to negotiate with their employers over the terms and conditions of their employment.

Collective bargaining in this country, other than for railroads and airlines, is conducted under the framework of the National Labor Relations Act. The process for selecting a union as the employees' representative, for defining the limits of permissible conduct to enforce bargaining demands, and for defining the nature of the bargaining relationship are governed by this statute and decisions interpreting it.⁸⁵ The National Labor Relations Act defines collective bargaining in part as:

[T]he performance of the mutual obligation of the employer and the representative of the employee to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .⁸⁶

Unlike most contractual relationships, however, the bargaining relationship between employer and union is a "shotgun marriage." In the normal contract situation, one may negotiate with many parties for the best terms possible, and may, for any reason, cease negotiating with any of them. Once a union is certified as the employees' representative, the employer is obligated to deal with the union. A second basic difference between the collective bargaining relationship and a normal contractual relationship concerns the nature of the agreement itself. In most contracts, the parties attempt to avoid subsequent disputes by addressing in advance every contingency imaginable. In a collective bargaining situation, the parties' agreement forms a basic framework for their relationship. The duty to bargain "does not terminate with the signing of the collective bargaining contract" but "continues through the life of the agreement so far as it is necessary to enable the parties to administer the contract and resolve grievances or disputes."⁸⁷ Thus, collective bargaining is a continuing process between the parties. Because section 8(d) of the NLRA provides that neither party is required "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract,"⁸⁸ modifications to existing agreements

85. For a recent authoritative treatise on this subject, see G. BERENDT, *COLLECTIVE BARGAINING* (1985).

86. 29 U.S.C. § 158(d) (1982).

87. *Sinclair Refining Co. v. NLRB*, 306 F.2d 569, 570 (5th Cir. 1962). See also *Conley v. Gibson*, 355 U.S. 41 (1957).

88. 29 U.S.C. § 158(d) (1982).

must be negotiated and agreed upon in order to comply with the NLRA. A unilateral change in existing contractual terms is a "refusal to bargain" and a violation of section 8(a)(5) of the NLRA.⁸⁹

The federal agency responsible for enforcement of the National Labor Relations Act's provisions is the National Labor Relations Board ("NLRB"). Among its responsibilities with respect to collective bargaining negotiations, the NLRB has the authority to investigate and administratively adjudicate claims that either the employer or union has committed an "unfair labor practice" by failing to bargain in "good faith" in violation of sections 8(a)(5) or 8(b)(3) of the NLRA. The NLRB has the exclusive power to remedy unfair labor practices.⁹⁰ Generally, when an employer commits an unfair labor practice in violation of section 8(a)(5), the NLRB will order the employer to negotiate the matters at issue, order that the *status quo ante* be restored, and order that employees be made whole for any benefits unilaterally discontinued.⁹¹ Generally, unilateral changes in employer practices during the course of a collective bargaining relationship concerning either existing contractual provisions or mandatory subjects for collective bargaining are regarded as *per se* refusals to bargain and violate section 8(a)(5) of the NLRA.⁹² An NLRB finding of an unlawful refusal to bargain and its remedial order are enforceable upon application to the appropriate United States Court of Appeals.⁹³

A. Components of Collective Bargaining Agreements

Collective bargaining agreements comprise many individual clauses governing the employment relationship. Generally, if a subject concerns, "wages, hours, and other terms and conditions of employment," as defined in section 8(d) of the NLRA, it is a "mandatory" subject for collective bargaining. Other topics are either permissive or illegal subjects of bargaining, about which the parties are not required to bargain or may not bargain.⁹⁴ Most elements in collective bargaining agreements, and certainly the "cost" items that debtors-in-possession may wish to alter, are mandatory subjects of collective bargaining.

89. C&S Indus., 158 N.L.R.B. 454 (1966).

90. NLRB v. Food Store Employees Local 347, 417 U.S. 1 (1974); Continental Oil Co. v. NLRB, 113 F.2d 473 (10th Cir. 1940).

91. See, e.g., Beacon Journal Publishing Co. v. NLRB, 401 F.2d 366 (6th Cir. 1968).

92. NLRB v. Katz, 369 U.S. 736 (1962).

93. American Fed'n Labor v. NLRB, 308 U.S. 401 (1940).

94. See, e.g., NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

1. *Compensation*

Wages, whether hourly rates of pay;⁹⁵ piece rates and incentive wage plans;⁹⁶ overtime pay;⁹⁷ shift differentials;⁹⁸ paid holidays;⁹⁹ paid vacations;¹⁰⁰ or severance pay,¹⁰¹ are a mandatory subject for collective bargaining.

2. *Fringe Benefits*

Group health insurance has long been held to be a mandatory subject for collective bargaining.¹⁰² An employer has a duty to bargain with respect to pension plans and benefits as they relate to current employees.¹⁰³ Profit sharing plans are also a mandatory subject for collective bargaining.¹⁰⁴ Even where the collective bargaining agreement is otherwise silent, discontinuation of a "Christmas turkey" or modifications in the prices charged at vending machines on the company's property (even if only to pass through newly increased costs) may violate section 8(a)(5) of the NLRA.¹⁰⁵

3. *Other Non-Wage Items*

Many other non-wage items, which have a substantial impact on employer costs, are subjects for collective bargaining. Hours of work, including work schedules, a requirement for Sunday work, and length of the work day are mandatory subjects for collective bargaining. Similarly, the provision of uniforms, layoff, recall and seniority provisions, workloads, holidays, sick leave policies, and work rules are all mandatory subjects for collective bargaining.¹⁰⁶ Any unilateral change in these mandatory subjects for collective bargaining violates section 8(a)(5) of the NLRA. Certain other subjects are

95. *Beacon Piece Dyeing & Finishing Co.*, 121 N.L.R.B. 953 (1958).

96. *C&S Indus.*, 158 N.L.R.B. 454 (1966).

97. *Braswell Motor Freight Lines, Inc.*, 141 N.L.R.B. 1154 (1963).

98. *Smith Cabinet Mfg.*, 147 N.L.R.B. 1506 (1964).

99. *Singer Mfg.*, 24 N.L.R.B. 444 (1940), *modified and enforced*, 119 F.2d 131 (7th Cir.), *cert. denied*, 314 U.S. 708 (1941).

100. *Jimmy-Richard Co.*, 210 N.L.R.B. 802 (1962), *enforced*, 527 F.2d 803 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 907 (1976).

101. *NLRB v. Adams Dairy*, 137 N.L.R.B. 815 (1962); *enforced*, 350 F.2d 108 (8th Cir.), *cert. denied*, 382 U.S. 1011 (1966).

102. *W.W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949).

103. *See Allied Mills, Inc.*, 82 N.L.R.B. 854 (1949).

104. *Kroger Co. v. NLRB*, 401 F.2d 682 (6th Cir. 1968), *cert. denied*, 395 U.S. 904 (1969).

105. *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979); *Southern Materials Co.*, 198 N.L.R.B. 257 (1972).

106. *See Hilton Mobile Homes*, 155 N.L.R.B. 873 (1965); *Beacon Piece Dyeing & Finishing Co.*, 121 N.L.R.B. 953 (1958); *United States Gypsum Co.*, 94 N.L.R.B. 112 (1951).

not clearly mandatory subjects for collective bargaining and, depending upon the circumstances, a change may not constitute an unfair labor practice.¹⁰⁷ Even if these changes do not constitute unfair labor practices, changes in operations may violate the existing contractual language and result in a grievance and eventual arbitration hearing.

B. *Continuing Collective Bargaining Agreements After They Expire*

Unlike most contracts, collective bargaining agreements under the NLRA continue indefinitely unless the party desiring to change the agreement gives notice to the other party at least 60 days prior to the agreement's expiration date,¹⁰⁸ and notification to the Federal Mediation and Conciliation Service within 30 days of such notice.¹⁰⁹ Even after an agreement has expired, however, an employer may not implement changes in mandatory subjects for collective bargaining

107. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Fibreborad Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1965); *Pittsburgh Plate Glass Co.*, 177 N.L.R.B. 911 (1969), *enf. denied*, 427 F.2d 936 (6th Cir. 1970), *aff'd*, 404 U.S. 157 (1971); *Westinghouse Electric Corp.*, 150 N.L.R.B. 1574 (1965).

108. 29 U.S.C. § 158(d)(1) (1982).

109. 29 U.S.C. § 158(d)(3) (1982). *See also* *NLRB v. Cone Mills Corp.*, 373 F.2d 595, 598 (4th Cir. 1967), wherein the court stated:

It is axiomatic in contract law that the parties to an agreement are relieved of their mutual obligations upon termination of the agreement. A collective bargaining agreement is not, of course, an ordinary contract. . . . Since parties to a collective bargaining agreement normally contemplate a subsisting contractual relationship of indefinite duration with not infrequent renewals or renegotiations and since the employment relationship generally continues beyond expiration or termination of the agreement, it has been said, that some rights created by collective bargaining agreements survive the termination of the agreement.

Id. (citation omitted).

In *Henson v. NLRB*, 428 F.2d 133, 136 (8th Cir. 1979), the court noted that "even after expiration of a collective bargaining contract, an employer is under an obligation to bargain with the union before he may permissibly make any unilateral change in the terms and conditions of employment." *Id.* Further, in *Industrial Union of Marine and Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), *cert. denied sub nom.*, *Bethlehem Steel v. NLRB*, 375 U.S. 984 (1964), the court found that "accordingly, the company's unilateral action with respect to them unlawful. The fact that there was no agreement in effect at that time does not alter our conclusion." *Id.* The mandatory provisions of the contract, i.e., those that relate to wages, hours, conditions of employment, overtime, shift differential, paid holidays, paid vacations, severance pay, pension plans, health insurance plans, and profit-sharing plans of current employees all continue in full force after the expiration date of the bargaining agreement.

Collier, many judges, and most academicians overlook the element of continuity. The labor law result, therefore, is the same as would exist under property law or contract law. For example, in most states unless advance notice is given by the landlord, a term residential lease will continue as a month to month tenancy after expiration of the term. If a supplier continues to perform after the expiration date of a contract and the goods are accepted, the specifications of the contract respecting size, color, mixture, quality and price will continue to govern.

absent an "impasse" in negotiations. An impasse occurs when, after extensive "good faith" negotiations, seemingly irreconcilable differences exist in the parties' positions.¹¹⁰ When such an impasse occurs, the employer may only make unilateral changes in working conditions to the extent that they are not on specific terms which the union has rejected. Aside from typical collective bargaining agreements, multiemployer agreements raise particular problems in the bankruptcy context.

C. *Multiemployer Agreements*

The problems associated with multiemployer agreements arise because the union has negotiated a contract providing the same terms and conditions of employment for the employees of numerous employers, many of whom are direct or indirect competitors of the debtor. Despite the need for a single employer (i.e., the debtor) to achieve relief from onerous contractual provisions and its employees' interest in job security, the union has a different interest in maintaining the solidarity of identical terms and conditions of employment for all employers. This represents a conflict of interest because the union was elected by the specific employees of this employer (the debtor) to represent them in relation to this employer. No bankruptcy court has addressed that issue, possibly because the parties recognize that they would be facing an emotionally charged digression to adjudicate the tension between the representation portions of the NLRA and the right of parties in interest to vote their claims in a bankruptcy case. Thus, in a multiemployer context, a debtor may experience great difficulty in achieving sufficient union concessions. To a lesser degree, "pattern bargaining" restricts concessions from a union that has negotiated identical individual agreements with separate employers within the same industry.¹¹¹

V. REJECTION OF EXECUTORY CONTRACTS

Rejection of executory contracts evolved during this century as a result of case law which was directed toward the avoidance of waste in management of estates in reorganization or in liquidation, deriving its impetus from an English statute of 1869.¹¹² The broad

110. *Fetzer Television, Inc. v. NLRB*, 317 F.2d 420 (6th Cir. 1963).

111. The bargaining agreement between the Steelworkers and the basic steel manufacturing companies expires in the Autumn of 1986. It is anticipated universally that, as an opening bargaining ploy, the steel manufacturing companies will demand for themselves whatever concessions have been granted to Wheeling-Pittsburgh. Employers generally do not wish to compete with other companies having lower labor costs.

112. Bankruptcy Act, 1869, 32 & 33 Vict. ch. 71.

basis for rejection results from the general circumstance that a business either in reorganization or in liquidation will be operating at a lower level of activity and, consequently, may have idle or excess rented space or leased equipment. There is no advantage to present creditors in having the estate continue to pay rentals on unused space and equipment because no benefits are being received. The needless outflow of liquid assets should be staunched in the interest of creditors because the theoretical concept of both a Chapter 11 reorganization and a Chapter 7¹¹³ liquidation is to maximize dividends to creditors. Payments should be stopped in accordance with some formula which does not unduly injure the lessors of the land or equipment and which terminates a purposeless drain upon the estate.

Step one of the process of avoiding waste is to permit the debtor or trustee to terminate any burdensome lease.¹¹⁴ This will constitute a breach of contract for which the lessor will be allowed damages. Step two is to treat the breach of contract as though it had taken place before the case was filed to prevent the breach of contract damages from having the first priority status of an expense of administration. Because priorities are granted at the expense of lower priority creditors and non-priority creditors, it is in the economic interest of a general creditor to remove or to prevent the allowance of claims as priority claims, particularly first priority claims which have no maximum limit.

Stated in economic terms, the purpose of permitting the rejection of executory contracts is to enable a debtor-in-possession to do business at market rates without the necessity of paying for unnecessary space or equipment. Its shackles are removed so that it may become able to compete. The rejection of collective bargaining agreements is similarly a cost saving measure where the focus is on reducing the level of expense rather than on eliminating it entirely.

The most comprehensive discussion of the rejection of executory contracts appeared in two articles by Professor Countryman,¹¹⁵ the first relating to land contracts and contracts for the sale of goods, and the second relating to employment contracts. With respect to employment contracts, the second article distinguished between individual employment contracts and collective bargaining agreements, and noted that the debtor-in-possession has an obligation to observe state¹¹⁶ and federal labor laws during an ongoing op-

113. 11 U.S.C. §§ 701-766 (1982 & Supp. II 1984).

114. See 11 U.S.C. § 365(a) (1982 & Supp. II 1984).

115. Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439 (1973), *Part II*, 58 MINN. L. REV. 479 (1974).

116. States laws respecting priorities of wages will not be discussed because of their diversity. Essentially they promote employees' wages or fringe benefits either as

eration. It did not, however, discuss the fundamental differences between a conventional contract and a collective bargaining agreement, nor the consequences that flow from those differences. Until *Bildisco* and section 1113, very little dramatic had been added to the subject since Professor Countryman's exposition, other than to update the subject to include the Bankruptcy Code, to discuss subsequent court decisions that permitted rejection of collective bargaining agreements, and to describe perceived gaps in earlier articles and discussions on the subject.¹¹⁷

VI. REJECTION OF COLLECTIVE BARGAINING AGREEMENTS

Bildisco firmly established the proposition, which had been sustained at the Court of Appeals level for nine years,¹¹⁸ that a collective bargaining agreement may be rejected where economic circumstances dictate but under more rigid standards than other executory contracts.¹¹⁹ The purpose of rejection is to eliminate burdensome expenses and improve the opportunity for rehabilitation. In theory, this means an increased likelihood of a confirmed plan in which unsecured creditors received a significant dividend. In practice, it may

priorities, often called liens, or as liens. In general, wages or benefits which receive preferred treatment in a state court execution, but which will not support a foreclosure type proceeding, will be treated as unsecured claims in a bankruptcy court. Liens which will support an execution without the intercession of an intermediate judgment will be treated as statutory liens in a bankruptcy court.

117. See Bordewieck & Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J. 293 (1983); Gibson, *The New Law in Rejection of Collective Bargaining Agreements In Chapter 11: An Analysis of 11 U.S.C. § 1113*, 58 AM. BANKR. L.J. 325 (1984); Miller, *Chapter 11 of the Bankruptcy Act and Collective Bargaining Agreements*, 51 FORDHAM L. REV. 1120 (1984); Pulliam, *The Rejection of Collective Bargaining Agreements*, 70 A.B.A.J. 293 (Fall 1983); Rosenberg, *Bankruptcy And The Collective Bargaining Agreement—A Brief Lesson In The Use Of The Constitutional System Of Checks And Balances*, 58 AM. BANK. L.J., 293 (1984); Simon and Mehlsack, *Filing a Post-Bildisco Chapter 11 Petition to Reject a Labor Contract*, 52 FORDHAM L. REV. 1134 (1984); Comment, *Collective Bargaining and Bankruptcy*, 42 S. CAL. L. REV. 477 (1969); Note, *The Bankruptcy Laws Effect on Collective Bargaining Agreements*, 81 COLUM. L. REV. 391 (1981); Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759 (1975); *In re Bildisco: Rejection of Collective Bargaining Agreement*, 15 LOYOLA U. CHI. L.J. 761 (1984); Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, 80 MICH. L. REV. 134 (1981); Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements*, 51 NOTRE DAME LAW. 819 (1976); Note, *Bankruptcy Law—Labor Law—Rejection of Collective Bargaining Agreements as Executory Contracts*, 22 WAYNE L. REV. 165 (1975).

118. See *supra* note 45.

119. There is no present bankruptcy purpose in establishing a more rigid standard because contingent claims respecting loss of seniority, pension rights, benefit rights, and so forth, may be estimated under § 502(c) and allowed under § 502(a). Under the Bankruptcy Act of 1898 the contingent nature of the claims would have made them not provable, and hence not allowable. Rejection would have produced a non-compensable loss to the employees. Consequently, rejection of collective bargaining agreements received court approval less freely.

mean that the equity holders will continue to own their stock, but with a much lower level of debt. Whether a plan will be confirmed depends largely on whether there will be sufficient funds available for unsecured creditors so that they will vote for the plan. The continuation of management depends upon producing a plan satisfactory to creditors; the creditors have as direct and as immediate an interest in avoiding priority status for employees' claims as does management or equity ownership.

Before considering the circumstances under which a collective bargaining agreement might be rejected, it will prove helpful to consider what is a collective bargaining agreement; what are its similarities with and differences from other bilateral contracts; and whether the differences are sufficiently large so that an alternative result should be considered on the issue of rejection. These questions ordinarily are not asked and almost uniformly a collective bargaining agreement is treated as though it was just another executory contract. Different standards are applied with respect to rejection, not because the contract is different from other contracts, but because the parties are different from other parties. The party whose rights are sought to be curtailed is not an entrepreneur, but rather a group of employees represented by a labor union. The fact that the aggrieved party is a union of job holders has generally produced more rigid standards for court approval of an application to reject a collective bargaining agreement than for commercial contracts. Stated dramatically, a conventional contract relates to the manufacture or sale of material objects, a collective bargaining agreement relates to the jobs of human beings. The principal rationale given for the more difficult rejection standards is that it will save jobs, yet that more difficult standard has been applied where the debtor is defunct and the jobs already have been lost.¹²⁰

The most frequent employer unilateral modifications are the refusal to pay scheduled wage increases, reduction in wage rates, and cancellation or reduction of plan provisions covering vacation pay, severance pay, pension payments, and health and welfare payments. The *Bildisco* case included in its facts the company's retention of union dues withheld from the wages of employees, an event upon which the Court did not comment. What the employer's purpose would have been is not clear because under no circumstance would the employer be entitled to keep the wages that the employees had authorized to be withheld for a specific purpose.

Rejection of a collective bargaining agreement is somewhat dif-

120. *In re Alan Wood Steel Co.*, 449 F. Supp. 165 (E.D. Pa. 1978). The agreement was held to require payment to former employees of a closed plant. *United Auto Workers v. Roblin Indus.*, 116 L.R.R.M. 2598 (Bankr. W.D. Mich. 1983).

ferent in practical terms from rejection of other types of executory contracts. If there is a lease for real estate or equipment, a reduction in the employer's scope of operations may obviate the need for the space or equipment. Under those circumstances there is a complete rejection. Even if there is to be a partial discontinuance only, the normal practice on leases is to cancel the old agreement and to write a new one.

With respect to collective bargaining agreements, however, the situation is different because more of the subject matter of the agreement is expected to continue than to change. Of the twenty to one hundred promises by the employer in the agreement, the employer only desires to change a few, usually to reduce operating expenses, or overhead expenses, or both.¹²¹ While the Bankruptcy Code uses the term "rejection," in fact what occurs is a unilateral modification imposed by the debtor-in-possession. In a different context that would be an unfair labor practice.¹²² In a bankruptcy context it is a breach of contract. Obviously it is a prepetition breach if it occurred prepetition. If rejection is approved by the bankruptcy court postpetition, it also is deemed to be a prepetition breach by virtue of the retroactive operation of section 365(g)(1).

An argument might be made that a collective bargaining agreement may not be rejected after its expiration date because it is no longer "executory", and because section 365 applies only to "executory contracts."¹²³ So long as a working relationship between the

121. The most common of the employer promises described:

- | | |
|--------------------------------|---|
| 1. wages, | 13. eyeglasses, |
| 2. hours, | 14. sick leave, |
| 3. working conditions, | 15. maternity leave, |
| 4. vacations and vacation pay, | 16. grievance procedure, |
| 5. paid holidays, | 17. supplemental unemployment benefits, |
| 6. severance pay, | 18. uniform allowance, |
| 7. seniority, | 19. break time, |
| 8. pensions, | 20. wash up time, |
| 9. hospitalization expense, | 21. withholding union dues, |
| 10. medical expense, | 22. union security, |
| 11. prescription expense, | 23. subcontracting, |
| 12. dental expense, | 24. successors and assigns. |

With the exception of hours, working conditions, seniority, grievance procedure, union security, subcontracting, and successors and assigns, all of the principal items are monetary; payment is relatively contemporaneous, payment is in cash, the cost to the employer and the benefit to the employee are equivalent, and the cost and the benefit can be quantified readily. If any of those promises is broken, it is relatively easy to calculate the breach of contract damages in the bankruptcy court. Pensions, however, are a hybrid, in that the costs are current and easily measured. The benefit is delayed and subject to many contingencies.

122. See *supra* notes 94-111 and accompanying text.

123. Professor Countryman appears to argue for an elastic yardstick which would first look at the desired result of benefit to the estate and then determine whether a contract was executory or not depending on which result would benefit the estate. *Gloria Mfg. v. ILGWU*, 7334 F.2d 1020 (4th Cir. 1984), did not quantify the

debtor and covered employees continues, the NLRA mandates the performance of obligations which constitute the core of the definition of executory contract. The obligations of the parties with respect to the mandatory provisions of the agreement respecting wages, hours, and working conditions remain in force. It is a matter of labor law, and not either contract law nor bankruptcy law, what permissible provisions of the bargaining agreement continue to be controlling. The fact that each party has unfulfilled duties under the contract causes it to be executory. The fact that the obligations are implied after the expiration date does not diminish the quality of the document as an executory contract. It is an executory implied contract as contrasted with an executory express contract.

Most of the cases dealing with the interplay between the labor laws and the bankruptcy acts have been concerned with the provisions of the Bankruptcy Act of 1898, as amended, which no longer are germane. Under that Act there was a priority for "wages" but none for employee benefits. Thus the controversy often centered around whether certain benefits were "wages" for priority purposes. If not, they were unsecured claims. That problem largely was eliminated in the Bankruptcy Code, which created a third priority for wages and a fourth priority for employee benefits, both subject to a combined ceiling of \$2,000 per employee.

The Bankruptcy Code provides that the trustee "subject to the court's approval, may assume or reject any executory contract."¹²⁴ With collective bargaining agreements, the employer will want to eliminate only what he considers excessive; the employee must survive. As a practical matter, there is neither a complete assumption nor a complete rejection.¹²⁵ There is a compulsory accommodation. The parties are dealing within the rigid confines of two statutes, a labor statute and a bankruptcy statute that speaks in terms of "assume or reject."¹²⁶ The unilateral modification is closer to rejection

benefit to the estate of the rejection of an expired contract in a chapter and liquidation. The court found that the union had performed fully, so that the contract was not executory, suggesting that the business had ceased operations. In *In re Total Transp. Serv.*, 116 L.R.R.M. 2232 (Bankr. S.D. Ohio 1984), the court indicated that an expired contract of a closed business was not executory, but decided that in balancing the equities a \$2,800 benefit to the estate did not justify rejection.

124. See *supra* note 1.

125. Rejection usually creates significant breach of contract damages, the priorities of which may impede confirmation of a plan of reorganization because they must be paid in full. 11 U.S.C. § 1129(a)(7) (1982 & Supp. II 1984).

126. *In re Braniff Airways*, 117 L.R.R.M. 22771 (Bankr. N.D. Tex. 1982), presents an interesting insight into partial rejection. All employees had been terminated. A proposed merger with PSA would have protected the jobs of a large number of Braniff employees, but they would have been junior to the PSA employees. The Machinists sought to retain the seniority provisions of the Braniff agreement. Without directly addressing the issue of whether partial rejection is ever possible Judge Flowers' reasoned that: "partial rejection . . . should not be permitted where . . . the

than to assumption, and it traditionally has been treated as a rejection, though there may have been an implied assumption of the bulk of the contract.

A practical difference between a postpetition rejection of a collective bargaining agreement under section 1113 and the rejection of a real estate lease, relates to the custom of a debtor-in-possession to withhold payment of current rent after he decides to reject a lease. This provides a cash flow benefit to the debtor-in-possession from which the landlord may not obtain immediate relief in the state courts because of the stay of section 362(a)(1) of the Bankruptcy Code, and may not obtain immediate relief in the bankruptcy court because of the necessity of filing a complaint, giving notice, having a hearing, and awaiting an order of court. The process frequently occupies three months, during which time the debtor-in-possession has had a cash flow bonus. Occasionally, the money representing the rent due for the suspension period may be held by the debtor-in-possession until after confirmation.

It would be a most unusual circumstance, however, in which an organized work force would continue to provide services without payment. Thus the dicta in both the majority¹²⁷ and dissenting¹²⁸ opinions in *Bildisco*, which stated that accrued wages would be paid on a *quantum meruit* basis after rejection where the employees are members of a union, probably will not come into play.

The cash flow benefit ordinarily occurring in a lease situation because the landlord is precluded from taking unilateral collection action does not arise with respect to union represented employees. Organized employees usually will not work unless they are paid, so that a significant accrued liability does not develop. In all probability a debtor-in-possession will not be able to live off money owed to employees the way it is off money owed to landlords.

There are four particularly significant differences between commercial contracts or leases and collective bargaining agreements:

1. Commercial contracts and leases usually cover a single sub-

rejected portions destroy the internal integrity of the agreement and substantially upset the relative bargaining positions of the parties." *Id.* at 2273. With respect to good faith, he said: "If a debtor refuses to negotiate, that would be relevant on the issue of whether the debtor's motivation is solely to rid itself of the union, which is contrary to our national policy, and one of the equity factors to be considered." *Id.* See *In re Klaber Bros.*, 173 F. Supp. 83, 85 (S.D.N.Y. 1959), in which it was stated:

An executory contract cannot be rejected in part, and assumed in part.

The Debtor, or the trustee, is not free to retain the favorable features of the contract, and reject only the unfavorable ones. Assumption carries with it all of the burdens as well as the benefits of the contract. The contract must be rejected in its entirety, or not at all.

127. *Bildisco*, 465 U.S. at 513.

128. *Id.* at 535 (Brennan, J., dissenting).

ject; there is one promise to be kept. If the contract is rejected, the relationship between the parties terminates, unless a new contract is entered. A collective bargaining agreement will cover from 20 to 100 separate promises by the employer, only a few of which will be modified at any given time. The contracting parties will have a continuing relationship based upon the modified promises and the promises which were not modified.

2. Commercial contracts and leases usually are completely voluntary consensual agreements. Collective bargaining agreements are the result of federal labor laws that require the parties, and only these two parties, to negotiate and to contract.
3. Commercial contracts and leases are made and subject to revision by the real parties in interest. Collective bargaining agreements are made by unions and employers. With respect to union dues to be withheld from the employee's wages and paid over to the union, the union is the real party in interest. With respect to wages, vacations and vacation pay, severance pay, working conditions, paid holidays, overtime and other matters respecting short term compensation, the employees normally are the real parties in interest. Frequently in pattern bargaining, however, an argument is supportable that the true beneficiaries of certain provisions are not these specific employees but the union itself, employees of other employers, other employers,¹²⁹ or benefit fund trustees. Benefit fund trustees arguably are the real parties in interest with respect to provisions concerning funded pension and welfare plans.
4. All aspects of commercial contracts and leases normally are completed bilateral. Collective bargaining agreements are bilateral in form but multilateral in substance. With respect to different promises, the real party in interest may be
 - (a) the employees,
 - (b) the union, or
 - (c) benefit fund trustees.

Where the unilateral modification consists of a reduction in current wages, the benefit to the employer and the cost to the employee are the same. For example, a reduction of \$5 per hour in pay would save the employer \$200 per employee per week. It would cost the

129. The desire of a competitor under a multi-employer agreement to prevent the debtor from obtaining lower labor costs was not an interest which had to be weighed in a Chapter XI case in balancing the equities. *Bormans, Inc. v. Allied Supermarkets, Inc.*, 706 F.2d 187 (6th Cir. 1983).

employee the same amount. A 50 cent per hour reduction in pension payments would save the employer \$20 per week per employee. It is virtually impossible to calculate accurately the resultant cost or damage to an employee. Assumptions can be made on an individual basis of his projected longevity, continuity of employment, wage increases, and likelihood that a pension plan will continue to be a part of the bargaining agreement in future years. All of those actuarial assumptions turn on the further assumption that the debtor-in-possession will continue in business until the last contingency has been fulfilled. Such is hardly a realistic assumption when statistics show that only one out of every three corporations whose plan is confirmed will survive for as long as three years.¹³⁰

Severance pay probably will represent the biggest swing between a first priority claim and a general unsecured claim status,¹³¹ depending upon the circuit in which the case is filed. That and seniority will be affected greatly by what the recent history has been and what the immediate future will be respecting layoffs and terminations by the debtor.

Six circuit court decisions preceded *Bildisco*.¹³² They were all grappling with the fact that continuity is the central feature of a modified collective bargaining agreement. The employer and the employees continue to be interdependent. Both must bail a leaking boat, and it is no solace for one to recognize that it is the other's end of the boat which is lower in the water.

VII. REPRESENTATION

A phenomenon which accompanied the developing balance between employers and unions was that unions ceased to be pure representatives of employees but became major, national economic factors and independent entities which, from time to time, had separate interests only indirectly related to those of their members.¹³³ In the bankruptcy arena, it is becoming apparent that unions have conflicts of interests with their members and, upon occasion, should not simultaneously represent the employees and pursue contrary claims of their own. One of the principal conflicts is functional, the other is structural.

130. D. STANLEY AND M. GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* (1971) (commonly called The Brookings Study); see also Lopucki, *The Debtors in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code (First Installment)*, 57 AM. BANKR. L.J. 99 (1983).

131. See *supra* note 35.

132. See *supra* notes 42-45.

133. As of December 31, 1983, the International Brotherhood of Teamsters, Central States, Southeast and Southwest Areas Pension Fund had assets totalling \$4,898,612,436.

The functional conflict of unions results from the compensation patterns of the various businesses represented by a given international union, or by its locals, or by both. Where there is "pattern bargaining," all of the businesses have the same or similar compensation arrangements. The unions have a concern that a compensation reduction imposed upon the employees of one company will spread to requests for similar reductions for other companies, regardless of whether those companies are similarly situated and whether they are competitive. In considering external consequences of a change in a bargaining agreement, the union may not be advocating adequately the goals of the specific employees of each specific employer. One result of this union attitude is that a faltering company may be unable to obtain relief from the terms of its collective bargaining agreement, causing it to fail. The failure not only causes harm to the company's shareholders and creditors, but it also eliminates the jobs of the employees.

The structural conflict of the unions is that they may be representing principals at three different levels:

1. the employees (with respect to wages, working conditions, and so forth),
2. the unions (with respect to union dues), and
3. fund trustees (with respect to pension funds and health and welfare funds).

The sum of wages and benefits represents the bulk of the total labor cost of the employer. If that aggregate is to be reduced, from which source should the reduction come, and in what proportions? As entities, the unions have the greatest interest in sustaining payments of dues to pension funds and welfare funds, because those are the sources of the unions' power. Unions have been elected, however, to represent the employees. Because frequently the employees do not have a vested interest in the pension and health and welfare funds and will have to continue employment and possibly union membership to collect their benefits, those elements of the compensation package are low in the employee's appraisal of the important aspects of his earnings. What is important to the employee is his job, particularly among the younger employees with growing families. That is also the factor most important to the court, to the community, and to the trade creditors. If the business should be closed because of a strike or for other reasons, the trade creditors' hope of ultimate success, or at the minimum of a liquidation at going concern values, will have vanished.

For the most part, labor laws approach the subject of rejection as being adversarial or bilateral. Bankruptcy, on the other hand, is multilateral. The bankruptcy court attempts to draw a balance be-

tween the debtor and the creditors, but also among all of the creditors. The bankruptcy court views employees as individual creditors, all of whom under bankruptcy principles are theoretically entitled to full notice and an opportunity to become fully informed and to vote their views.

The National Labor Relations Act, in designating the certified labor representative of the employees as their sole and exclusive spokesman for purposes of that act, is in direct conflict with bankruptcy principles of individual voting by all members of a class, each as to his own claim, and a philosophical question arises as to the necessity of methods for redressing the absence of employee choice in a bankruptcy court. If NLRB procedures would provide an unjust result, those procedures may have to give way in the bankruptcy court, which is what *Bildisco* decided in a different context. In-court representation questions, on the other hand, constitute a fundamental conflict between expressed labor law principles and implied bankruptcy court procedures. That conflict is beyond the scope of this article.

VIII. BACKGROUND OF BILDISCO

The Court of Appeals cases that preceded *Bildisco* will not be analyzed in depth principally because they are of historic interest now. The first was *Kevin Steel* in the Second Circuit.¹³⁴

The crux of the *Kevin Steel* opinion was:

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. In *In re Overseas National Airways, Inc.*,¹³⁵ the court emphasized that a bankruptcy court should permit rejection of a collective bargaining agreement only after thorough scrutiny, and a careful balancing of the equities on both sides, for, in relieving the 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.¹³⁶ This approach is a sound one and the bankruptcy court must move cautiously in allowing rejection of a collective bargaining agreement.¹³⁷

134. *Shopmen's Local Union No. 455 v. Kevin Steel Prods.*, 519 F.2d 698 (2d Cir. 1975).

135. 238 F. Supp. 359 (E.D.N.Y. 1965).

136. *Id.* at 361-62.

137. *Kevin Steel*, 519 F.2d at 707.

Essentially the analysis is sound, but its emphasis upon observance of the policies of the NLRA distorts to a degree the responsibilities of a bankruptcy court to affect a balance among all national policies, among all creditors, and between the creditors and the debtor.

Several months after *Kevin Steel*, the Second Circuit was faced with a similar problem in *REA Express*,¹³⁸ where it adopted a more difficult standard. This standard, in fact, is completely unrealistic and unworkable:

[I]n view of the serious effects which rejection has on the employees, [rejection] should be authorized only where it clearly appears to be the lesser of two evils and that unless the agreement is rejected, the [debtor] will collapse and the employees will no longer have jobs.¹³⁹

The standard is unworkable because the bankruptcy court can seldom predict if and when a debtor will fail. It knows statistically that two out of every three Chapter 11 reorganization attempts will fail and will be converted to liquidation cases.¹⁴⁰ It knows that traditionally Chapter 11 corporations lose money for the first three months after filing, but its powers of prediction are no greater than those of anybody else. The court knows that the negative cash flow must be stopped, but it does not have the management skills to say that any particular spigot is the one that must be turned off. The other part of the profit equation is generating more income. The bankruptcy court does not have any special insight as to that either. Requiring the bankruptcy court before authorizing rejection to determine whether the debtor will collapse places an unattainable burden on the bankruptcy court.

The Senate and House hearings on the conference report¹⁴¹ which put together the 1984 amendments to the Bankruptcy Code¹⁴² indicate that the standard for granting temporary relief under section 1113(e)¹⁴³ shall be the *REA Express* standard.¹⁴⁴ If followed lit-

138. *Brotherhood of Ry., Airline and S.S. Clerks v. REA Express, Inc.*, 523 F.2d 164 (2d Cir.), cert. denied, 423 U.S. 1017 (1975).

139. *Id.* at 172.

140. See *supra* note 130.

141. 130 CONG. REC. H7471-7497 (daily ed. June 29, 1984) (statement of Rep. Morrison); 130 CONG. REC. S8887-8900 (daily ed. June 29, 1984) (statement of Sen. Packwood).

142. See *supra* note 2 for complete discussion of 1984 amendments to the Bankruptcy Code.

143. Section 1113(e) of the Code provides for changes in a collective bargaining agreement "if essential to the continuation of the debtor's business or in order to avoid irreparable damages to the estate." 11 U.S.C. § 1113(e) (Supp. II 1984). It is submitted that interim orders rarely, if ever, will be granted and that this subsection was inserted to create an aura of reasonableness.

144. "[T]he statutory language of subsection (e) stating the standard for qualifying for interim relief is, in essence, the *REA Express* standard . . ." 130 CONG. REC. H7474-7497 (daily ed. June 29, 1984) (statement of Rep. Morrison). "The court may only grant the interim relief . . . if essential to the continuation of the debtor's busi-

erally, this would mean that interim relief would never be granted as a temporary measure. A bankruptcy judge is not likely to decide at the mid-point of a hearing that the reorganization will fail unless he permits the requested changes and then find a month or two later that the changes are not necessary and that the reorganization can be successful without them. Either the judge will not make an interim finding or will make an early final determination (called an interim order) which he will duplicate when he issues his final order.

Truck Drivers Local Union No. 807 v. Bohack,¹⁴⁵ was the third case from the Second Circuit, which dealt with the subject of rejection of collective bargaining agreements, but did not lay down guidelines because that was not the precise issue of the case. Bohack employed 120 truck drivers under the National Master Freight Agreement, which contained a job protection provision and also an arbitration provision.¹⁴⁶ Bohack changed its method of operations and laid off the drivers without arbitration.¹⁴⁷ That was one of the two issues of the case.¹⁴⁸ The other was whether the bankruptcy court was prohibited by the Norris-LaGuardia Act¹⁴⁹ from enjoining picketing by the discharged drivers;¹⁵⁰ held that it was.¹⁵¹ This case was one of the rare situations where the employer sought to reject the entire contract and not just several selected provisions.¹⁵²

An appreciation of *Bildisco* and its predecessors at the Court of Appeal level is simplified by a recognition that the Bankruptcy Code and the National Labor Relations Act are *diametrically opposed* on the issue of modifications of a collective bargaining agreement without common consent. The issue respecting the dominance of one federal law over another federal law is more difficult, in one sense, than the issue respecting the dominance of federal law over state law, and vice versa.¹⁵³ The latter issues may be immensely complicated to delineate, but once decided, are relative easy to follow; it is one law or the other. Where the issue is a conflict between two federal laws, the problem is finding a middle ground which does not do excessive violence to either law, in effect achieving a workable com-

ness. This provision essentially requires the court to apply the test used . . . in the *REA Express* case . . ." 130 CONG. REC. S8887-8900 (daily ed. June 29, 1984) (statement of Sen. Packwood).

145. 541 F.2d 312 (2d Cir. 1976), *cert. denied*, 439 U.S. 825 (1978).

146. *Id.* at 314. Under the Bankruptcy Code most jurisdictions would hold that arbitration is discretionary with the bankruptcy court. Dietrick, *The Conflicting Policies Between Arbitration and Bankruptcy*, 40 BUS. LAW 33,36 (1984).

147. *Bohack*, 541 F.2d at 314.

148. *Id.*

149. 29 U.S.C. §§ 101-15 (1982).

150. *Bohack*, 541 F.2d at 314.

151. *Id.* at 318.

152. A complete rejection is understandable where the business has ceased.

153. *E.g.*, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

promise solution.¹⁵⁴

The purpose of the Supreme Court in accepting *Bildisco* for consideration was to resolve a circuit conflict and to affect a reconciliation among the standards set for rejection by the Second Circuit in *REA Express*¹⁵⁵ and those set by the Eleventh Circuit in *Brada-Miller*,¹⁵⁶ the Ninth Circuit in *Hotel Circle*,¹⁵⁷ and the Third Circuit in *Bildisco*.¹⁵⁸ The principle of rejection had been accepted by all of the courts, although the logic on which the Second and Third Circuits had relied was a strained theory that was rebuffed by the Supreme Court. That theory was that the debtor-in-possession was a new entity not bound by the contracts of the debtor.

It is surprising that the separate entity theory had received such acceptance because it is facially invalid. If a new entity is not bound by the burdens of an existing contract, neither can it receive the benefits. There would be no reason to reject if, as a new entity, it was not a party to the contract. There would be no ability to assume if the entity had no existing contractual relationship. It is a somewhat helpful theory to a beginner because it explains why prepetition events and obligations are treated differently from those which occur or arise postpetition, but it has little other utility.¹⁵⁹

The realities of bankruptcy indicate that on the day following the filing of a bankruptcy petition, the employees report to the same location, under the same working conditions, at the same rate of compensation, and doing the same jobs that they did the day before the filing. For them, in relation to the employer, nothing has changed. It is fitting that the Supreme Court laid to rest the new entity theory. To the extent that anything was new in the 9 to 0 explicit decision it is that *one national standard was established* for the guidelines to be followed in determining whether rejection should be permitted, not the "business judgment" test of conventional bilateral executory contracts, *but a balancing of the equities test* which takes into account the interests of all parties in the bank-

154. "This case places the statutory policies underlying Chapter 11 in tension with our national labor policy, as expressed in the National Labor Relations Act . . . our task is to reconcile the apparent conflict between the NLRA and the Bankruptcy Code and the policies they represent." *Bildisco*, 682 F.2d at 72.

155. *Brotherhood of Ry., Airline and S.S. Clerks v. REA Express*, 523 F.2d 164 (2d Cir.), cert. denied, 423 U.S. 1017 (1975).

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

157. *Local Joint Executive Bd., AFL-CIO v. Hotel Circle*, 613 F.2d 210 (9th Cir. 1980).

158. *In re Bildisco*, 682 F.2d 73 (3d Cir. 1982), *aff'd*, 465 U.S. 513 (1984).

159. The statement of Heraclitus of Ephesus (535-475 B.C.), that no man can step into the same river twice (because the water will have changed before the second step), is on a philosophical par with the separate entity theory. What is significant is not that there shall be a factual identity but that there shall be a recognizable identity. A debtor in possession is not identical to a debtor, but is recognizably similar.

ruptcy case.¹⁶⁰

The principal difficulty in following Justice Rehnquist's language in the majority decision of the unfair labor practice (5-4) decision is that the words he uses do not have their customary meanings. The rationale of the decision appears to be based upon a literal interpretation of section 365(g)(1). The Court approved the rejection application on January 15, 1981; the petition was filed April 14, 1980; therefore the breach of contract occurred April 13, 1980. In May, 1980, *Bildisco* refused to pay wage increases, but the Court's theory is that this was not an unfair labor practice because those provisions did not exist in May, 1980, having been eliminated on April 13, 1980.¹⁶¹

From the standpoint of serving as a precedent there are three major problems with the *Bildisco* unfair labor practice opinion:

1. the intent of section 365(g)(1) was to provide that the damages to be allowed for a rejected executory contract shall be those of a breach of contract committed before the date of the filing. Section 365(g)(1) was concerned with the date of the damages, not the date of the rejection. The purpose was to cause the damages to be general unsecured claims and not expenses of administration. A literal interpretation places everything in limbo, including NLRB jurisdiction, until after the bankruptcy court has acted upon the rejection application;
2. whether an act is an unfair labor practice depends upon a subsequent bankruptcy court decision on another issue;
3. normally a voidable contract is enforceable until it is avoided. The cases cited to support the Court's conclusion that "the collective-bargaining agreement is not an enforceable contract within the meaning of NLRA section 8(d),"¹⁶² dealt with another issue—whether under different facts that jurisdiction of the NLRB was concurrent with that of the state courts or was exclusive.

Because of Congressional action in eliminating postpetition uni-

160. The unanimous decision permitting rejection was expected. The House Judiciary staff previously had drafted a bill which Congressman Rodino introduced as H.R. 4908 within hours of the release of the *Bildisco* decision. It was more rigid than section 1113 in that the *REA Express* standard for rejection was expressly stated, in contrast to a "balancing of the equities" test in the enacted version. It was the 5-4 decision which was the shock. The absence of credible precedent and the illogic of the opinion intensified the labor opposition.

161. *Bildisco*, 465 U.S. at 532.

162. *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187 (1971); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 510-13 (1962).

lateral rejection in collective bargaining situations,¹⁶³ the confusion that could have resulted from *Bildisco* has been circumscribed. A benefit that should result from the decision is that the separate entity theory will be discredited in all future aspects of bankruptcy law.

IX. THE THREE DECISIONS OF BILDISCO

Bildisco can be understood best by recognizing it as three decisions in two cases:

1. a unanimous, explicit decision in *Local 408, International Brotherhood of Teamsters v. National Labor Relations Board*,¹⁶⁴ that a court approved rejection of a collective bargaining agreement does not constitute an unfair labor practice;
2. a 5 to 4 explicit decision in *National Labor Relations Board v. Bildisco and Bildisco*,¹⁶⁵ that a postpetition unilateral modification, subsequently approved by the court, does not constitute an unfair labor practice; and
3. a 9 to 0 implicit decision in the latter case that a prepetition unilateral modification, although subsequently approved in substance by the court, constitutes an unfair labor practice.¹⁶⁶

The facts in *Bildisco* are footnoted¹⁶⁷ to differentiate the two cases heard and because the Supreme Court dealt only with the postpetition unilateral modification and did not discuss the prepetition unilateral modification. The Supreme Court affirmed the Third Circuit, which had dealt with both. Thus the inference is that the Supreme Court approved the position of the Court of Appeals on the issue that was not discussed.¹⁶⁸

163. 11 U.S.C. § 1113(f) (Supp. II 1984).

164. U.S. S. Ct. Doc. No. 82-852.

165. U.S. S. Ct. Doc. No. 82-818.

166. *Bildisco*, 465 U.S. 513 (1984).

167. 81-2140 (82-852)—application of the Company to reject an executory contract under § 365(a) of the Bankruptcy Code. Approved by the bankruptcy court January 15, 1981; affirmed by the district court May 4, 1981; remanded by the Court of Appeals to the bankruptcy court June 17, 1982; affirmed 9 to 0 by the Supreme Court.

81-2238 (82-818)—Complaint of NLRB that the Company had engaged in unfair labor practices in violation of § 8(a)(1) and § 8(a)(5) of the NLRA (29 U.S.C. § 158(a)(1) and (5)), issued July 31, 1980, on which default judgment was entered by NLRB on April 23, 1981, subsequently forwarded to the Court of Appeals for enforcement, which was denied June 17, 1982; affirmed by the Supreme Court 5 to 4.

168. *Cooper Painting, Inc.*, 273 N.L.R.B. No. 25 (Hunter, J., dissenting).

"I note, however, that the Court in *Bildisco* stated nothing which questioned or disputed the Board's authority to adjudicate and/or remedy prepeti-

The form of section 1113 indicates that Congress was attempting to and successfully did block two aspects of *Bildisco*. First, the immediate effectiveness of a postpetition unilateral decision of the debtor-in-possession; and second, the absence of a procedure by which the union might be able to negotiate with full knowledge of all significant economics facts.

It is submitted that three different benchmarks should be used by a court respecting an approval of an application to reject a collective bargaining agreement:

1. If the contract has not expired and the business is functioning, the standards of section 1113(c) should apply;
2. If the contract has expired but has not been replaced, and the business is functioning, the standards of section 1113(c) should apply; and
3. If the business has closed, whether the contract has expired or not, the employees should be treated as general creditors, except to the extent that Congress has provided priorities for them under section 507(a)(3) and (4).

Only the second and third propositions require explanations. Where the contract has expired by its own terms but has not been replaced, the working conditions remain as they were before by virtue of the NLRA. It is as though an indeterminate extension had been granted. The same standards should apply as before expiration because the same conditions exist as before expiration.

Where the business has closed, there no longer are any jobs to save. There is no labor peace to maintain. Policy questions should relate solely to typical bankruptcy issues of distributing assets in accordance with the measures contained in the Bankruptcy Code, primarily section 507.¹⁶⁹ In a liquidation, rejection does not affect the jobs of employees because there are no jobs; it only affects the priorities of their claims.

If the purpose of the reorganization is to produce a revitalized going concern, then the jobs of the employees are the critical fulcrum upon which the remaining equities are to be balanced. If the

tion unfair labor practices. Thus, it is undisputed that the Board has the exclusive authority to determine whether alleged unfair labor practices have occurred prior to the filing of the bankruptcy petition."

If the Board has exclusive jurisdiction to determine unfair labor practice but does not have the power postpetition to exercise that jurisdiction, it means that the contractual impairment committed by the debtor can not be remedied as an unfair labor practice but only as a breach of contract. The dissent in *Cooper Painting* appears to consider that this denied a remedy to the injured employee. It may have denied to him the theoretical right to be rehired, but in real terms that right was eliminated when the business closed three years earlier.

169. See *supra* note 35.

purpose of the reorganization is to produce a liquidation plan acceptable to the creditors, rather than to have the case converted to a straight bankruptcy and liquidated by a trustee, then jobs are irrelevant. There are no jobs. The issue simply is one of allocating the net assets of the debtor among its creditors. National labor policy should not play any part in this strictly bankruptcy setting because national labor policy is premised on continuing negotiations between viable entities.

Where the operation already has ceased and there no longer are employees covered by the agreement, whether or not the agreement has expired, it is a matter of semantics to discuss whether the agreement shall be assumed, or rejected, or continued in limbo. There no longer exists any contract which can be enforced. The only issue remaining is the priority to be accorded to employee claims. If a judge wishes to grant first priority, he refuses to reject. If he wishes to limit the priorities by following the Congressional scheme, he permits the rejection, which causes the breach to be deemed to have occurred prepetition and very likely substitutes third priority, fourth priority, and general unsecured status for first priority status.

*Kevin Steel, REA Express, and Bohack*¹⁷⁰ all demonstrate an attitude of the Second Circuit which is directed more toward a bilateral labor-management approach to the problems of rejection than appears from the decisions of other circuits. Thus it probably is no coincidence, but rather a matter of judicial philosophy, that *Straus-Duparquet* achieved a similar result several years earlier favoring employee creditors over trade creditors.¹⁷¹ In other words, one should not anticipate that the *Straus-Duparquet* doctrine will be changed.¹⁷² Thus an early part of pre-bankruptcy planning in the Second Circuit should be to determine what severance expenses might become and whether having them classified as expenses of administration might preclude confirmation. If so, the strategy might be to eliminate the severance provision prepetition or to plan to file the case in a different circuit from the Second.

The assertions in most cases that the court will consider the employer's attitude toward negotiation in arriving at its own decision on approving the rejection application suggest that a prepetition unilateral modification might prejudice a postpetition application. This is one of the dangers of a prepetition unilateral rejection in the Second Circuit. The other danger is in trying to deduce in

170. See *supra* note 45.

171. *Straus-Duparquet, Inc. v. Local Union No. 3*, 386 F.2d 649 (2d Cir. 1967).

172. The employee bias of the Second Circuit can be seen from *In re W.T. Grant*, 620 F.2d 319 (2d Cir.), cert. denied *sub nom. Rodman v. Rinier*, 446 U.S. 983 (1980), holding that posting of notice is not sufficient to terminate a severance pay plan of non-organized employees.

advance what the Second Circuit's attitude will be under common factual circumstances. Assume that a corporation with a severance plan files for reorganization and immediately files an application to reject the severance plan. Six months later the bankruptcy court approves the rejection, but while the proceeding was pending, 30% of the employees were terminated. Will the court say that, under section 365(g)(1), the severance provision was eliminated the day before the filing of the petition, so that no severance provision was in effect when the employees were terminated? The pro-employee attitude of the Second Circuit in other situations suggests that it might say that a severance plan was in effect when these employees were terminated and that their rights became fixed as of that moment; the employees cannot be deprived of those rights retroactively at a time when they have no work-related connection with the employer.

X. EXCLUSIVE AND OVERLAPPING JURISDICTION

An understanding of the respective spheres of operation of the NLRB and the bankruptcy courts is essential to developing a successful strategy of prepetition rejection. Prepetition rejection is a double-barrelled approach with a small bore weapon. The first thrust is that the damages resulting from the breach of contract are a private and not a public matter. As such, they are subject to the automatic stay of section 362(a) and not exempt under section 362(b)(4). The more employees involved in the bargaining agreement rejection, the less are the chances of success under this theory. The second thrust is that it is inappropriate for the NLRB to act on the rejection because the bankruptcy court is equally competent to deal with money issues, its procedure is cheaper and quicker.

As a starting place, consider the specialized courts in most metropolitan areas in which there is a criminal division exclusively for criminal cases and a law division exclusively for law cases. A intentionally strikes B on the head with a board. A has committed a crime; A has committed a tort. He may be tried in the Criminal Court for the crime and in the Law Court for the tort. His criminal punishment may be a fine paid to the county treasury. His civil punishment will be a judgment for actual damages and possibly an additional amount for punitive damages, both payable to the plaintiff.

Taking the same format into the labor law area, an employer changes a collective bargaining agreement unilaterally. By that single act the employer has committed an unfair labor practice, and he has committed a breach of contract. The union may file an unfair labor practice charge with the NLRB, or it may bring a breach of

contract action in a civil court, normally a district court.¹⁷³ If the employer is a debtor, the civil court would be the bankruptcy court. What the employer must do to avoid manifold complications resulting from a prepetition rejection is to make certain that the relief which is appropriate to cure either the unfair labor practice or the breach of contract is solely the payment of money. The reason for this is that the bankruptcy court is competent to adjudicate a breach of contract claim involving money damages. The bankruptcy court is not competent to determine non-monetary unfair labor practice charges, such as, whether a discharge was lawful and what the remedy should be if it was not. Only the NLRB can handle that kind of problem.

Conceivably an appropriate claim, adversary complaint, or declaratory judgment action could establish promptly a determination of what the damages would be. There would be little for the NLRB to do because the bankruptcy court already would have awarded the damages which the NLRB would award if its process were carried through until completion. So long as the prepetition breach is limited to a change in wages, hours, vacation pay or severance pay, both the NLRB and the bankruptcy court will be dealing only with money damages, and the earlier bankruptcy court judgment will preempt an NLRB award.

The measure of damages will be the differential in hourly cost multiplied by hours worked from the effective date of the breach until there is a lawful recognition of the modification. For that reason, it is advisable to have a bankruptcy court adjudication follow the filing. The date of the court approval of the rejection, if there is an approval, is the date that the unauthorized modification becomes an authorized modification. That establishes a cut-off date for measuring damages.

One key to whether a prepetition rejection strategy will provide a significant benefit to the debtor will depend largely on whether the debtor is able to confine the breach of contract damages to the period preceding the cut-off date. A second key to the strategy is whether, if the damages are limited to the period preceding the cut-off date, there will be some form of intervention by the NLRB respecting future damages.

These two areas can be approached most readily by examining the unexpressed components of a typical make-whole award of the NLRB. One segment is a back-pay order, which provides a monetary recompense to the employee for whatever his damages have been from the date of the unfair labor practice until the present. The

173. 29 U.S.C. § 185(a) (1982).

other segment is the reinstatement of the *status quo ante*, which provides protection against future damages.

A bankruptcy court order can be obtained much more readily than an NLRB award, so that it will be assumed that a bankruptcy court order has issued. If the bankruptcy court damages are fully compensatory, there is no occasion for the NLRB to proceed. The injury to the employee has been determined, and that determination is *res judicata*. The employee can recover only once. It is academic that the unfair labor practice continues in theory because the effect of it has been nullified. If the bankruptcy court damages are not fully compensatory, the NLRB may consider taking action to eliminate the continuing effect of the unauthorized rejection. The method of calculating the damages in the bankruptcy court thus becomes critical.

Allowance of claims is a traditional bankruptcy procedure. Under the Bankruptcy Code the debtor may file a claim for a creditor if the creditor has not made a timely filing.¹⁷⁴ Assume that either the union files a claim, which includes both past damages and future damages, or that the debtor files a claim for past damages, which the union seeks to amend by including future damages. The court order will address future damages, either allowing them or disallowing them. If allowed, the future damages would be the actuarially computed present value of the future stream of the differential in earnings over the projected working life of this employee with this company at an assumed wage level. In theory, this would be the economic equivalent of reinstating the original wage level.

No economic advantage flows to the employer from a prepetition rejection if the bankruptcy court order includes present damages for the future loss of earnings. On a cash flow basis there would have been a slight *temporary advantage* because there was not a present need to pay the wage differential from the time of the rejection until the date of the award.¹⁷⁵ There would, however, be a major cash flow *disadvantage* in having to make a *present* payment of the differential in future earnings.

There is no way to predict in which directions bankruptcy courts will go. Having the ability to allow the present value of future contingencies is a new power under the Bankruptcy Code which has not been exercised broadly. Possibly advocacy will be the determinant in the early precedent-setting decisions. Some better guidelines exist as to what the attitude of the NLRB might be toward permitting the employer to have a permanent benefit from an unfair labor

174. See *supra* note 2 and 11 U.S.C. § 501(a) (1982 & Supp. II 1984).

175. There might be an additional delay in payment if the claim is paid near the end of the case along with the other claims.

practice, which would be the situation if the bankruptcy court did not permit the employee to obtain recompense for his future loss of wages. Where the bankruptcy court procedure is claims allowance, there will be no adjudication respecting ratification of the earlier rejection, although allowance of full damages would moot the issue. Two other potential procedures will be examined to see whether they might produce a ratification of the unilateral action of the employer so that the breach would not continue to be an unfair labor practice.

Section 1113 comes to mind as a possibility because it legalizes a non-negotiated change in a collective bargaining agreement. Upon analysis it becomes clear that section 1113 would not be available as a ratification instrument for four principal reasons:

1. It is logically inconsistent for a debtor to assert that the earlier rejection is effective while pursuing an application to reject that which it asserts has been eliminated.
2. Section 1113(b)(1)(A) requires that before the application to reject may be filed, the debtor shall have presented a proposal to the union. It is logically inconsistent for a debtor to propose modifications which exist already and which the debtor contends were made effective previously.
3. Section 1113(f) can have postpetition application only. It contemplates that the changes under consideration may not be implemented before the rejection is approved. A prepetition rejection would have caused the changes to have been effective both before and after the filing of the bankruptcy case and during the section 1113 hearing.
4. It is inconceivable that a union would accept a proposal to implement a rejection retroactively to a date before the bankruptcy filing. Thus the debtor could not meet the approval prerequisite of section 1113(c)(2) that the union "refused to accept such proposal *without good cause*."

The third possibility is a declaratory judgment action in which the bankruptcy court determines that the admittedly unlawful action has become lawful because it is necessary for the rehabilitation of the debtor. In a somewhat different context that was the argument advanced in *Hotel Circle*,¹⁷⁶ *Brada-Miller*,¹⁷⁷ and *Bildisco*.¹⁷⁸ The significant jurisprudential difference between the two situations is that the three cited Court of Appeals cases were considering a circumstance where Congress had not defined the ground rules for

176. See *supra* note 43.

177. See *supra* note 44.

178. See *supra* note 42.

rejecting a collective bargaining agreement, and so a conventional bankruptcy process was proper. Congress now has established section 1113 as the only road to take.

In summary, it appears that the only hope for a successful prepetition rejection strategy would be the long-odds chance that the bankruptcy court would not rule on the future earnings issue or would rule against it for whatever reason. However, even if the debtor should be successful in limiting damages to those that had accrued by the date of the bankruptcy court order, there still would remain the issue of whether the NLRB would institute a charge based upon the future losses to the employees as a result of the unfair labor practice.

Edward Cooper Painting,¹⁷⁹ which followed *Bildisco*,¹⁸⁰ was a 2-1 decision that the NLRB would not institute an enforcement proceeding postpetition and that it would not continue postpetition a hearing initiated postpetition. Footnote 3 of the *Edwin Odum*¹⁸¹ case casts doubt upon the continuation of the abstention policy. The *Cooper Painting* case overemphasized the actual decision of *Bildisco*. The *Odum* footnote overemphasized the counter-vailing effect of section 1113.

The proper attitude of the NLRB with respect to monetary unfair labor practices should be to leave them alone if a bankruptcy case is filed, provided that the nature of the remedy which the NLRB would fashion would be similar to a potential order of the bankruptcy court. If the bankruptcy court should issue a similar order, there would be no reason for the NLRB to act. Until it develops whether the bankruptcy court will order payment of full damages, past and prospective, there is no cause for NLRB concern. The NLRB should take that position as a matter of comity and also because it might be subject to a bankruptcy court injunction if it does act. Defending against a duplicate NLRB procedure would be a waste of the estate's assets by the debtor. If the bankruptcy court does not consider future damages, it will be proper for the NLRB to proceed on that ground, but only if the issue is a public matter and is covered by the exclusionary provisions of section 362(b)(4).

179. *Edward Cooper Painting Inc.*, 273 NLRB Dec. (CCH) ¶ 224 (Feb. 12, 1985).

180. See *supra* note 42.

181. *Odum v. Service Employees Int'l Union Local 6*, 274 NLRB Dec. (CCH) ¶ 146, 147 (March 18, 1985). The *Odum* court stated:

Although the Supreme Court held . . . that filing a Chapter 11 petition render a collective bargaining agreement unenforceable, Congress nullified *Bildisco* in that regard by enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984. . . . As the petition here was filed after Congress changed the law, *Bildisco* is inapplicable to the instant case.

Id. at 147 n.3.

A. Concurrent NLRB Enforcement

A difficult aspect of the law to predict is what will be the attitude of first, the NLRB, and second, of bankruptcy courts toward the NLRB's use of its enforcement powers after the filing of a bankruptcy petition with respect to a prepetition unfair labor practice, specifically the unilateral modification of the provisions of a collective bargaining agreement respecting wages. Two assumptions will be tested: (1) the time interval between the unilateral modification and the filing of the petition was too short to permit an NLRB charge to be made before the bankruptcy petition was filed, and (2) the time interval was sufficiently long to permit a charge to be filed by the NLRB, and a charge was filed.

Further, two questions are raised with respect to each hypothetical situation:

1. Will the NLRB spontaneously omit or curtail its enforcement activity, and
2. Will the bankruptcy court enjoin NLRB proceedings if the NLRB does not stop voluntarily?

The backdrop against which each of these questions will be analyzed is the further assumption that the issues can be resolved within three months in the bankruptcy court, in contrast with the possibility of a four year hearing and review process before the NLRB and the Court of Appeals. Furthermore, a bankruptcy court order will be self-executing, whereas an NLRB order processed into a judgment by a Court of Appeals will have to be presented to the bankruptcy court for allowance and payment. There is a further assumption that the unilateral wage reduction in each case was preceded by months of bona fide negotiations in which the employer made all of the disclosures which would be required in a hearing under section 1113. The question thus becomes one of the odds of success if the employer presents itself in the best possible light.

Once a claim or an application to reject has been filed in the bankruptcy court it becomes a matter of "turf" whether the NLRB proceeds. The NLRB should recognize that in a monetary matter the issues will be the same in both tribunals.¹⁸² A rejection order by the bankruptcy court will terminate the period of measurement in both forums because it will establish the wage rate to be applicable

182. One of the three incomprehensibles of *Mile Hi* is the statement that the entire bargaining agreement was rejected. What were the terms under which the employees worked during the period succeeding the rejection? How were they arrived at? Normally a bankruptcy court must approve any contracts which are not in the ordinary course of business. Normally rejection creates significant breach of contract damages the priorities of which impede confirmation of a plan of reorganization because they must be paid in full.

from that date forward.¹⁸³ A sensible procedure for the NLRB would be to suspend hearings upon learning of the filing of a bankruptcy claim or of a section 1113 application, and to dismiss the charge as being moot upon being advised of the finality of a bankruptcy court order approving rejection. A bankruptcy court order denying rejection would not be *res judicata* on the issue of an unfair labor practice, and so it would be logical for the NLRB to proceed if the debtor-in-possession failed to establish in the section 1113 hearing that a balancing of the equities favored rejection.

The remaining question is whether a bankruptcy court will enjoin the NLRB if that body continues with its hearing process after the bankruptcy court hearing process has begun. The probabilities are that the bankruptcy court would enjoin the NLRB, in spite of section 1 of the Norris-LaGuardia Act and section 10(e) of the Administrative Procedure Act. *Marbury v. Madison*¹⁸⁴ established the general proposition of judicial review of administrative action. *Leedon v. Kyne*¹⁸⁵ established that the basic district court jurisdiction over interstate and foreign commerce supersedes the limitations of court review under section 9(d) of the NLRB. *Deering-Milliken, Inc. v. Johnston*¹⁸⁶ ruled similarly with respect to the Administrative Procedure Act, stating :

What is required is some balance between the interest of the Board, of the Union, and of the employee. It should be recognized, on the one hand, that the Court should not interfere with any reasonable exercise of the Board's discretion in controlling the progress of the proceedings before it. On the other hand, adequate protection of the employer's rights should be afforded.¹⁸⁷

Although the window within which the NLRB may be enjoined is small, where the NLRB proceeding will produce at great expense and delay an order which will be moot, the need to eliminate waste would justify the cessation of a meaningless hearing procedure, by injunction if not stopped spontaneously.

Considerable confusion exists with respect to the power of a bankruptcy court to enjoin a labor strike, boycotting, or picketing. *Prima facie* the bankruptcy court does not have that power because of section 1 of the Norris-LaGuardia Act. Two Court of Appeals cases which held that way, however, were wrong because of the fact situations. The first case arose in the Second Circuit and was typical of the Second Circuit's labor law approach to combined labor law

183. The NLRB is not a proper forum to consider whether a bankruptcy court has power to ratify a prepetition rejection. That would be a direct appeal from the bankruptcy court order.

184. 5 U.S. (1 Cranch) 137 (1803).

185. 358 U.S. 184 (1958).

186. 295 F.2d 856 (4th Cir. 1961).

187. *Id.* at 868.

and bankruptcy law issues. *In re Petrusch*¹⁸⁸ was a Chapter 13 proceeding in which the debtor owed prepetition debts to the Health and Hospital Fund and to the Pension and Retirement Fund. The Teamsters picketed the debtor's place of business to force payment of the prepetition debt. The bankruptcy court enjoined the picketing as a violation of the automatic stay of section 362(a)(6).¹⁸⁹ In reversing the bankruptcy court injunction on *Norris-LaGuardia* grounds, the Court of Appeals ignored case administration and the fundamental precept that creditors of a class shall be treated alike, which is the cornerstone of bankruptcy law. Bankruptcy law is a process for the equitable distribution of the assets of a debtor among his multiple creditors. The Court of Appeals turned a fourth priority claim into a superpriority claim that became payable immediately in cash ahead of all secured creditors, priority creditors and unsecured creditors. The debtor had to pay the Teamsters to get the picketing stopped.

In *Cowles & Associates*,¹⁹⁰ the Sixth Circuit blindly followed the Second Circuit, relying on *Norris-LaGuardia* and not contemplating that it was dealing with a prepetition debt, and that it was preferring the pension fund above all other creditors. \$36,000 was owed to the Union for pension fund payments, which it demanded and then struck. The Court of Appeals converted a fourth priority claim into a superpriority administrative claim by reversing the injunction of the bankruptcy court.

188. 667 F.2d 297 (2d Cir. 1981), *cert. denied*, 456 U.S. 974 (1982). The court's theory was that the provision for plan payments in the collective bargaining agreement embodied terms and conditions of employment. Therefore, any controversy was a labor dispute; hence controlled by *Norris-LaGuardia*. A strike is a bold strategy in a geographical area in which exists a pool of unemployed workers with the requisite skills. Many reorganization filings are brought about by a chronic economic malaise with attendant industry-wide layoffs and not just by a specific deficiency of the company under reorganization.

Probably because of the mobility of their members, the Teamsters appear more willing to strike than most other unions. In *Briggs Transp. Teamsters*, 739 F.2d 341 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 295 (1984), the debtor had received court approval of a rejection. The Teamsters threatened to strike if the modified contract were imposed. The debtor sought to enjoin the threatened strike, which was denied by the court on the basis of the *Norris-LaGuardia* Act, 29 U.S.C. §§ 101-115 (1982). The Teamsters Union is most frequently cited as being intransigent with respect to making individualized adjustments in its master contract to accommodate the needs of the specific employees of a specific debtor.

"For the purposes of the instant application these facts are of interest as suggesting the futility of collective bargaining on part of a five-driver employer, with a local of one of the most powerful nationwide unions." *In re Ryan*, 4 BANKR. CT. DEC. (CRR) 64, 67, 68 (Bankr. D. Conn. 1978); *In re Salt Creek Freightways*, 47 Bankr. 835 (Bankr. D. R.I. (1983)); *In re Blue Ribbon Transp.*, 113 L.R.R.M. (BNA) 3505 (Bankr. D. R.I. 1983).

189. See *supra* note 21. "Any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case. . . ."

190. *Crowe & Assoc. v. Bricklayers and Masons Local No. 2*, 16 Bankr. 271 (6th Cir. 1983).

The fact that this article says that the decisions are wrong does not necessarily mean that those circuits will reverse themselves or that other circuits will refuse to follow them. The decisions are wrong because these cases were not "labor disputes." They were bankruptcy cases that encompassed "labor disputes." The circumstances, however, demonstrate the need for forthright negotiations with a union before filing with the bankruptcy court. Possibly payment of the amount due, even though it would be a preferential payment, might be better than a strike or the risk that other courts would follow the Second and Sixth Circuits. The *In re Catamount Dryers, Inc.*¹⁹¹ court was correct in not enjoining a strike over a *postpetition* breach of the bargaining agreement by failing to pay a scheduled wage increase.

As a policy issue, courts that have considered the question have tended to determine that the policy of forcing the union and the employer to work things out between themselves, either through peaceful negotiation or economic confrontation, is a more important national policy than a fresh start for debtors. It is not likely that the balance will shift. Therefore, with respect either to a prepetition rejection or to a section 1113 application, the prospects of a strike must be weighed. Unions increasingly are using the threat of a strike as a lever to cause bankruptcy judges not to approve rejections. The threat is particularly persuasive where union members have approved a strike vote. Litigating the issue of whether the union has the right to strike becomes a time-consuming and expensive digression inimical to the purpose of rehabilitation.

B. Governmental Agencies As Bill Collectors

One argument for keeping the NLRB from acting during the pendency of a bankruptcy case is that this is a private issue of money to be paid immediately to specific individuals and not a public policy matter of general application. As a private issue, it would not qualify for the exemption from stay of section 362(b)(4).

Section 362(b)(4) is an indirect offshoot from *Perez v. Campbell*,¹⁹² which was a supremacy clause¹⁹³ confrontation between the Bankruptcy Act and the Uniform Motor Vehicle Safety Responsibility Act.¹⁹⁴ Adolfo Perez was an uninsured driver who had been in an

191. *In re Catamount Dryers, Inc.*, 24 Bankr. 59 (Bankr. D. Vt. 1982). The payment would be an administrative expense and consequently not a preference.

192. 402 U.S. 637 (1971).

193. U.S. CONST. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land. . . ." *Ogden v. Sanders*, 25 U.S. (12 Wheat.) 213 (1827), held that federal bankruptcy powers supersede those of a state.

194. Greatly oversimplified, the Act provides that the Secretary of State may

automobile accident, as a result of which the owner of the other vehicle obtained a confession judgment of \$2,425.98. When Perez did not pay the judgment and failed to post security for payment, the creditor caused Perez' driver's license to be suspended, as well as that of his wife, who was not in the car at the time of the accident but was a joint owner under Arizona community property law. Subsequently, Mr. and Mrs. Perez filed petitions in bankruptcy, were discharged, as was the judgment debt, and sought return of their drivers' licenses. The suit centered around a provision in the Uniform Act that "[a] discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this article."

The Supreme Court, holding that under the supremacy clause state law respecting an insolvent debtor had to yield to federal law, stated: "The sole emphasis of the [Uniform] Act is one of providing leverage for the collection of damages from drivers who either admit that they are at fault or are adjudged negligent," and quoted from *Local Loan Co. v. Hunt*,¹⁹⁶ "'One of the primary purposes of the Bankruptcy Act is to give debtors a new opportunity in life and a clear field for future effort unhampered by the pressure and discouragement of pre-existing debt.'"

Cases under section 362(b)(4) arise most frequently when public prosecutors threaten with criminal charges a debtor who has written bad checks unless the writer makes reparation directly to the payee of the check or makes payment to the public office, which in turn forwards it to the payee. Uniformly these procedures are held not to be exempt from the stay of section 362(a).¹⁹⁶

The customary factors to consider when determining whether the actions of the governmental agencies are private (not exempt from the stay) or public (exempt from the stay) are: 1. the nature of the penalty; 2. the ultimate recipient of any penalty of fine; and 3. the immediacy of the reparation.¹⁹⁷ A decision that prepetition severance pay elimination is a private issue between the employee and

suspend the driver's license of a negligent driver who has an unpaid collision liability resulting from his negligence. As a practical matter, it is the other driver who determines whether or not the negligent driver may keep his license, or regain it after a suspension. The Act was sponsored by the National Conference on Street and Highway Safety and adopted by 44 states and the District of Columbia.

195. 292 U.S. 234 (1934).

196. When it is clear that the principal motivation is neither punishment nor a sense of public duty but rather to obtain payment of a dischargeable debt either by an order of restitution or by compromise of the criminal charge upon payment of the civil obligation, the Bankruptcy Court may properly enjoin the criminal proceeding. *In re J.C. Taylor*, 16 Bankr. 323 (Bankr., D. Md. 1981). *In re Alan I.W. Frank Corp.*, 8 BANKR. CT. DEC. (CRR) 1343 (Bankr. E.D. Pa. 1982).

197. *In re Dan Hixson Chevrolet Co.*, 7 BANKR. CT. DEC. (CRR) 1210, 1211 (Bankr. N.D. Tex. 1981).

the debtor would mean also that it is a claim subject to allowance by the bankruptcy court, which would assess the breach of contract damages. The calculation would be simple with respect to any employee whose service had been terminated by the date of the allowance of the claim; it would be whatever the severance pay would have been if the plan had remained in effect and would be a third priority claim at best. With respect to the employees who continue to work, the calculation would depend upon projections such as to the period of future service and future wage levels.

If a bankruptcy court should hold that the NLRB hearing was a public policy matter and exempt from stay under the provisions of section 362(b)(4), possibly the NLRB would find that an unfair labor practice had been committed and would order the reinstatement [or restoration] of the severance pay plan provisions.¹⁹⁸ In the Second Circuit this would produce a first priority claim for those who had been terminated. For those who had not been terminated, but had been damaged because the provision would no longer be available whenever they should be terminated, it is difficult to predict what the Second Circuit attitude might be on the priority to be given their awards. What may be as important is what would be the attitude of a bankruptcy court. A bankruptcy court is more likely to take a multilateral bankruptcy approach than a court of appeals. There is a reasonable probability that a bankruptcy court would determine that the loss to employees of the future benefits should be measured as of the time that the loss occurred, which was prepetition when the plan was eliminated. Thus the loss would be allocated between third priority and general unsecured claim.

Bankruptcy courts have found that governmental units are subject to being enjoined.¹⁹⁹ A Fifth Circuit case found the NLRB was subject to the exemption:

It is clear that the NLRB is a governmental unit. This action was taken to enforce the federal law regulating the relationship between employer and employee. We can safely conclude therefore that this is an exercise of police or regulatory powers which places it within the section 362(b)(4) exemption of the automatic stay.²⁰⁰

The *Evans Plumbing* case related to the allegedly unlawful discharge of two employees, a *non-monetary dispute*. A distinction should be made between it and cases respecting *monetary unilateral modifications* of bargaining agreements. There were two issues in

198. See *supra* note 8.

199. *In re Theobald Indus.*, 8 BANKR. CT. DEC. (CRR) 847, 849 (Bankr. D. N.J. 1981). ". . . the N.L.R.B. proceedings at issue, although regulatory in nature, primarily relate to the protection of the pecuniary interest in the debtor's estate and not to matters of public safety and health."

200. *NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981).

Evans Plumbing. The first was a public policy decision for which the case would stand as a precedent of general application, namely, was the discharge lawful? The second aspect was a matter of money damages—the back pay award and future pay protection. Payment of an antecedent debt is in the private sector. Reemployment is a specific performance kind of relief. It is closely related to these particular employees, but also the nature of the relief may warn others of the NLRB's public policy.

The unilateral modification cases in Chapter 11 normally will be financial and will relate to specific named individuals as affected members of the union. The argument that an NLRB hearing on matters of compensation would be private and not exempt from the stay of section 362(a) is persuasive but not compelling.

The *Evans Plumbing* court also observed:

We note that our decision today would permit the entry of judgment for injunctive relief and for back pay; however, should it be necessary to enforce judgment for back pay, a different question would be presented. *We express no opinion as to whether an action to execute or enforce a money judgment be exempt from the automatic stay.*²⁰¹

Recently the Eighth Circuit in *Superior Forwarding* upheld a bankruptcy court's authority to enjoin the NLRB,²⁰² on the ground that the cost of the NLRB hearings threatened the assets of the estate. Without reference to the Norris-LaGuardia Act or to the *Evans Plumbing* case, the *Superior Forwarding* court held that the bankruptcy court has the discretion and authority to enjoin federal regulatory proceedings under section 105 when those proceedings would threaten the debtor's estate, and when the court has jurisdiction over a petition in bankruptcy. The basis of the injunction was waste of assets.²⁰³

201. *Id.* at 293 (emphasis added). The legislative history indicates that the reason for the restraint with respect to enforcement of an NLRB award is not because of a lack of power in the NLRB but as a recognition of the conflict of purpose with the bankruptcy law. 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 in a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

202. *NLRB v. Superior Forwarding, Inc.*, 762 F.2d 695, 698 (8th Cir. 1985). See also *In re Shippers Interstate Service, Inc.*, 618 F.2d 9, 12 (7th Cir. 1980); *In re Bel Air Chateau Hosp., Inc.*, 611 F.2d 1248, 1251 (9th Cir. 1979).

203. *Superior Forwarding*, 762 F.2d at 698. Apparently the NLRB did not attempt to have the injunction hearing transferred to the district court under 28 U.S.C. § 157(d) (1982). In *In re Nicholas, Inc.*, Daily Labor Rep. (12-18-85) D-1 (Bankr. D. N.J. (1985)), the court stated:

On a complaint to enjoin an NLRB hearing on the discharge of organized employees who refused to work unless paid in advance, the bankruptcy court refused to enjoin on the ground that the unfair labor practice at issue did not grow out of the collective bargaining agreement and so was beyond the scope of the decisions in *Bildisco* and *Superior Forwarding*.

There are two significant differences between an action by the NLRB to rectify a monetary breach and the action of a county prosecutor to obtain restitution on a non-sufficient funds check by threatening criminal prosecution:

1. on the bad check charge, the payee would obtain outside the bankruptcy court 100 cents on the dollar as a result of the criminal threat, as against nothing or next to nothing *paid to him as a bankruptcy dividend*, and
2. on the bad check charge the payee would obtain outside the bankruptcy court 100 cents on the dollar as a result of the criminal threat, as against nothing or next to nothing *paid to other creditors as a bankruptcy dividend*.

In two different respects the bad check payee would be receiving more than his fair share of the debtor's assets, both as an absolute matter and also in relation to all other creditors. Payment would be outside the bankruptcy court.

In the circumstances of an NLRB monetary award, however, payment would be made within the bankruptcy case on the basis of a claim presented to and allowed by the bankruptcy court. The allowed claim would be scaled down to the level of all other claims of the same class of creditors. There is nothing odious in the NLRB action, and for that reason it is particularly inappropriate, and possibly unnecessary, for an injunction to issue from the bankruptcy court. The principal drawbacks to an NLRB hearing would be the additional expense that it would entail for the debtor-in-possession, the delay that would result from the hearing and court of appeals' approval, and the probability that after three or four years of litigation and waiting, the award would be disallowed as a duplicate of a breach of contract claim previously allowed in bankruptcy. These factors may have played a part in the background of the *Cooper Painting*²⁰⁴ decision to abstain, but they were not identified.

XI. GOOD FAITH

Labor adherents frequently claim that Chapter 11 proceedings are filed to break a labor contract. A few such instances have occurred and the cases have been dismissed.²⁰⁵ It is likely that other

204. *Cooper Painting*, 273 NLRB No. 25 (1985).

205. In *In re Tinti Constr. Co.*, 10 BANKR. CT. DEC. (CRR) 767 (Bankr. E.D. Wis. 1983), the union was the only creditor, all other bills had been paid. Rejection of the collective bargaining agreement was denied by the court. In all likelihood the court would have dismissed the case for bad faith if that objection had been made.

Likewise, in *In re Mamie Conti Gowns*, 12 F. Supp. 478 (S.D.N.Y. 1935), the corporate assets were twice its debts. "Considering the disproportion of assets over liabilities as stated in the debtor's petition, I am not wholly satisfied that this entire

employers who file to break the union will meet similar results.²⁰⁶

What is a more common situation is that a faltering corporation is in economic difficulty in a number of different aspects; its physical plant is old and obsolete; its machinery and tools are worn or antiquated. It does not have sufficient capital to modernize or to acquire an adequate inventory. Technological advances have bypassed its industry. Under any of these conditions the probabilities are that its labor costs per unit of production are higher than those of its competitors, which will be true even if the respective wage scales of the comparison companies are all at the same compensation level.

Normally under such circumstances, it is difficult to obtain an infusion of capital to modernize the faltering company to the point where it can become competitive. All costs will come under scrutiny, and of these, labor costs will be the largest or the second largest component in most circumstances. The largest cost items will come under the closest scrutiny, and, labor costs have a great cash flow immediacy. Consequently, labor costs may receive the earliest and most concentrated attention.

Good faith is a requirement of every legal proceeding. If the plaintiff (or petitioner) does not have an honest belief that he is entitled to the requested relief, establishment of that fact by his adversary should cause the case to be dismissed. There is no unique requirement of good faith in a Chapter 11 case, but good faith is an essential part of every voluntary reorganization case where the management has a conscientious belief that the company may be rehabilitated by an adjustment of its debt structure. Merely obtaining lower costs in one or more production areas is not sufficient, the purpose of bankruptcy reorganization is debt adjustment and maximizing the equitable distribution of available assets and future earnings among creditors.

In a Chapter 11 case involving a rejection of a collective bargaining agreement, the question of "good faith" may arise in two different ways, but the differentiation between the two is never rec-

proceeding under section 77B was begun to promulgate and consummate a plan of reorganization, and not to discard by order of court, this particular contract." [A multi-employer contract with the International Ladies' Garment Workers Union.]

In *International Bhd. of Teamsters v. Quick Charge*, 168 F.2d 513, 515-16 (10th Cir. 1948), the corporation had assets of \$285,000 and liabilities of \$65,000 and only sought to adjust \$19,000 in secured debt and \$31,000 in unsecured debt. "Furthermore, it is difficult to escape the conclusion that the sole purpose on the part of Quick Charge in filing this reorganization under Section 77B was to rid itself of the labor dispute with the Union." See also *In re C & W Mining Co.*, 116 L.R.R.M. 2023 (Bankr. N.D. Ohio 1984); *In re Louise E. Sammarco Electric Co.*, 11 BANKR. CT. DEC. (CRR) 792 (Bankr. N.D. Ohio 1984).

206. *Contra In re Southern Elec. Co.*, 23 Bankr. 348 (Bankr. E.D. Tenn. 1982) (to save business rejection allowed in spite of anti-union attitude of employer).

ognized. The first issue of good faith is the basic jurisprudential question of whether the debtor has an honest belief that rehabilitation is possible through a Chapter 11 reorganization, a bankruptcy question. The second issue of good faith is whether the debtor attempted to resolve through bona fide negotiation with the union the problem of the reduction of compensation levels of organized employees, which is a labor law question. Whether the employer bargained with the union in advance of filing has nothing to do with whether the employer filed the reorganization petition in good faith; it relates only to whether the employer sought compensation reduction in good faith.

There is a broad consensus in the cases that, in determining whether to approve compensation reduction, the court should include among its standards the negotiation efforts of the employer prior to its unilateral modification or prior to filing its application to reject. The result is a melding of labor law and bankruptcy law principles within the bankruptcy court.²⁰⁷

XII. CONSTITUTIONALITY

The constitutionality of the Bankruptcy Code has become so politicized that an analytical study in depth would be unproductive. It can be stated with a high degree of likelihood that no district court or court of appeals will make a critical objective examination of the underlying law. Such a large majority of the judges at those two levels of the federal court system already have committed themselves to the constitutionality of The Bankruptcy Amendments and Federal Judgeship Act of 1984 in their lobbying efforts with members of Congress that it would be contrary to human nature for them to reverse their positions at this time.²⁰⁸ What might develop

207. Before acting on a petition to modify or reject a collective bargaining agreement, however, the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. The NLRA requires no less. No only is the debtor-in-possession under a duty to bargain with the union under § 8(a)(5) of the NLRA . . . but the national labor policies of avoiding labor strife and encouraging collective bargaining . . . generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference. . . . The Bankruptcy Court need step into this process only if the parties' inability to reach an agreement threatens to impede the success of the debtor's reorganization. If the parties are unable to agree, a decision on the rejection of the collective bargaining agreement may become necessary to the reorganization process. At such point, action by the Bankruptcy Court is required, while the policies of the Labor Act have been adequately served since reasonable efforts to reach agreement have been made.

Bildisco, 465 U.S. at 526.

208. Countryman, *Serambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and Legislative Process*, 22 Harv. J. on Legis. 1-45

in the Supreme Court, other than the vote of the Chief Justice in favor of constitutionality, is impossible to predict. Because of the remoteness of any objective trial on the subject within the next several years, it does not appear worthwhile to make a detailed examination of the issue at this time.

A rash of cases are working their way through the federal court system on the subject of whether the bulk of the bankruptcy judges are holding office unconstitutionally because they were appointed by Congress and not by the President or by the Judiciary.²⁰⁹ Other cases are pending on the issue of whether non-tenured bankruptcy judges are exercising powers reserved to tenured judges under the Constitution.²¹⁰ The issue has not been raised, but might be if there were greater confidence that it would be considered objectively, of whether section 157(d) of the Judicial Code, which was part of the same amendatory act as section 1113, does not violate the "uniformity" clause because adversary proceedings which arise under laws of the United States regulating organizations or activities affecting interstate commerce have a different procedure from proceedings based upon laws enacted under other constitutional powers. Section 157(d) generally is considered to be a device to have matters relating to labor issues tried in the district courts instead of in the bankruptcy courts.²¹¹

According to a Bureau of Labor Statistics release in January, 1985, during 1984 18.8% of American industrial workers were members of labor unions (and 81.2% were not). Because of the concentration of unionized employees in the billion dollar corporations, the possibilities are that 10% or less of the employees of corporations most susceptible to Chapter 11 filing are members of unions. Section 1113 is geared to the 10% and not to the 90% under a constitutional enabling grant which speaks of "uniform laws on the subject of Bankruptcies." The cases decided and reported under section 1113 have confirmed that the unorganized workers may bear all, or a ma-

(1985). *In re Wildman*, 10 BANKR. CT. DEC. (CRR) (Bankr. N.D. Ill. 1983).

209. U.S. CONST. art. II, sec. 2, cl. 2 states that the president "shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . judges of the Supreme Court, and all other Officers of the United States. . . ."

210. U.S. CONST. art. III, sec. I provides: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior. . . ." See also *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (bankruptcy judges are appointed for terms).

211. "Since an application to reject a collective bargaining agreement implicates national labor policy, as well as bankruptcy policy, if the union or trustee so move, such an application is to be heard by a U.S. district judge." CONG. REC. H7496 (Daily ed., June 19, 1984) (statement of Rep. Morrison). See Simon, *supra* note 56, at 1137 for labor's view point. ("With rare exceptions, bankruptcy judges have never been more than rubber stamps for the debtors").

for portion, of the wage reduction by debtors-in-possession who seek rejection of collective bargaining agreements under section 1113.

Almost universally, employers will unilaterally reduce the compensation of unorganized workers at the time they apply for court approval of rejection of portions of the bargaining agreement with organized workers. Thus the unorganized workers are affected immediately. Probably it will be six weeks or more before there is a decision respecting the organized workers. Regardless of how that is decided, the organized workers will have had six more weeks of pay at the original level. In addition, approval will be denied by the bankruptcy court in a percentage of the cases. With respect to those cases, the organized workers, by maintaining their compensation levels, are permanently ahead financially of the unorganized workers, whose compensation was reduced previously and will continue at the lower level. Reduction is swift and certain for unorganized employees, but slow and conjectural for organized employees.

With respect to the unorganized employees, the employer may reduce compensation prospectively upon notice but without any prior explanation or external approval. With respect to the organized employees the employer must negotiate with the union, reveal financial information respecting the company, and finally convince a court of the need for the compensation reductions. Clearly, that does not represent uniformity. Because there were no reports, debate or votes on section 1113, there is no conventional legislative history nor indication why Congress did not seem concerned respecting constitutionality. Newspaper accounts of the outrage of union leaders over the *Bildisco* decision suggest that that addition of section 1113 was political and not cerebral.

*American Provision Co.*²¹² demonstrates a result which was an-

212. *In re American Provision Co.*, 12 BANKR. CT. DEC. (CRR) 558 (Bankr. D. Minn. 1984) lists 9 requirements for a bankruptcy court approval of a rejection application under section 1113:

1. The debtor in possession must make a proposal to the Union to modify the collective bargaining agreement.
2. The proposal must be based upon the most complete and reliable information available at the time of the proposal.
3. The proposed modifications must be necessary to permit the reorganization of the debtor.
4. The proposed modification must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.
5. The debtor must provide to the Union such relevant information as is necessary to evaluate the proposal.
6. Between the time of the making of this proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet the reasonable times with the Union.
7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modification of the collective bargaining agreement.

anticipated and which probably occurs in many of the cases where rejection of a collective bargaining agreement is an issue. One non-union employee took a pay cut, and the balance of the non-union employees agreed to work longer hours. The proposal respecting organized employees was a \$3.50 per hour reduction in wages and insurance premium reductions of about \$92.50 per month per employee. This would have represented a 5% savings in labor cost, but just a 2% saving of total costs.

The court considered only how the savings respecting the organized workers related to total costs, which was 2%, a figure not sufficiently significant to justify court approval. The court paid no heed to the fact that the non-union employees would bear the entire cost of the labor cost reduction. It is curious that the court would not approve a small reduction causing minor injury to organized employees. The convoluted reasoning suggests that paradoxically the court might have approved a large reduction, which would have been more detrimental to the employees. The court also found that the employer had held only one negotiating meeting with the union before applying for approval of a rejection and that this was an indication of bad faith on the part of the employer.

*Hanover National Bank v. Moyses*²¹³ is the leading case on the issue of uniformity. The Bankruptcy Act of 1898 provided, in effect, that each individual debtor would be entitled to the same exemptions in bankruptcy as in a state court execution upon judgment. At that time there were forty-five states, with forty-five different exemption provisions, so that the exemptions of a bankrupt in Massa-

8. The Union must have refused to accept the proposal without good cause.

9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.

213. 186 U.S. 181, 190 (1902). The opinion is incorrect historically in a number of respects as to both early English and early American bankruptcy law. The *Moyes* opinion states that it is true that from the first bankrupt act passed in England, 34 & 35 Hen. VIII, Chap. 4, to the days of Queen Victoria, the English bankrupt acts applied only to traders . . . From 1543 to 1570 and from 1706 to 1711, however, there were no limitations on the occupations of persons who could be made bankrupts. The limitation of the Act of 1570 was to

merchant or other person, using or exercising the trade of merchandize by way of bargaining, exchange, rechange, bartry, chevisance, or otherwise, in gross or by retail, or seeking his or her trade of living by buying and selling and [being a native born or naturalized citizen].

That limitation was expanded with every successive act, so that by the time of American independence, the object class expressly included also bankers, factors, insurers and scriveners, and expressly excluded farmers, graziers and drovers of cattle.

Further, the *Moyes* opinion's description of the bankruptcy laws and insolvency laws of the colonies at the time of independence is a meaningless generality. All colonies except Connecticut had general insolvency laws. Connecticut would pass several private insolvency laws each year. Massachusetts, Maryland, New Jersey, New York, and Pennsylvania had experimented with bankruptcy laws but had abandoned them because the colonies had no extraterritorial jurisdiction and could not affect non-resident creditors nor reach assets located beyond their respective borders.

chusetts would be different from those of a bankrupt in California and elsewhere, both as to items and as to value. The bankruptcy law was held to be uniform because in every state a debtor could retain the same amount under bankruptcy process as under local process. The amount might differ from state to state, but everywhere it was only that property which was not exempt from state execution.

One point which never has been raised in the judicial and academic discussions of uniformity is that the law has been uniformly applied to all residents of any given state. Men or women, blacks or whites, aliens or citizens,²¹⁴ were treated alike. The present law discriminates in favor of about 10% of the working population likely to be affected by corporate bankruptcies. Virtually every company that has an organized workforce also has an unorganized workforce, so that some degree of economic discrimination against the unorganized workers is likely in every case where the employer seeks to reduce any labor cost provisions of its bargaining agreement.²¹⁵

A similar argument could be made under the Fifth Amendment. In a bankruptcy case, granting priorities or special procedures to one group means the taking of property from others. Unless the classification of unionized employee is a reasonable classification for bankruptcy purposes, there would appear to be deprivation of property without due process of law, both with respect to the unorganized workers and to the unsecured creditors.

Historically, there have been a number of classifications in both English and American law based upon occupation or citizenship.²¹⁶

214. Exceptions to this generality are Section 507(a)(5)(B) which creates a priority for "United States fishermen" and Section 546(d) which limits trustee's avoiding powers respecting "United States fishermen." The preferred treatment of domestic creditors over foreign creditors is directly contrary to the United States' position for most of this century as a member of the International Chamber of Commerce. Both provisions were sleepers slipped in amid the general confusion which accompanied the passage of the Bankruptcy Amendments and Federal Judiciary Act of 1984 and rode along with similar preferred treatment given to producers of grain. Presumably the sections will be amended either by making them applicable to all fishermen or by deleting the special treatment for fishermen.

215. The unions may argue that there is no discrimination against unorganized workers because they have consented to a reduction in compensation, so that they have no cause to complain. Quite obviously, however, the consent would be under economic duress, "either accept the lower wage scale or accept the risk of termination."

216. For the most part the classifications have related to who might be debtors. Originally in England all creditors were treated alike, whether secured or unsecured. *Smith v. Mills*, 76 Eng. Rep. 441 (Ex. 1584). The quantity of the debt, not the quality of the debt, was the controlling factor.

"... to every of the said creditors, a portion rate and rate alike, according to the quantity of their debts."

In the United States there has been a substantive distinction between secured creditors and unsecured creditors and among the priorities granted to various classes of unsecured creditors. Until now *procedures* have been uniform.

There never has been a classification based upon whether or not a debtor or a creditor was a member of a union. It is submitted that such is an unreasonable classification under both section 1113 and section 157(d), whether it is expressed *in haec verba* or whether it is a consequence of the operation of the law as written. To the ordinary observer, the thought expressed by Senator Packwood and Congressman Morrison²¹⁷ that section 1113 might be used to discriminate against organized workers is fatuous. The more general anticipation that section 1113 would discriminate in favor of the organized worker and against the unorganized worker has been carried out. Where the employees are not organized, whether they are covered by posted work rules or not, the employer may change prospective working conditions and wage scales unilaterally. Thus, that reduction in compensation usually will commence immediately with respect to non-organized employees hired at will, who are subject to a double discrimination; their wages will be reduced, whether or not a bankruptcy court approves a rejection application respecting unionized employees, and their wages will be reduced before a court hearing instead of afterward.

XIII. CONCLUSION

Economic circumstances, rather than statutory procedures, probably will determine the results which section 1113 will produce. The labor unions are as aware as the employers to what alternative opportunities for employment exist for their members near the plant of a desperate employer. The sphere of uncertainty for a union always will be what are the probabilities that the business will succeed if concessions are made, and if they are not made. If the union concludes that the business will fail in any event, it probably will try to hold on to what it has for as long as it can.

The key to the success of section 1113 as a device of implementing reorganizations is that it will be a significant burden unless management is able to gain the confidence of the union in management's projections of the need for concessions if future viability is to be achieved.²¹⁸ The section 1113 procedure will delay cost reductions so

217. "This section would ensure that, where the trustee seeks to repudiate a collective bargaining agreement, the covered employees do not bear either the entire financial burden of making the reorganization work or a disproportionate share of that burden, but only their fair and equitable share of the necessary sacrifices." 130 CONG. REC. H7496 (daily ed. June 29, 1984) (statement of Rep. Morrison). "This language guarantees that the focus of cost cutting must not be directed exclusively at unionized workers. Rather the burden of sacrifices in the organization process will be spread among all affected parties." 130 CONG. REC. S8898 (daily ed. June 29, 1984) (statement of Sen. Packwood).

218. Rejection was denied in *In re K&B Mounting, Inc.*, 13 BANKR. CT. DEC. (CRR) 240 (Bankr. N.D. Inc. 1985) on the ground that insufficient information was

long that the debtor's small cash reserve might be exhausted before relief is granted.

There is only one certain answer. The solution is cooperation, recognition of what is the common goal. Section 8(d) of the NLRA and section 1113 of the Bankruptcy Code are merely procedures to be followed where parties cannot agree. If management and labor can agree, expense and delay are eliminated. Local situations will determine what moves each side will have to make to develop an assurance of equality of sacrifice. It will mean reduction at the executive level of salaries, bonuses, company automobiles, country clubs at company expense, and other prerequisites.²¹⁹ That astringency is not overly burdensome if the executives recognize that they are not likely to obtain a sympathetic judicial ear in the section 1113 hearings unless there is a measure of overall fairness in the apportionment of the cost reductions. The parties are going to have to recognize that litigation is an expensive procedure and that the opportunities for survival are enhanced immeasurably if the potential lawyers' fees can be retained in the business.

In summary, it should be borne in mind that the debtor will have the burden of persuasion on the issue of rejection. The debtor will have to have followed the precepts noted in *American Provision*, be current on ERISA report filings, and also it will have to establish that the organized employees are not being asked to bear a larger burden than non-organized employees and management.²²⁰ Management will have to convince the court that it attempted in good faith to work out a compromise solution with the union. Management should seek only "necessary" modifications in the agreement. Annoying provisions which do not have a major cost impact will have to ride along and be negotiated away or retained. The bankruptcy court will not become concerned with them. The same will be true of attempts to revise non-monetary provisions of the bargaining agreement where it is difficult to quantify the dollar savings to be achieved and thereby establish the economic necessity of the change.

supplied to the union. The case could have been dismissed for lack of good faith because the Company had no debts other than unpaid employee benefit obligations.

219. *In re Fitzgerald*, 44 Bankr. 628 (Bankr. W.D. Mo. 1984); *Pesce Baking Co.*, 43 Bankr. 949 (Bankr. Ohio 1984). Rejection was denied in *In re Cook United, Inc.*, 13 BANKR. CT. DEC. (CRR) 283 (Bankr. N.D. Ohio 1985), where top management did not take any cuts and the proposed cost reduction was to be obtained by replacing older full time employees with younger part time employees.

220. *Allied Delivery*, 49 Bankr. 700 (Bankr. N.D. Ohio 1985), found the proposal not unfair due to a lower percentage reduction for nonorganized employees because the wages of that group were lower and they did not have pension coverage.

