
Christopher Capuano

Follow this and additional works at: https://scholarship.law.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.edu/lawreview/vol33/iss4/5

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
NOTES

REJECTION OF COLLECTIVE BARGAINING AGREEMENTS IN BANKRUPTCY: NLRB V. BILDISCO & BILDISCO AND THE LEGISLATIVE RESPONSE

Chapter 11 of the Bankruptcy Code (Code)\(^1\) contains a detailed scheme designed to allow a debtor to avoid liquidation through reorganization or rehabilitation of the troubled business.\(^2\) Under the supervision of the bankruptcy court, a trustee\(^3\) or debtor in possession\(^4\) is required to perform certain statutorily created duties. These include filing a reorganiza-

---


2. Further, this scheme preserves the employees' jobs as well as the interests of both creditors and shareholders. See infra note 16. A financially distressed corporation has two options under title 11 of the United States Code. It may petition for bankruptcy under chapter 7, which entails liquidation and a distribution of the proceeds to the creditors. 11 U.S.C. §§ 701-766 (1982). The company can also file under chapter 11, which contemplates a reorganization and continuation of the business. 11 U.S.C. §§ 1101-1174 (1982). In either case, after the prebankruptcy petition is filed, all creditors' claims against the debtor are automatically stayed. 11 U.S.C. § 362 (1982). This is the crucial "breathing spell" granted the financially distressed company. It allows the court-appointed trustee or debtor in possession to confer with the creditors to establish a mutually satisfactory plan of rehabilitation. See 11 U.S.C. § 1103 (1982).


4. See generally 11 U.S.C. §§ 1101, 1104, 1108 (1982). At any time after the commencement of the reorganization case, but before the confirmation of the rehabilitation plan, see infra note 6, on request of a party in interest, the court will appoint a trustee to manage the business. See 11 U.S.C. § 1104(a) (1982). This trustee must consult with the creditors' committee as soon as practicable. 11 U.S.C. § 1103(d), (c)(1) (1982). The trustee must also file with the court a list of the debtor's creditors and a statement of the financial status of the company. See 11 U.S.C. §§ 521(1), 1106(a)(2) (1982). Further, the court appointee must investigate the financial condition of the debtor, the operations of the debtor, and the desirability of continuing the business. See 11 U.S.C. §§ 329, 521(2), 1106(a)(3) (1982). The trustee is also accountable for all property received and the application of the estate property. See 11 U.S.C. §§ 345, 363(c), 1106(a)(1) (1982). Although the above is not
tion plan as soon as practicable and using the mechanisms provided by the Code to allow the debtor temporary relief from creditors' actions. One of the devices that the trustee or debtor in possession may invoke to improve the financial condition of the company is provided by section 365(a) of the Code. This statutory provision permits rejection of an executory contract that is financially burdensome to the reorganizing enterprise.

The policies and provisions of federal labor legislation conflict with the

an exhaustive list of the trustee's duties, it does reveal the extensiveness of the responsibilities.


6. 11 U.S.C. § 1106(a)(5) (1982). "The plan determines how much creditors will be paid, and in what form (cash, property, or securities, for example); whether the stockholders will continue to retain any interest in the company; and in what form the business will continue (without several unprofitable divisions, for example)." H.R. Rep. No. 595, 95th Cong., 1st Sess. 221, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6180. The debtor in possession also has the exclusive right to negotiate a rehabilitation plan with the creditors' and equity security holders' committees for 120 days or as long as the court deems appropriate. 11 U.S.C. § 1121(b), (d) (1982). In a chapter 11 proceeding, the debtor in possession or trustee may assume or reject the contract "at any time before the confirmation of a plan, but the court, on request of any party to such contract . . . may order the trustee to determine within a specified period of time whether to assume or reject such contract . . . ." 11 U.S.C. § 365(d)(2) (1982). By contrast, in a chapter 7 liquidation proceeding, the trustee or debtor in possession has only 60 days from the order for relief to assume or reject the contract; otherwise, it is deemed rejected. 11 U.S.C. § 365(d)(1) (1982). Comparison of these statutory provisions reveals Congress' greater interest in the success of the reorganization procedure for the legislators granted the chapter 11 trustee a longer period for consideration of whether or not to reject the contract due to the possibility of a rejection of a beneficial contract. For duties of the debtor in possession or a trustee in a reorganization case, see 11 U.S.C. §§ 1106-1107 (1982).

7. 11 U.S.C. § 365(a) (1982). Section 365(a) provides: "Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." The power of the debtor in possession to reject an executory contract under § 365(a) is derived from § 1107(a), which provides that "a debtor in possession shall have all the rights . . . of a trustee serving in a [chapter 11 reorganization] case . . . ." 11 U.S.C. § 1107(a) (1982). As will be discussed infra, section 365(a) has been superseded with respect to the rejection of collective bargaining agreements by § 1113 of the Bankruptcy Amendments and Federal Judgeship Act of 1984. See infra notes 65-82 and accompanying text.

Despite the myriad of rules under the Code for a proper reorganization, it should be recognized that, to effectuate the policies of the Code, "[t]he hallmark of Chapter 11 is flexibility." 5 COLLIER ON BANKRUPTCY ¶ 1100.01 (15th ed. 1983); see Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, Inc., 523 F.2d 164, 168-69 (2d Cir.), cert. denied, 423 U.S. 1017 (1975), cert. denied, 423 U.S. 1073 (1976).
Code's grant of flexibility to the debtor in possession. Federal labor legislation is directed toward the goal of industrial peace through the promotion of collective bargaining. The National Labor Relations Act (NLRA) was enacted to promote collective bargaining and thereby ensure industrial peace. Experience has shown that the refusal by employers to accept the process of collective bargaining will necessarily lead to industrial strife and a consequent obstruction of the free flow of commerce.

8. See infra note 11. Section 8(d) of the NLRA defines collective bargaining as "the performance of the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . ." 29 U.S.C. § 158(d) (1982).


11. 29 U.S.C. § 151 (1982). This awareness of the possibility of obstruction to commerce is expressed in § 1 of the NLRA:

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

Id. The obstruction to the free flow of commerce due to the lack of collective bargaining derives from:

(a) [an] impairing [of] the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

Id.; see First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 674 (1981) ("A fundamental aim of the [NLRA] is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce. Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management.") (citation and footnote omitted); Ford Motor Co. v. NLRB, 441 U.S. 488, 499 (1979) (collective bargaining is preferable to allowing disputes outside the negotiation process to lead to stress); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 401-02 (1952) (enforcement of the obligation to bargain collectively is of prime importance); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (the NLRA "goes no further than to safeguard the right of employees to self-organization . . . for collective bargaining . . . without restraint or coercion"). Collective bargaining is also carried out free from government intervention as to the actual terms and conditions of employment. See Howard Johnson Co. v. Hotel Employees, 417 U.S. 249, 254 (1974) (quoting NLRB v. Burns Int'l Sec. Servs., 406 U.S. 272, 287 (1972), quoting H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970)) ("[F]reedom of collective bargaining—'private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract'—[is] a 'fundamental premise' of the federal labor laws . . . .").
To avoid this undesirable end, section 8(a)(5) of the NLRA requires the employer to bargain collectively with the employees' representatives. In addition, this section of the Act prohibits either party from unilaterally terminating or modifying the collective bargaining agreement outside certain specified procedures.

The respective policies of the NLRA and the Code, therefore, collide when the trustee or debtor in possession requests permission to reject a

---


It should be noted that a debtor in possession is an employer within the meaning of the NLRA. Section 2 of the NLRA defines the term "employer" to include "any person acting as an agent of an employer." 29 U.S.C. § 152(2) (1982) (emphasis added). A trustee in bankruptcy is considered to be a "person" within the meaning of the NLRA. 29 U.S.C. § 152(1) (1982). Thus, the trustee or debtor in possession falls within the application of the term "employer" in § 8(a)(5). Because § 8(d) defines the duty to bargain under § 8(a)(5), a debtor in possession who terminates or modifies a contract outside of the procedures prescribed in § 8(d), infra note 13, also violates § 8(a)(5). See NLRB v. Lion Oil Co., 352 U.S. 282, 285 (1957). A unilateral modification of the contract, therefore, would constitute a violation of § 8(d) and § 8(a)(5). See Allied Chem. & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 159, 185 (1971).

13. 29 U.S.C. § 158(d) (1982). The proviso of § 158(d) further defines the collective bargaining obligation:

Where there is in effect a collective bargaining contract covering employees in an industry affecting commerce . . . no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof . . . ; (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications; (3) notifies the Federal Mediation and Conciliation Service . . . ; and (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) . . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Id. (emphasis added). It has been recognized that the purpose of § 8(d) extends beyond mere promotion of contract compliance. "The conditions for a modification or termination set out in paragraphs (1) through (4) plainly are designed to regulate modifications and terminations so as to facilitate agreement in place of economic warfare." Allied Chem. & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 187 (1971); see H.R. Rep. No. 510, 80th Cong., 1st Sess. 34 (1947).

It should also be recognized that, in spite of the defined, protracted modification procedure of § 8(d), this section is construed flexibly in light of all the provisions of the NLRA, its object, and policy. See, e.g., NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956).
collective bargaining agreement as an executory contract under section 365(a) of the Code. Allowing the debtor in possession to reject the collective bargaining agreement would result in a unilateral termination of the contract in violation of the NLRA section 8(d) termination and modification procedures.\(^{14}\) Requiring the debtor in possession to comply with all the statutory requirements of section 8(d) is equally objectionable because it would hinder the Code's goal of providing the debtor with a flexible and unfettered opportunity to revitalize the failing business.\(^{15}\)

Due to the lack of a clear legislative mandate in either the Code or the NLRA, the judiciary was faced with the task of accommodating the competing interests and policies.\(^{16}\) The courts generally held that a collective

\(^{14}\) See supra note 13. Further, § 2 of the NLRA defines the term "person" under the NLRA as including "trustees in cases under title 11." 29 U.S.C. § 152(1) (1982). Thus, Congress has revealed a specific intent to bind a trustee or debtor in possession to the requirements of the NLRA.

\(^{15}\) See Perez v. Campbell, 402 U.S. 637, 648 (1971) (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)) (purpose of a reorganization is to grant the debtor "a new opportunity in life and a clear field for future effort"); accord Harris v. Zion's Sav. Bank & Trust Co., 317 U.S. 447, 451 (1943); Stellwagen v. Clum, 245 U.S. 605, 617 (1918). The root principle of § 365(a) is that "a trustee in bankruptcy [should have the authority to] renounce title to and abandon burdensome property." 2 COllIER ON BANKRUPTCY ¶ 365.01 (15th ed. 1983).

\(^{16}\) The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business' finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap... If the business can extend or reduce its debts, it often can be returned to a viable state. It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.


For the policies underlying the NLRA, see supra notes 9-11 and accompanying text; see also John Wiley & Sons v. Livingston, 376 U.S. 543, 550 (1964) (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79 (1960)) ("[A] collective bargaining agreement is not an ordinary contract. 'It is a generalized code to govern a myriad of cases which the draftsmen [could not] wholly anticipate... The collective agreement covers the whole employment relationship.'"). Livingston and Warrior & Gulf "distinguished a labor agreement from other forms of agreements and established a new common law insofar as labor contracts were concerned." La Penna, Bankruptcy & the Bankruptcy Act, N.Y.U. CONF. ON LAB., 169, 175 (1976).

It should be noted that the legislative history of the Adjustment of Debts of Political Subdivisions and Public Agencies and Instrumentalities specifically addressed the issue of rejection of labor contracts. Section 402(b)(1) permitted the court to allow the "[agency, instrumentality, or political subdivision] to reject executory contracts and unexpired leases of the petitioner, after hearing on notice to the parties to such contracts [and] leases..." 11 U.S.C. § 402(b)(1) (1976) (footnote omitted) (codified as amended at 11 U.S.C. § 365(a) (1982)). The House Report concerning the standard for the rejection of ordinary, executory contracts required a showing that the contract is "onerous and burdensome, and its rejection
bargaining agreement, with the court's approval, could be rejected as an executory contract under section 365(a) of the Code. The inquiry focused on the proper characterization of the post-petition debtor, its consequent obligations under the NLRA, and the proper standard to be used to permit rejection of the agreement. The courts of appeals developed divergent characterizations of the debtor in possession, labeling it either as the same prebankruptcy company or as a "new entity." Further, three standards for rejecting the agreement emerged:

(1) the balancing of the equities test that involved a two-step analysis: first, the contract must be shown to be "onerous and burdensome," and second, the equities of the situation must tip decidedly in favor of...
Rejection of Collective Bargaining Agreements

(2) a heightened standard of review test\(^\text{22}\) that required the contract to be so onerous and burdensome that its nonrejection would effectively preclude a successful reorganization;\(^\text{23}\) and

(3) the business judgment rule that permitted rejection of the agreement when it would improve the financial condition of the debtor.\(^\text{24}\)

In *NLRB v. Bildisco & Bildisco*,\(^\text{25}\) the United States Supreme Court addressed two issues: (1) under what conditions can a bankruptcy court permit rejection of a collective bargaining agreement; and (2) may the National Labor Relations Board (NLRB or Board)\(^\text{26}\) find a debtor in pos-

---

\(\text{21. See In re Brada Miller Freight Sys., Inc., } 702 \text{ F.2d 890, 899 (11th Cir. 1983); }\)

\(\text{22. See Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, Inc., 523 F.2d 164 (2d Cir.), cert. denied, 423 U.S. 1017 (1975), cert. denied, 423 U.S. 1073 (1976). The Second Circuit decided REA Express only one month after Kevin Steel. See supra note 20 and accompanying text.}\)


In *Local Joint Executive Bd. v. Hotel Circle*, the United States Court of Appeals for the Ninth Circuit affirmed the district court decision that adopted the business judgment rule. 613 F.2d at 218. The court, however, expressly refused to address the issue of the proper standard for rejection of a collective bargaining agreement. *Id.* at 213 n.2. Nevertheless, the fact that the Ninth Circuit made no attempt to balance the employee concerns vis-a-vis the objective of a successful reorganization in concluding that rejection was appropriate could reflect an unannounced use of the business judgment rule. See Comment, *Bankruptcy Law-Labor Law: Rejection, Assumption and Modification of Collective Bargaining Agreements*, 1981 ARIZ. ST. L.J. 311, 321.

\(\text{25. 104 S. Ct. 1188 (1984). Two cases were consolidated for argument: the first was NLRB v. Bildisco & Bildisco; the second was Teamsters Local 408 v. NLRB. Both cases were reported below at 682 F.2d 72 (3d Cir. 1982).}\)

\(\text{26. The NLRB was created pursuant to § 3 of the NLRA in 1935. 29 U.S.C. § 153 (1982). “It is the business of the Board to give coordinated effect to the policies of the [National Labor Relations Act].” NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953). Further, “[t]he function of striking [the] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [NLRB], subject to limited judicial review.” NLRB v. Local 103, Int’l Ass’n of Ironworkers, 434 U.S. 335, 350 (1978) (quoting NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957)) (emphasis added); see NLRB v. Weingarten, Inc., 420 U.S. 251, 267 (1974). Deference is thus given to the NLRB based upon its expertise in the field of labor relations. It should be noted that the NLRB has ruled that a debtor in possession violates § 8(d) and § 8(a)(5) by unilaterally}\)
session guilty of committing an unfair labor practice for unilaterally terminating or modifying the labor contract during the period following the filing of the bankruptcy petition and before rejection of the agreement has been approved by the bankruptcy court. The Court held that, before a bankruptcy court acts on a petition to reject a collective bargaining agreement, it should be persuaded that reasonable yet prospectively unsuccessful efforts to negotiate a voluntary modification have been made.27 Having established this fact, the majority stated that the bankruptcy court should permit rejection of the agreement upon a proper showing by the debtor that the agreement burdens the estate and that the equities tip in favor of rejection.28 The Court further held that a debtor does not commit an unfair labor practice in violation of the NLRA when it unilaterally terminates or modifies the agreement before receiving the bankruptcy court's permission to reject it.29

In April, 1980, Bildisco, a New Jersey partnership, filed a voluntary petition for reorganization under chapter 11 of the Bankruptcy Code.30 The bankruptcy court designated Bildisco as a debtor in possession and authorized it to operate the business. In January 1981, the debtor in possession sought permission from the bankruptcy court to reject its collective bargaining agreement with Local 408 of the Teamsters, pursuant to section 365(a) of the Code.31 Without articulating a standard for rejection, the bankruptcy court promptly approved the rejection of the agreement retroactive to the date immediately preceding the filing of the bankruptcy petition.32 The union appealed to the district court which affirmed the

altering the terms of a collective bargaining agreement. See ISG Extrusion Tooling, Inc., 262 N.L.R.B. 114, 116 (1982); Airport Limousine Serv., Inc., 231 N.L.R.B. 932, 935 (1977). But see Blazer Indus., 236 N.L.R.B. 103, 109-10 (1978) (trustee in bankruptcy held not bound to the preexisting collective bargaining agreement when there were significant changes in the operations of the debtor immediately after the bankruptcy petition was filed).

27. 104 S. Ct. at 1196.
28. Id.
29. Id. at 1200.
31. 682 F.2d at 75; see supra note 7. At the rejection hearing, a Bildisco partner stated that the company would be able to save approximately $100,000 in 1981 by abrogating the collective bargaining agreement. 682 F.2d at 75.
32. 682 F.2d at 75. Section 365(g)(1) provides in part that "the rejection of an executory contract. . . . of the debtor constitutes a breach of such contract . . . . (1) if such contract . . . has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition. . . ."
33. 11 U.S.C. § 365(g)(1) (1982) (emphasis added). The Senate Report explains that the purpose of the "relation back" of the time constituting the breach of the contract "is to treat rejection claims as prepetition claims." S. REP. No. 989, 95th Cong., 2d Sess. 60 (1978). Allowance for these claims is provided under the rules for prepetition claims. See 11 U.S.C. § 502(f), (g) (1982). Priority for these § 502 claims is determined under the rules for prepetition
bankruptcy court's order. Thereupon, the union appealed to the United States Court of Appeals for the Third Circuit.

In mid-summer 1980, the union filed unfair labor practice charges with the NLRB complaining that Bildisco had violated certain provisions of the collective bargaining agreement. In July 1980, the General Counsel of the NLRB issued a complaint alleging that Bildisco had engaged in unfair labor practices in violation of sections 8(a)(1) and 8(a)(5) of the NLRA by making unilateral changes in the collective bargaining agreement. Bildisco failed to respond to the NLRB's repeated efforts to have the company file its answers to the complaint. In January, 1981, the NLRB moved for summary judgment based upon Bildisco's failure to answer the complaint. One month later, Bildisco stated that its delay in filing an answer had been caused by its chapter 11 proceedings. It also informed the Board's General Counsel of the bankruptcy court's rejection of the collective bargaining agreement and argued that the retroactive effect of such rejection terminated the contract after April 14, 1980. On April 23, 1981, the NLRB granted the General Counsel's motion for summary judgment, claims. See 11 U.S.C. § 507 (1982). The Senate Report covering § 507(a)(2), which grants second priority to § 502(f) prepetition unsecured claims, refers to individuals within this category as "involuntary gap" creditors. S. Rep. No. 989, 95th Cong., 2d Sess. 60 (1978). This second priority covers "claims arising in the ordinary course of the debtor's business or financial affairs after a title 11 case has begun but before the order for relief . . . ." Id.

Despite this relation back notion, many courts deem the executory contracts to remain in effect after the bankruptcy petition has been filed and until they are rejected by the party with court approval. See, e.g., Federal's Inc. v. Edmonton Inv. Co., 555 F.2d 575, 579 (6th Cir. 1977); Smith v. Hill, 317 F.2d 539, 542 n.6 (9th Cir. 1963); In re Guardian Equip. Corp., 18 Bankr. 864, 867 (Bankr. S.D. Fla. 1982). This reveals judicial belief that the relation back of the rejection does no more than to create prepetition claims and does not affect the enforceability of the contract.

33. 682 F.2d at 75. In a bench opinion, the district court noted that under the Bankruptcy Act, judicial evaluation of petitions to reject commercial contracts utilized a "business judgment" standard whereas the test for labor contracts was more rigorous. The district court determined that the contract would have been rejected under either standard and thus it was not necessary to rule on the appropriate test. Id.

34. Id. at 76. See infra notes 42-53 and accompanying text.

35. The union claimed Bildisco failed to grant wage increases called for by the collective bargaining agreement. In addition, vacation pay was withheld. Further, Bildisco ceased making required pension and welfare contributions to the appropriate trust funds, and failed to forward to the union the dues the company was withholding from the employees' paychecks. 682 F.2d at 75-76.

36. Id. Section 8(a) of the NLRA provides in part: "[i]t shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . . (5) to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C. § 158(a)(1), (5) (1982); see supra note 13 for a definition of the collective bargaining obligation.

37. 682 F.2d at 76.

38. Id. See supra note 32.
stating that Bildisco had not shown good cause for its failure to answer the complaint. 39 The Board made a “finding of fact” that the debtor in possession was the alter ego in bankruptcy to Bildisco. 40 Therefore, the NLRB ordered Bildisco, as debtor in possession, to honor the terms of the collective bargaining agreement. Further, the Board petitioned the United States Court of Appeals for the Third Circuit for enforcement of its order. 41

The court of appeals consolidated the union’s appeal and the NLRB’s petition for enforcement of its order. The court examined the policies of the Code and the NLRA. 42 It determined that section 365 permits rejection of collective bargaining agreements as executory contracts. 43 The circuit court also rejected the alter ego theory propounded by the NLRB and emphasized that the debtor in possession, in contrast to a pre-bankruptcy debtor, is not a party to the contract. 45 It stated that the authority of the debtor in possession unilaterally to institute a midterm modification or termination of the collective bargaining agreement is not, therefore, limited by the restrictions of section 8(d) of the NLRA 46 because the debtor in possession is not a party to any labor agreement. 47 Further, because the rejection of a contract relates back to the date of the filing of

39. 682 F.2d at 76.
40. Id. Alter ego status exists when there is a finding that the two enterprises have “substantially identical management, business purpose, operation, equipment, customers, and supervision as well as ownership.” Crawford Door Sales, 226 N.L.R.B. 1144 (1976); see also Howard Johnson Co. v. Hotel Employees, 417 U.S. 249, 259 n.5 (1979) (“a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management” is to be of no legal consequence and such an alter ego is subject to all the legal and contractual obligations of the predecessor). The difference between a determination of “alter ego” and “successor employer” status is that the alter ego is required to assume its predecessor’s collective bargaining agreement. See, e.g., Marquis Printing Corp. and Mutual Lithograph Co., 213 N.L.R.B. 394 (1974). With successor status, one is required only to recognize and bargain with the exclusive representatives of the employees. See, e.g., NLRB v. Burns Int’l Sec. Servs., Inc., 406 U.S. 272 (1972).
41. 682 F.2d at 76.
42. Id. at 78.
43. Id. at 79. Under § 365(g), the rejection of an executory contract constitutes a breach of such contract immediately before the date of the filing of the chapter 11 petition. 11 U.S.C. § 365(g) (1982); see supra note 32. The union will, therefore, have a right to damages resulting from this breach. See La Penna, supra note 16, at 180-83 (1976). For a discussion of the priority of union claims against the debtor, see infra note 138.
44. The court “suggest[ed] to the NLRB that, at least in matters within [the Third Circuit], it cease operating under such a fundamental misconception of the law.” 682 F.2d at 83.
45. Id. at 78-79.
46. See supra note 13.
47. 682 F.2d at 79.
the bankruptcy petition, the court reasoned that if Bildisco were permitted to reject the contract, the NLRB would be precluded from finding the debtor guilty of an unfair labor practice based on a unilateral modification of the agreement.

The court then examined the standard to be applied in allowing the rejection of a labor contract. It concluded that the "balancing of the equities" approach provided the correct formulation of the appropriate accommodation between the competing statutory policies. The court expressly rejected the more stringent test that permits rejection only when it is necessary to save the debtor company from collapse. Because the lower courts had approved rejection without articulating a standard, the court vacated the district court decision and remanded to the bankruptcy court for reconsideration. The NLRB's application for enforcement of its order requiring that the terms of the collective bargaining agreement be honored also was denied.

---

48. See supra note 32.
49. 682 F.2d at 83.
50. Id. at 79. The court believed that the debtor-in-possession must first demonstrate that the continuation of the collective bargaining agreement would be burdensome to the estate; that once this threshold determination has been made the debtor-in-possession must make a factual presentation sufficient to permit the bankruptcy court to weigh the competing equities; that the polestar is to do equity between claims which arise under the labor contract and other claims against the debtor; that, in this, the court must consider the rights of covered employees as supported by the national labor policy as well as the possible 'sacrifices which other creditors are making' in the effort to bring about a successful reorganization . . . .

Id. at 81 (quoting Group of Inst. Inv. v. Chicago, Mil., St. P. & Pac. R.R., 318 U.S. 523, 550 (1943)).
51. Id. at 79. The court rejected the formulations of [certain] decisions . . . which purport to follow the . . . "balancing of the equities" [test] but instead replace [that standard] with a test predating permission to reject on a showing 'that an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a failing carrier in bankruptcy from collapse.'

Id. (quoting Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, Inc., 523 F.2d 164, 169 (2d Cir.), cert. denied, 423 U.S. 1017 (1975), cert. denied, 423 U.S. 1073 (1976); see supra notes 21-22 and accompanying text. The Third Circuit enunciated two reasons for not following this strict test:

first, for the pragmatic reason that it may be impossible to predict the success vel non of a reorganization until very late in the arrangement proceedings; and second, for the prudential consideration that . . . imposition of [the REA Express] test unduly exalts the perpetuation of the collective bargaining agreement over the more pragmatic consideration of whether the employees will continue to have jobs at all.

682 F.2d at 80.
52. 682 F.2d at 84-85.
53. Id. at 85.
The Supreme Court affirmed, holding that after a sufficient showing that reasonable, yet unsuccessful, efforts have been made to negotiate a contract modification, a bankruptcy court may permit a debtor in possession to reject its collective bargaining agreement with a union. The Court unanimously ruled that the standard to be utilized by the bankruptcy court in determining whether rejection of the labor contract should be permitted requires a showing that the agreement burdens the estate and that the equities balance in favor of rejection. It maintained that because of the special nature of a collective bargaining agreement and the consequent "law of the shop" that the agreement creates, a standard stricter than the "business judgment" test, utilized to permit rejection of ordinary, executory contracts, should be applied by the bankruptcy court in ruling on a petition to reject a labor contract. The Court, however, repudiated the application of a test that would make rejection contingent upon the debtor's demonstration that, absent rejection, the company would be forced into liquidation. It reasoned that the application of such a very strict test would be contrary to the flexibility and equity inherent in the Code.

A sharply divided Court further held that a debtor's unilateral termination or modification of the collective bargaining agreement, prior to formal approval of contract rejection by the bankruptcy court, does not constitute a violation of section 8(d) of the NLRA. It asserted that the authority to reject is vital to the basic purpose of a chapter 11 reorganization because rejection will release the debtor in possession from burdensome contracts that may impede a successful reorganization. Five justices further reasoned that, because the collective bargaining agreement is not an enforceable contract from the date of the filing of the bankruptcy petition to formal acceptance of the contract, the debtor in possession is not bound by the requirements of section 8(d).

Writing for the dissent, Justice Brennan disagreed with the majority's holding that a debtor in possession does not commit an unfair labor practice when it unilaterally alters the terms of a labor contract post-petition
yet prior to receiving bankruptcy court permission to reject the contract.\textsuperscript{63} He asserted that the majority misinterpreted the policies and provisions of the Code and the NLRA for it was Congress' intent that a debtor in possession adhere to the terms of a collective bargaining agreement in the post-petition period.\textsuperscript{64}

Legislation was introduced in Congress the day the Court handed down \textit{Bildisco} to counter the potentially harmful impact of the Court's ruling.\textsuperscript{65} The recently enacted Bankruptcy Amendments and Federal Judgeship Act of 1984 (Bankruptcy Amendments Act) represents the culmination of this legislative drive to alter certain aspects of the \textit{Bildisco} scheme relating to the standard and procedure for the rejection of a collective bargaining agreement in a reorganization case.\textsuperscript{66} Under the Bankruptcy Amendments Act, after filing a petition for bankruptcy, yet prior to filing an application for rejection of a union contract, the debtor in possession or trustee must

\begin{footnotesize}
\begin{enumerate}
\item[63.] Id. at 1211.
\item[64.] Id.
\item[65.] On February 22, 1984, Representative Peter Rodino introduced a bill that would require the debtor in possession to petition the bankruptcy court for authorization to terminate or modify the labor contract. Further, the bankruptcy court could permit rejection only if it found that the jobs covered in the collective bargaining agreement would be lost and the financial reorganization of the debtor would fail unless rejection were permitted. Finally, Rodino's bill unequivocally denied the trustee the authorization to unilaterally terminate or modify the collective bargaining agreement. H.R. 4908, 98th Cong., 2d Sess. \S\ 3, 130 CONG. REC., H780-81 (daily ed. Feb. 22, 1984) (statement of Rep. Rodino).
\item[66.] The complete text of subtitle J reads as follows:

Sec. 541. (a) Title 11 of the United States Code is amended by adding after section 1112 the following new section:

\begin{verbatim}
§ 1113. 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
\end{verbatim}
\end{enumerate}
\end{footnotesize}
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 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 employee 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.

(b) The table of sections for chapter II of title 11, United States Code, is amended by inserting after the item relating to section 1112 the following new item:

1113. Rejection of collective bargaining agreements.

(c) The amendments made by this section shall become effective upon the date of enactment of this Act; provided that this section shall not apply to cases filed under title 11 of the United States Code which were commenced prior to the date of enactment of this section.

make a contract modification proposal to the employees' representative. 67 The proposed modifications may not extend beyond those alterations necessary to the successful reorganization of the debtor. 68 Further, the proposal must contain assurances that all creditors, the debtor, and other affected parties are being treated fairly and equitably. 69 Thus, the statute

Stat. 333, 390-91. The Bankruptcy Amendments Act was enacted on June 29, 1984 and signed into law by the President on July 10, 1984. See Bankruptcy Amendments, 1984 U.S. CONG. & AD. NEWS, 98 Stat. 333, 392. Congressional commentary on the Bankruptcy Amendments Act reveals that the purpose for the labor legislation was to overturn that part of Bildisco permitting unilateral contract changes prior to a judicial hearing. See 130 CONG. REC. S8898 (daily ed. June 29, 1984) (statement of Sen. Packwood); id. at S8890 (statement of Sen. Dole); id. at H7491 (statement of Rep. Moorhead); id. at H7494 (statement of Rep. Glickman); infra notes 179-93.

67. Bankruptcy Amendments Act, supra note 66. Further, the debtor must provide the union representative with such information as is necessary to evaluate the proposal. See id. at § 1113(b)(1)(B).

68. Id. The key phrase is "necessary modifications." The debtor in possession, therefore, "must limit his proposal to modify a collective bargaining agreement to only those modifications that must be accomplished if the reorganization is to succeed." 130 CONG. REC. H7496 (daily ed. June 29, 1984) (statement of Rep. Morrison); see id. at H7490 (statement of Rep. Fish); id. at S8892 (statement of Sen. Hatch). Senator Packwood further viewed the "necessary modification" language as a provision that will preclude the debtors from exploiting the bankruptcy procedure as a means to rid itself of undesired features of a collective bargaining agreement that have no relation to the successful reorganization of the company. The "necessary" prerequisite therefore, "guarantees the sincerity of the debtor's good faith in seeking contract changes." Id. at S8898 (statement of Sen. Packwood).

69. See Bankruptcy Amendments Act § 1113(b)(1)(A), supra note 66. The phrase "affected parties" probably will be construed broadly. It may "include those parties with a contractual, legal, or financial tie to the debtor that would make it one of the logical parties to the equities balancing that must proceed as the court administers a reorganization." 130 CONG. REC. S8892 (statement of Sen. Hatch). Nevertheless, it is "not meant to include any party which might conceivably be affected in any minor way, but is intended to encompass those parties directly affected." Id. at S8888 (statement of Sen. Thurmond). The interests of all nonunion employees, therefore, should be considered. Id. The object of the "fair and equitable treatment" requirement is to prevent the focus for cost cutting from being directed exclusively at the union employees. Rather, the burden is to be spread among all "affected parties." "Experience shows that when workers know that they alone are not bearing the sole brunt of the sacrifices, they will agree to shoulder their fair share and in some instances without the necessity for a formal contract rejection." 130 CONG. REC. at S8898 (statement of Sen. Packwood). Further, the fair and equitable treatment language was intended to assure that "the type of balancing of all the equities that takes place when the court finally rules on rejection also takes place during [the] preliminary negotiations." Id. at S8892 (statement of Sen. Hatch).

With respect to the actual accounting, the conference committee was aware of the practical difficulties involved in identifying all the interested parties and their respective interests at this early stage of the reorganization. Thus, the mandated proposal by the business to the union representative is not to be construed as requiring a detailed accounting of how the reorganization burden is to be distributed among the affected parties. See id.

In his commentary on the Bankruptcy Amendments Act, Senator Packwood referred to a particular bankruptcy court decision as an example of the application of the fair and equita-
initially demands good faith negotiations between the parties as a prerequisite to obtaining judicial relief from a burdensome labor contract.\footnote{70}

Once an application for rejection of a labor contract has been made, and therefore necessarily after a modification proposal has been proffered and good faith negotiations have occurred,\footnote{71} the court\footnote{72} must schedule a hearing within fourteen days after the filing of the rejection petition.\footnote{73} The court is thereafter required to rule on the rejection application within thirty days after commencement of the hearing;\footnote{74} nevertheless, this time period may be extended by the court as justice requires and as the employees' representative and the debtor in possession agree.\footnote{75} Further, the court may approve an application for rejection only where the following elements are found:

(1) the trustee has negotiated with the parties;\footnote{76}

(2) the union representative has refused to accept the trustee's proposal "without good cause";\footnote{77} and

\footnote{70}{See Bankruptcy Amendments Act § 1113(b)(2), supra note 66.}
\footnote{71}{See supra notes 67-70 and accompanying text.}
\footnote{72}{Although not explicitly stated in the Bankruptcy Amendments Act, it has been suggested that because "an application to reject a collective bargaining agreement implicates national labor policy, as well as bankruptcy policy, if the union or trustee [move to reject the labor contract], such an application is to be heard by a United States district judge." 130 CONG. REC. at H7496 (statement of Rep. Morrison).}
\footnote{73}{See Bankruptcy Amendments Act § 1113(d)(1), supra note 66. The court, however, may extend the time for commencement of the hearing for a maximum of seven days as justice requires or as the trustee and union representative agree. \textit{Id.}}
\footnote{74}{\textit{Id.} at § 1113(d)(2), supra note 66.}
\footnote{75}{The statute does not place a uniform ceiling on the extension of time for the court to rule on the rejection application. This decision is left to the discretion of the parties. \textit{Id.}}
\footnote{76}{See supra notes 67-70 and accompanying text. One should note, however, that a troubled business may not be able to reorganize without a complete rejection of the labor agreement. "Complete rejection may, in cases of severe financial distress, be the only proposal that a business may make to effect reorganization. The good faith nature of these negotiations will require that the employees' union representative be given an opportunity to review and accept or reject the business proposal." 130 CONG. REC. at S8892 (statement of Sen. Hatch). Thus, it is recognized that a proposal offering only complete rejection of the contract may be statutorily acceptable.}
\footnote{77}{See Bankruptcy Amendments Act § 1113(c)(2), supra note 66. The phrase "without good cause" is undefined. The language was included, however, to ensure that a process of good faith negotiation occurs prior to judicial intervention. \textit{See} 130 CONG. REC. at 7496 (statement of Rep. Morrison). The requirement acts as an incentive for the debtor to negoti-
(3) the equities balance clearly in favor of rejection of the collective bargaining agreement. Thus, the Bankruptcy Amendments Act provides a structured yet flexible time frame within which the rejection must be ruled upon. The statute, however, inflexibly demands the existence of all three prerequisites before rejection of the contract may be approved.

In order to ensure the successful reorganization of the debtor, the Bankruptcy Amendments Act includes several emergency relief provisions. The amendments provide that the court, after notice and a hearing, may authorize interim modifications in the collective bargaining agreement if essential to the continuation of the business or in order to avoid irreparable damage to the debtor company. Further, should the court not rule

A ruling on the “without good cause” requirement will be very fact-specific and should be judged in light of the purpose of the language—to promote good faith negotiations. The conferees believed that the language should be interpreted narrowly by a reviewing court. “[I]t certainly was not intended to permit virtually any refusal on the part of the labor representative. 130 CONG. REC. at H7495 (statement of Rep. Lungren). It has been suggested that the ruling on this requirement should be based on facts derived directly from the contract between the parties. Id. A balancing test has been proposed. “[R]ejection of a proposal should only happen if the cause for rejection is good enough to risk the damage to the business as well as its creditors and employees that delay on protracted negotiations could produce.” Id. at S8892 (statement of Sen. Hatch). It has further been suggested that the good cause requirement is not intended to encompass traditional labor law concepts; the bankruptcy courts are not to be transformed into another NLRB. See id. at S8888 (statement of Sen. Thurmond). But see id. at S8900 (statement of Sen. Moynihan) (“the legislation . . . embodies the principles of the NLRA by requiring the company to bargain in good faith.”). In sum, the provision should be applied in a “workable manner.” Id. at S8888 (statement of Sen. Thurmond).

87. See Bankruptcy Amendments Act § 1113(c)(3), supra note 66. The legislative history reveals that the Bildisco balancing of the equities test is the standard that will be applied. See 103 CONG. REC. at H7495 (statement of Rep. Lungren); id. at H7490 (statement of Rep. Fish); id. at S8890 (statement of Sen. Dole); id. at S8900 (statement of Sen. Moynihan); id. at S8892 (statement of Sen. Hatch). “The word ‘clearly’ is merely intended to assure that rejection is not warranted where the equities balance exactly equal on each side.” Id. at S8892 (statement of Sen. Hatch). It seems more likely, however, that in each case the equities will balance in favor of one alternative or the other. See id.

89. See Bankruptcy Amendments Act § 1113(e), supra note 66. The purpose of granting interim modifications is to “prevent draining estates beyond repair.” 130 CONG. REC. at H7490 (statement of Rep. Fish). Such a motion for interim relief may only be made in conjunction with an application to reject the collective bargaining agreement. If interim modifications are granted, however, they are effective only for the period of consideration
the application to reject the contract within thirty days of the commencement of the rejection hearing, the trustee or debtor in possession may unilaterally terminate or alter any provision of the collective bargaining agreement pending the court's ruling on the application to reject. These and ruling on the application to reject the labor contract. See Bankruptcy Amendments Act § 1113(d)(1), (d)(2), (d)(3), (e); 130 Cong. Rec. at H7496 (statement of Rep. Morrison). Further, the court, "in deference to the overall policy of the provision which is to encourage the parties to reach their own agreement through collective bargaining...in framing the interim relief] may not go beyond the proposal made by the trustee pursuant to subsection (b)(1)(A)." 130 Cong. Rec. at H7496 (statement of Rep. Morrison); see supra notes 67-70 and accompanying text. There is debate, however, concerning whether the statute requires the application of the strict REA Express standard in ruling on a motion for interim relief. Compare 130 Cong. Rec. at H7496 (statement of Rep. Morrison) ("The statutory language of subsection (e) stating the standard for qualifying for interim relief is, in essence, the REA Express standard.") and id. at S8898 (statement of Sen. Packwood) (the interim modification provision requires the application of the REA Express standard) with id. at H7496 (statement of Rep. Lungren) (favoring an "extremely narrow" standard yet not accepting the REA Express formulation because one should not subordinate the debtor's reorganization to the union contract, thus risking the employees jobs, by so strictly interpreting the § 1113(e) standard); see infra notes 101-18 and accompanying text. Finally, although not expressly provided in the Bankruptcy Amendments, it has been stated that if the application for rejection of the contract is denied, the employees are entitled to their wages and benefits lost under an interim order as an administrative expense. See 130 Cong. Rec. at H7496 (statement of Rep. Morrison); infra note 138.

80. The Bankruptcy Amendments require the court to rule on the rejection application within 30 days of the commencement of the rejection hearing. See Bankruptcy Amendments Act § 1113(d)(2), supra notes 66, 74 and accompanying text. In the interests of justice, however, this time period may be extended. See Bankruptcy Amendments Act § 1113(d)(2), supra note 66.

81. See Bankruptcy Amendments Act, § 1113(d)(2), supra note 66. Legislative commentary on this emergency relief mechanism varied. It has been stated that this provision, requiring a prior hearing and the subsequent expiration of an established time limit before the debtor in possession could unilaterally alter the labor agreement, overruled Bildisco with respect to the unfair labor practice issue. See 103 Cong. Rec. at S8890 (statement of Sen. Dole); id. at S8898 (statement of Sen. Packwood); see infra notes 179-93 and accompanying text. It is believed that the contract is statutorily deemed "enforceable" during the post-bankruptcy petition period. See 130 Cong. Rec. at S8898 (statement of Sen. Packwood) (commenting that the Bankruptcy Amendments Act, which requires a hearing prior to permitting a unilateral modification by the debtor, establishes that the contract is enforceable and binding on both parties until a court-approved rejection); see infra notes 179-93 and accompanying text. Commentary focusing on this interpretation of the emergency provision not surprisingly stressed the limited nature and secondary consequences expected from the 30-day exception. See, e.g., 130 Cong. Rec. at S8898 (statement of Sen. Packwood). In the event the court subsequently refuses to permit rejection of the contract, the trustee must pay back any wages and benefits withheld unilaterally. Id. Moreover, if the debtor unilaterally alters the contract, the union is "free to engage in strike activity since its no-strike obligation would no longer be binding." Id.

Legislative explication has also noted the practical significance of the emergency, unilateral modification provision:

should a judge fail to rule on an application for rejection within 30 days of the commencement of the hearing on such application, the debtor may unilaterally
provisions represent congressional awareness of the practical necessity of providing the debtor with the needed flexibility to avoid being forced into liquidation during the reorganization process.\textsuperscript{82}

In order to adequately understand and properly apply the standards and procedures affecting collective bargaining agreements embodied in the Bankruptcy Amendments Act, one must possess an understanding of \textit{Bildisco} and prior case law. This Note, therefore, will compare the statutory frameworks of the Code and the NLRA and will examine the varied judicial interpretations of the conflicting policies of these two statutes. Particular emphasis will be placed on an examination of the three standards that have been applied to reject a collective bargaining agreement in bankruptcy. Further, this Note will discuss \textit{Bildisco} and the subsequent legislative modifications with respect to the standard the court will apply to rule on a rejection application and the ability of the debtor in possession to unilaterally alter the terms of the collective bargaining agreement. An analysis of \textit{Bildisco} and the Bankruptcy Amendments Act will reveal that, although Congress has moderated \textit{Bildisco}'s tendentious conclusion favoring the reorganizing debtor, it might not have altered the practical consequences of the rejection process.\textsuperscript{83}

\begin{quote}

terminate or alter any of the provisions of the collective bargaining agreements pending the court's final ruling on the application. \textit{At that point in time, the debtor would essentially be in the same position he is now in under the Bildisco decision—that is he may unilaterally abrogate the contract pending the court's decision.}
\end{quote}

130 \textsc{Cong. Rec.} at S8888 (statement of Sen. Thurmond) (emphasis added). The implication from this language is that the emergency exception may have a significant impact. Thus, it would not be accurate to state that \textit{Bildisco}'s holding with respect to a debtor's post-petition unilateral termination or modification of the labor contract was completely overruled by the Bankruptcy Amendments Act. \textit{See infra} notes 179-93 and accompanying text.

Finally, it should be noted that, in the event the court fails to rule on the rejection application within the prescribed time limit, "expeditious mandamus relief would be available in the appellate courts." 130 \textsc{Cong. Rec.} at H7496 (statement of Rep. Morrison).

82. \textit{See} 130 \textsc{Cong. Rec.} at S8888 (statement of Sen. Thurmond). It should be noted that the Bankruptcy Amendments are prospective in application. The amendments do not apply to cases filed prior to the date of their enactment. \textit{See Bankruptcy Amendments Act § 541(c), supra} note 66. Cases pending prior to the date of the enactment of the amendments, June 29, 1984, therefore will follow the \textit{Bildisco} holding.

83. In addition to the statutory conflict that must be resolved, there are other practical considerations that reveal the significance of the Supreme Court decision and the legislation. Over the past several years, there has been a marked increase in chapter 11 filings. During the twelve-month period ending June 30, 1982, 12,385 chapter 11 proceedings were initiated. \textit{See Table F3A, Admin. Office, U.S. Courts Statistical Analyses and Reports Div. (June 30, 1982).} For the same period ending June 30, 1983, 18,306 chapter 11 proceedings were commenced. \textit{See Table F3A, Admin. Office, U.S. Courts Statistical Analyses and Reports Div. (June 30, 1983).} This represents almost a 48% increase and reveals a trend of increased
I. JUDICIAL INTERLINEATION: A SPECTRUM OF STANDARDS

As previously stated, prior to enactment of the Bankruptcy Amendments Act, the Code placed no express limitation on the power of the bankruptcy court to approve the rejection of a collective bargaining agreement. This decision, therefore, rested within the discretionary powers of the judiciary. For approximately twenty-five years, the courts have attempted to resolve the tension between the bankruptcy provisions and the NLRA.


The import of Bildisco and the legislation is further clarified by combining these statistics with the latest information regarding membership in labor organizations. The number of nonagricultural labor organization members in 1980 was 22,811,000 or 25.2% of the total number of nonagricultural employees in the country. (The NLRA does not include agricultural laborers in its definition of employees who receive protection under the Act. See 29 U.S.C. § 152(3) (1982).) See U.S. Bureau of Labor Statistics, Directory of Nat'l Unions and Employee Associations (1971, 1975, 1979) reprinted in U.S. Bureau of the Census, Statistical Abstract of the United States, 409 (103 ed. 1982-83). More specifically, in 1978, there were 174 unions in the country (excluding single firm and local unaffiliated unions), while union membership was at 21,784,000, having held firm at approximately the same level over the previous ten years. Id. at 408. The number of employees who will be affected by this decision and legislation, therefore, is substantial.

Membership in large labor organizations (those with 100,000 members or more) represents a more defined group of employees who will be affected by Bildisco and the legislation. Moreover, many of the industries with which the largest labor organizations are associated are undergoing financial difficulties. (In 1980, Teamsters membership stood at 1,891,000; the Automobile Workers had 1,684,000 members; the Steelworkers had 1,238,000 members. Id. at 409.) See, e.g., Wash. Post, Mar. 21, 1982, at F1A; Wall St. J., Sept. 16, 1981, at 53, col. 4.

Unions, however, have recognized the importance of the success of the reorganization in sustaining employment of union workers. These unions have helped to aid employers in saving their failing businesses by reducing, for example, the wage and benefit packages or increasing production. See First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 681 n.19 (1981) (noting several instances when unions have aided financially troubled employers to revive their businesses); N.Y. Times, Oct. 9, 1983, at 1, col. 12 (reporting instances of employees accepting wage reductions in response to threatened plant closings); Wash. Post, Aug. 13, 1983, at B7, col. A.

84. See supra note 16 and accompanying text.

85. See 8 COLIER ON BANKRUPTCY ¶ 3.15 (14th ed. 1978); see also King v. Baer, 482 F.2d 552 (10th Cir.), cert. denied, 414 U.S. 1068 (1973) (the court’s rejection of the contract was within the discretion of the judges).

86. The first case to address this conflict was In re Klaber Bros., Inc., 173 F. Supp. 83 (S.D.N.Y. 1959). In Klaber Bros., the union had appealed a decision of the bankruptcy referee who had granted a motion of the debtor in possession to reject its collective bargaining agreement with the union. The court stated that § 713 of the Bankruptcy Act made no distinction among the types of executory contracts that could be rejected. Therefore, it reasoned that “the power to permit rejection of an executory contract should be exercised where rejection is to the advantage of the estate, [that is,] where the contract is detrimental, its rejection should be permitted.” Id. at 85. The court also noted that the NLRB was without
Because of the lack of Supreme Court or legislative guidance, several standards for rejection were developed.

A. Kevin Steel and REA Express: Accommodating the Code and the NLRA Through the Use of the “New Entity” Theory

1. The Kevin Steel Standard of Review

The standard of review adopted by the majority of the courts was first introduced in Shopmen’s Local No. 455 v. Kevin Steel Products, Inc. Kevin Steel, a debtor in possession under chapter 11 of the Bankruptcy Act (Act), had successfully petitioned the bankruptcy court for rejection of one of its three collective bargaining agreements. The union appealed the decision to the United States District Court for the Southern District of New York. The court reversed, holding that the power of the bankruptcy court to reject an executory contract did not extend to collective bargaining agreements.

Upon appeal by Kevin Steel, the United States Court of Appeals for the Second Circuit examined section 713 of the Bankruptcy Act, the precursor to section 365(a) of the Code, and stated that under chapter 11 the debtor jurisdiction to interfere with the rejection of a collective bargaining agreement. Id. It concluded that the referee’s decision was justified and upheld the rejection of the agreement. Id. 87. 519 F.2d 698 (2d Cir. 1975). For commentary concerning this case, see generally Levy and Blum, Limitations on Rejection of Union Contracts Under the Bankruptcy Act, 83 COM. L.J. 259 (1978); Note, The Labor-Bankruptcy Conflict: Rejection of a Debtor’s Collective Bargaining Agreement, 80 MICH. L. REV. 134 (1981); Note, Bankruptcy Law—Labor Law—Rejection of Collective Bargaining Agreements as Executory Contracts in Bankruptcy, 22 WAYNE L. REV. 165 (1975).

88. See supra note 1.

89. Kevin Steel, 519 F.2d at 700. The NLRB found that Kevin Steel had committed unfair labor practices in violation of § 8(a)(5) and § 8(a)(1) of the NLRA, by refusing to execute the agreement that it had concluded with the union. 209 N.L.R.B. 493, 499 (1974). The NLRB further found that Kevin Steel had violated § 8(a)(3) and § 8(a)(1) of the NLRA “by discriminating against employees because of the insistence of their shop steward on strict enforcement of the provisions of the Union’s contract, and it ha[d] violated section 8(a)(1) by offering an employee an inducement to abandon the Union.” Id.


91. See supra note 17. The court also noted the lack of appellate opinions on point. One reason cited for this lack of judicial guidance was that “only a hardy—or some might say foolhardy—employer would provoke a strike by trying to terminate an existing labor contract.” Kevin Steel, 519 F.2d at 703 (citing In re Public Ledger, Inc., 161 F.2d 762, 766-67 (3d Cir. 1947)).

in possession is a "new entity" that possesses its own rights and duties, subject to the supervision of the bankruptcy court. It emphasized that within this framework, the debtor should not be considered a party under section 8(d) of the NLRA to any labor agreement with the union and is therefore not subject to the termination and modification provisions of that section. The court noted the necessity of providing the debtor with a new start. It asserted that the policy of the Code would be violated by placing the struggling entity in a worse position than that of a successor employer who normally is not bound by its predecessor's collective bargaining agreements. Therefore, the Kevin Steel court held, the debtor in possession is not precluded from rejecting the collective bargaining agreement by section 8(d) of the NLRA.

The court further asserted that a proper reconciliation of the statutory conflict between the NLRA and the Code does not necessarily contemplate

---


94. 519 F.2d at 704. See Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 256-62 (1974); NLRB v. Burns Int'l Sec. Serv., 406 U.S. 272, 291 (1972); Note, The Bargaining Obligations of Successor Employers, 88 Harv. L. Rev. 759, 760 (1975). There are, however, possible exceptions to the rule that a successor employer is not bound by its predecessor's collective bargaining agreement. In Howard Johnson, the Supreme Court noted that in light of the difficulty of the successorship question, the myriad of factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, it is appropriate to emphasize the facts of each case. 417 U.S. at 256.

95. 519 F.2d at 706. The court also noted that critical commentary in this area favors the instant result. Id. at 704; see THE DEVELOPING LABOR LAW 817-18 (C. Morris ed. 1971); Countryman, Executory Contracts in Bankruptcy: Part II, 58 Minn. L. Rev. 479-98 (1974).

The Second Circuit also examined how the existence of § 77(n) of the Bankruptcy Act, 11 U.S.C. § 205(n) (1976) (codified as amended at 11 U.S.C. § 1167 (1982)), should be interpreted. This section provided that "no judge or trustee acting under [title 11] shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act." (The Code section today reads: "Notwithstanding section 365 . . . neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act . . . except in accordance with section 6 of such Act . . . ".) The Kevin Steel court reasoned that the existence of § 77(n) of the Act reveals Congress' awareness of how to remove labor agreements from the scope of the power to reject executory contracts. 519 F.2d at 704. The court, therefore, refused to require of employers not subject to the RLA that which is demanded of those employers subject to its strictures. Id. at 705. It commented that "[t]he distinct problems of [employers under the RLA] and their importance to
that the collective bargaining agreement should be rejected in all instances. In each case, the bankruptcy court must scrutinize thoroughly the petition to reject the agreement and balance the equities on both sides. The court concurred with the union that several matters relevant to this scrutiny include: (1) a possible improper motivation by the employer to rid itself of the union; (2) convincing proof of the company's financial condition, including the source of its difficulties and the benefit to be gained by rejection of the contract; and (3) a weighing of the equities against rejection, including the loss of intangible employee rights. The court remanded with instructions to reconsider the rejection issue in light of the considerations propounded.

2. The Strict REA Express Test

One month after Kevin Steel, the Second Circuit Court of Appeals

the national economy are well recognized.” Id. See, e.g., International Ass'n of Machinists v. Central Airlines, 372 U.S. 682, 687-89 (1963).

Finally, the court expressed the belief that few companies will enter into bankruptcy to free themselves of the burdens of their labor agreements because “[t]he adverse consequences of bankruptcy are ordinarily far too harsh for that.” 519 F.2d at 706. But see N.Y. Times, May 3, 1983, at D2, col. 1 (several asbestos companies filed under chapter 11 to avoid suits by employees over asbestos-related diseases and Wilson Foods Co. filed under chapter 11 to avoid higher labor costs).

96. 519 F.2d at 706-07. The court also expressly repudiated the business judgment rule. Id. at 707; see infra notes 143-52 and accompanying text. It noted that “[t]he decision to allow rejection should not be based solely on whether [rejection] 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.” Id.

97. 519 F.2d at 707; see, e.g., supra note 95. The United States District Court for the Southern District of New York in In re Mamie Conti Gowns, Inc., noting the petitioner's disproportionate relationship of assets to liabilities (over two to one), concluded that the bankruptcy proceeding was not commenced to promulgate a plan of reorganization but to discard the present labor contract. 12 F. Supp. 478, 480 (S.D.N.Y. 1935). The petition to reject the contract was denied. Id.

98. 519 F.2d at 707. A certain level of hardship imposed as a prerequisite to rejection should preclude frivolous attempts to reject a collective bargaining agreement. See Note, Bankruptcy Law—Labor Law—Rejection of Collective Bargaining Agreements as Executory Contracts in Bankruptcy, 22 WAYNE L. REV. 165, 174 (1975).

99. 519 F.2d at 707. By relieving a debtor from its obligations under a collective bargaining agreement, the court “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.” In re Overseas Nat'l Airways, 238 F. Supp. 359, 361-62 (E.D.N.Y. 1965). Other nonmonetary provisions at risk include grievance and arbitration procedures and no strike/no lockout clauses.

100. 519 F.2d at 707.

again was presented with a case involving bankruptcy law-labor law tensions. In *Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc.*, a debtor in possession under chapter 11 of the Bankruptcy Act had moved to reject two collective bargaining agreements subject to the Railway Labor Act (RLA) as onerous and burdensome under section 313 of the Act. The court summarized its decision in *Kevin Steel* and stated that the standard for the bankruptcy court's allowing rejection of the labor contract requires a showing by the debtor in possession that the contract "is onerous and burdensome and that the equities tip decidedly in favor of termination."

The court examined the plain wording of the RLA. It found that section 2 of the RLA does not permit a trustee to change the rates of pay or the working conditions embodied in a collective bargaining agreement except in the manner prescribed in the agreement or in section 6 of the RLA.

---


104. Section 313 of the Act provides that "[u]pon the filing of a petition the court may . . . 1) permit the rejection of executory contracts of the debtor upon notice to the parties to such contracts and to such other parties in interest as the court may designate." 11 U.S.C. § 713(1) (1976) (codified as amended at 11 U.S.C. § 365(a) (1982)).

105. *REA Express*, 523 F.2d at 166. Although the court characterized its *Kevin Steel* test in this language, it should be noted that an "onerous and burdensome" requirement was never expressly mentioned in the *Kevin Steel* opinion. The *REA Express* court rephrased the *Kevin Steel* test by stating:

[W]here, after careful weighing of all of the factors and equities involved, including the interests sought to be protected by the RLA, a district court concludes that an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a failing carrier in bankruptcy from collapse, the court may under § 313(1) authorize rejection or disaffirmance of the agreement.

*Id.* at 169.

106. 45 U.S.C. §§ 151, 156 (1982). The court stated that the purpose of the provisions of the RLA, like those of the NLRA, are to "avoid disruptions of commerce by forcing the parties to exhaust collective bargaining procedures and, where the RLA applies, to encourage use of arbitration and mediation before engaging in self-help strikes or other forms of unilateral action." *REA Express*, 523 F.2d at 168. Section 151(a) provides that the general purposes of the RLA are:

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of
The court noted that section 6, like section 8(d) of the NLRA, provides a protracted procedure for changing certain provisions of the contract.\footnote{107} Emphasizing that the purpose of the RLA is to avoid disruptions in commerce pending the resolution of the carrier's labor problems, the court further noted that section 313 of the Act places no restriction on the type of executory contract that may be rejected.\footnote{108} The court reasoned that Congress' awareness of how to exclude certain contracts from the operation of the bankruptcy laws is revealed in section 77(n) of the Act, which precludes the changing of wages or working conditions of railroad employees except in the manner prescribed in the RLA.\footnote{109} REA Express, however, was involved in the surface and air transportation of express shipments; its employees apparently did not work on trains.\footnote{110} The court, therefore, did not consider the REA Express employees to be railroad employees within the meaning of section 77(n).\footnote{111} Having thus established that section 77(n)

\begin{footnotes}
\item[107] 523 F.2d at 169. The Second Circuit noted the protracted statutory modification procedures for a collective bargaining agreement under the RLA. \textit{Id.} at 170-71; see 45 U.S.C. §§ 151-188 (1982). The seventh paragraph of § 152 provides that "[n]o carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 . . . ." 45 U.S.C. § 152(7) (1982). Section 156 further requires 30 days written notice of an intended change in agreements affecting rates of pay as well as specifying additional time-consuming procedures. 45 U.S.C. § 156 (1982). The court placed emphasis on the need for the debtor in possession to act promptly to avoid onerous contract terms in order to preserve the enterprise as an ongoing concern and preserve the employees' jobs. 523 F.2d at 170-71.
\item[108] \textit{Id.} at 169.
\item[110] 523 F.2d at 166.
\item[111] \textit{Id.} at 168. But see \textit{In re Overseas Nat'l Airways}, 238 F. Supp. 359 (E.D.N.Y. 1965) (collective bargaining agreements with pilots and stewardesses were subject to § 77(n) of the RLA and thus could be changed only in conformity therewith). \textit{See supra} note 95 for the text of § 77(n) as presently codified at 11 U.S.C. § 1167 (1982). Although § 1167 appears to preclude the changing of wages and working conditions of all collective bargaining agreements subject to the Railway Labor Act, § 103(g) of the Code restricts the applicability of § 1167 to railroad reorganizations. 11 U.S.C. § 103(g) (1982). Thus, the seemingly broader language of § 1167 is only as broad as its precursor, § 205(n) of the Bankruptcy Act, in that both apply only to railroad employees. \textit{See In re Braniff Airways}, 25 Bankr. 216 (Bankr. N.D. Tex. 1982) (§ 1167 is confined to collective bargaining agreements of railroad employees and does not apply to agreements of airline employees who are otherwise subject to the
of the RLA did not preclude the application of the provisions of chapter 11 of the Bankruptcy Code, the court attempted to give effect to both statutory schemes and held that the contract could be rejected.\footnote{523 F.2d at 169. For a discussion of the underlying purpose of the RLA, see infra note 106 and accompanying text.}

The court of appeals then examined whether the contract should be rejected in the instant case. The court suggested that REA Express became a new juridical entity after entering chapter 11 proceedings and therefore was not a party to the collective bargaining agreement entered into by REA Express prior to the bankruptcy proceedings.\footnote{523 F.2d at 170. The court derived this rationale from its decision in \textit{Kevin Steel}. See \textit{Kevin Steel}, 519 F.2d at 704.} It asserted that this new employer is required, however, to bargain collectively with the employees' representative.\footnote{523 F.2d at 170. The court of appeals stated that although "REA Express is not bound to assume the collective bargaining agreement of its predecessor, [the pre-chapter 11 company is,] as a new employer, obligated to bargain collectively with the representatives of the employees hired by it." \textit{Ibid.} The court derived much of its successor employer law from NLRB v. Burns Int'l Sec. Serv., 406 U.S. 272 (1972). In \textit{Burns}, the successor employer, subject to the NLRA, hired 27 of its 42 employees from the predecessor employer. The Supreme Court held that where the bargaining unit remains substantially unchanged, the new employer must negotiate with the certified bargaining agent of the employees. \textit{Ibid.} at 281. The court further held that, in spite of Burns' duty to bargain, "it was [not] bound to observe the substantive terms of the [previous] collective bargaining contract." \textit{Ibid.} at 281-82. The result is similar under the RLA. Section 152 has been interpreted to place upon the carrier, which includes a debtor in possession under \S\ 151, the positive duty to bargain collectively with the employees' representative. See Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570, 574-76 (1971); Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377-78 (1969); Bakaly & Bryan, \textit{Survival of the Bargaining Agreement: The Effect of Burns}, 27 \textit{VAND. L. REV.} 117 (1974); Gaus & Morris, \textit{Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns}, 59 \textit{VA. L. REV.} 1359 (1973); Comment, \textit{Criteria for Determining Employer Successorship—Factor Analysis, Burns and the Need for a New Standard}, 11 \textit{WAKE FOREST L. REV.} 437 (1975); Note, \textit{The Bargaining Obligations of Successor Employers}, 88 \textit{HARV. L. REV.} 759 (1975).} The court inquired whether the chapter 11 debtor unilaterally could change the terms of employment prior to such collective bargaining and concluded that, although a solvent successor employer financially might survive despite the maintenance of the status quo with regard to wages and other terms and conditions of employment, this new chapter 11 juridical entity needs flexibility in order to sustain the enterprise as a going concern.\footnote{523 F.2d at 170-71; \textit{see supra note 7.}} The court, thus, held that REA Express could implement new terms of employment without regard to the modification procedures of section 6 of the RLA.\footnote{523 F.2d at 170; \textit{see supra note 107.} The REA Express court also agreed with the
Examining the decision of the district court, the court of appeals enunciated a strict standard in determining whether a collective bargaining agreement should be rejected. It stated that rejection is warranted where it "clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the carrier will collapse and the employees will no longer have their jobs." The court remanded to determine if the contracts were sufficiently onerous and burdensome to warrant rejection.

Judicial interpretations of the Kevin Steel and REA Express standards differed. Several lower courts applied the less stringent Kevin Steel standard, disregarding the subsequent REA Express test requiring a consideration of the possible imminent collapse of the debtor. Other courts synthesized the two standards into a single test requiring a threshold show-
ing that a successful reorganization is contingent upon rejection of the collective bargaining agreement. If such a showing was substantiated, the court then engaged in a balancing of the equities test. It is evident, then, that a uniformly applied standard of review was lacking.

B. Brada Miller: Retaining a Balancing of the Equities Test Without the “New Entity” Theory

The United States Court of Appeals for the Eleventh Circuit, in Matter of Brada Miller Freight Systems, Inc., determined that the Kevin Steel balancing of the equities test properly accommodated the competing interests in the Code and the NLRA. Brada Miller Freight Systems, a commodities carrier principally engaged in the trucking industry, filed a reorganization petition under chapter 11 of the Code. In the meantime, various locals of the International Brotherhood of Teamsters filed charges with the NLRB complaining that certain conduct of Brada Miller relating to the rejection of the collective bargaining agreement constituted unfair labor practices. Brada Miller successfully petitioned the bankruptcy court to reject its collective bargaining agreements pursuant to section 365(a) of the Code. The district court affirmed, and the NLRB and the affected unions appealed.


121. See supra note 105. The court in In re Alan Wood Steel Co. described the test as follows:

First, the court should determine that the agreement is onerous and burdensome to the estate, so that failure to reject will make a successful arrangement impossible.

Second, the equities must be balanced and found to favor debtor. Then, and only then, may rejection of a collective bargaining agreement be permitted.

In re Alan Wood Steel Co., 449 F. Supp. 165, 169 (E.D. Pa. 1978); see In re Penn Fruit Co., 92 L.R.R.M. 3548 (E.D. Pa. 1976) (three collective bargaining agreements were sufficiently onerous and burdensome to warrant rejection and balancing the equities supported the termination of the contracts).

122. 702 F.2d 890 (11th Cir. 1983). In addition to Bildisco, Brada Miller is one of the few recent federal circuit court cases to reach the issue of the appropriate standard for rejection of a collective bargaining agreement. In Borman’s, Inc. v. Allied Supermarkets, 706 F.2d 187 (6th Cir.), cert. denied, 104 S. Ct. 263 (1984), the court expressly refused to rule on the standard for rejection of a collective bargaining agreement. 706 F.2d at 190 n.8. Further, in Local Joint Executive Bd. v. Hotel Circle, Inc., 613 F.2d 210 (9th Cir. 1980), the court also felt no need to address the question of the appropriate standard for rejection. Id. at 213-14 n.2.

123. Brada Miller, 702 F.2d at 892-93.

124. Id. at 893. The district court found that the denial of the motion to reject would have resulted in the collapse of Brada Miller and therefore the equities balanced in favor of
The court of appeals considered whether section 8(d) or section 365(a) governed the rejection or termination of collective bargaining agreements. Unlike the other federal appellate courts that had addressed this issue, the *Brada Miller* court was unpersuaded by the "new entity" theory. It concluded that the debtor in possession is indistinguishable from the pre-bankruptcy company with respect to its obligations under the collective bargaining agreement and the labor laws. The court emphasized that it is necessary to reconcile the conflicting statutory language, rather than to

rejection of the contract. The court concluded that this evidence satisfied the "test" propounded in *Kevin Steel* and *REA Express*. *Id.*

125. *Id.* at 894-95. Other commentators have also criticized the "new entity" theory. See, e.g., Bordewieck & Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11*, 57 Am. Bankr. L.J. 301 (1983) ("'new entity' theory simply cannot withstand close scrutiny; one need only observe that a 'new entity,' not a party to the contracts of its prepetition predecessor, would scarcely need bankruptcy court approval to reject [its labor contract]"); see also Note, *The Labor Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, 80 Mich. L. Rev. 134, 137-42 (1981).

In *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39 (3d Cir. 1942), the court looked to the substance of the relationship between the prebankruptcy company and the debtor in possession and found their interests indistinguishable for the purpose of enforcing their responsibilities to the employees. The court's language is instructive:

Court supervision of corporate reorganization affords the operating possessor no freedom from its statutory duty to its employees. And where managerial control and economic interest of the debtor in possession and the reorganized company are the same . . . then in no legally significant sense can the [debtor] be differentiated from the debtor in possession so far as the employer-employee relationship is concerned. *Id.* at 43-44.

126. 702 F.2d at 895. The court wondered why, if Congress had intended that the debtor in possession not be bound to the contracts of the prebankruptcy company, the debtor still had to apply for rejection of its collective bargaining agreement with the bankruptcy court. The court reasoned that if Congress had intended that the debtor in possession not be bound to the contracts of the prepetition debtor, it could first have set up a statutory scheme whereby the filing of the petition would constitute a breach of the collective bargaining agreement and then granted the debtor in possession the discretionary power to assume, not reject, certain favorable contracts. The court of appeals further noted that if the bankruptcy court refuses to permit rejection of the contract, the debtor in possession is bound retroactively to the agreement. It asserted that the "proponents of the new entity concept have failed to articulate a legal theory which justifies binding a 'non-party' to the agreement." *Id.*

Moreover, the court noted that the debtor in possession may be held accountable for unfair labor practices committed in the period between the filing of the chapter 11 petition and the motion for rejection of the agreement. *Id.* Thus, the court concluded, the new entity theory is viable only in situations where the court approves rejection of the contract. *Id.*

The court also considered the restrictive judicial commentary on the "new entity" theory. In *In re Unishops, Inc.*, 543 F.2d 1017 (2d Cir. 1976), the United States Court of Appeals for the Second Circuit wrote:

We again caution that the language in [*Kevin Steel*] stating that '[a] debtor in possession under Chapter 11 . . . is not the same entity as the pre-bankruptcy company' should not be extended as a generalization in cases other than those involving labor collective bargaining agreements where the claim is that section 8(d) of
sidestep the apparent clash through the use of an inadequate legal concept.\textsuperscript{127}

The court examined the language of the Code to discern the scope of its coverage. The court noted the existence of section 1167(a), through which Congress specifically exempted collective bargaining agreements formed under the RLA from the operation of section 365(a).\textsuperscript{128} It asserted that section 1167(a) revealed the ability of Congress specifically to exempt certain labor contracts from the operation of section 365(a).\textsuperscript{129} Although the court did not fully accept the successor employer-debtor in possession analogy previously proffered by the Second Circuit Court of Appeals in \textit{Kevin Steel}\textsuperscript{130} and \textit{REA Express},\textsuperscript{131} it did recognize the significance of several factors that would mitigate against binding the chapter 11 debtor to the substantive terms of the collective bargaining agreement entered into by the previous employer.\textsuperscript{132} The court emphasized the difficulty that would arise in finding fresh management and capital to participate in a reorganization effort if the debtor were not free to reject the collective bargaining agreement.\textsuperscript{133} The court asserted that Congress could not have intended the ultimate fate of the company to rest solely in the hands of the employees. It stressed that there are other interests at stake, such as those of the creditors and shareholders. The court concluded that labor contracts are not immune from the flexibility provided by section 365(a).\textsuperscript{134}

\textit{Id.} at 1018-19; see \textit{Truck Drivers Local No. 807 v. Bohack Corp.}, 541 F.2d 312, 319-20 (2d Cir. 1976) (one cannot take literally the statement that a debtor in possession is not a party to the labor agreement). The \textit{Brada Miller} court, however, was unpersuaded by the constraining language of \textit{Unishops}. The court saw no evidence of an intent by Congress to limit application of the “new entity” theory to collective bargaining agreements.\textsuperscript{135} 702 F.2d at 896. 127. \textit{Brada Miller}, 702 F.2d at 896.

128. \textit{See supra} note 95.

129. The significance of Congress' failure to exempt other types of collective bargaining agreements from § 365 is strengthened by the numerous amendments to the bankruptcy and labor laws. The 1978 overhaul of the Bankruptcy Act left untouched the narrow exception for railway labor agreements. \textit{Brada Miller}, 702 F.2d at 896-97.

130. \textit{See Kevin Steel}, 519 F.2d at 704.

131. \textit{See REA Express}, 523 F.2d at 170.

132. \textit{Brada Miller}, 702 F.2d at 897. The court stated:

[I]f a corporation attempting to reorganize under Chapter 11 is compelled to retain verbatim its pre-bankruptcy collective bargaining agreement, regardless of the degree to which the burdens imposed by the agreement contributed to the corporation's demise, it would often be impossible to induce fresh management and capital to participate in the revitalization effort of a bankrupt enterprise.

\textit{Id.}

133. \textit{Id.}

134. \textit{Id.}
The Brada Miller court then focused its attention on the proper standard for the bankruptcy court to apply in determining if rejection of the collective bargaining agreement is appropriate. The court analyzed the Kevin Steel and REA Express standards and found that the Kevin Steel test provided a satisfactory accommodation of the competing interests. It refused to subordinate the myriad of diverse interests at stake solely to the issue of the ability of the debtor in possession to establish that, absent rejection of the agreement, the company would collapse. The court maintained that the possibility of a forced liquidation, albeit an important consideration, should not be dispositive of the issue of the permissibility of rejection of the contract.

The court also suggested that the following several factors may be considered by the bankruptcy court in striking a balance among the competing interests: (1) the possibility of liquidation, with and without rejection, and the aggregate impact of liquidation on the interested parties; (2) the claims of employees and other interested parties that will arise due to the rejection of the collective bargaining agreement, the adequacy of relief to satisfy such claims, and the impact of the claims on the debtor; (3) the

135. Id. at 899. The court agreed with the Third Circuit's Bildisco opinion, particularly with regard to the "prudential consideration that the imposition of the strict REA Express standard unduly exalts the perpetuation of the collective bargaining agreement over the more pragmatic consideration of whether the employees will continue to have jobs at all." Id. at 898-99 (quoting NLRB v. Bildisco, 682 F.2d 72, 80 (3d Cir. 1982)).

136. 702 F.2d at 899.


The Brada Miller court also stated that in determining the possibility of liquidation, it should be recognized that the debtor in possession is required to bargain with the union, even after rejection of a collective bargaining agreement. Brada Miller, 702 F.2d at 899; see Kevin Steel, 519 F.2d at 704; REA Express, 523 F.2d at 170. Further, employees retain the right to strike should negotiations fail. See In re Ryan Co., 83 Lab. Cas. ¶ 10,487, at 17, 952 n.1 (D. Conn. 1978). Therefore, the possibility of an employee strike should also enter into the court's evaluation. Brada Miller, 702 F.2d at 899. In addition, the potential savings to the debtor should be examined if the contract is rejected. These savings can be measured as the difference between the union and nonunion wages and benefits or the lowering of the priority of some union claims. See infra note 138.

cost-spreading abilities of the parties;\textsuperscript{139} and (4) the good or bad faith of the parties in seeking a solution to their immediate labor problems.\textsuperscript{140} Concluding that the polestar is to do equity between claims under the labor contract and other claims against the debtor,\textsuperscript{141} the court remanded in light of the standards propounded.\textsuperscript{142}

C. The Business Judgment Rule

It is well established that the standard for rejection of an ordinary commercial contract involves merely a showing that rejection would benefit the estate.\textsuperscript{143} For many years, this standard, known as the business judgment rule, also was applied to the rejection of collective bargaining agreements.\textsuperscript{144} Further, in spite of the more recent rulings in \textit{Kevin Steel, REA

\textsuperscript{139} Balancing the equities with regard to cost-spreading ability, the court suggested that an eventual \$50,000 loss to a group of employees earning \$20,000 per year would have a more impoverishing effect than a \$100,000 loss to a group of banks or a major distributor. \textit{Brada Miller,} 702 F.2d at 900.

\textsuperscript{140} The court suggested several points of observation, including whether the employer sought concessions from the employees prior to its attempts to reject the contract and whether the union was amenable to the course of action. \textit{Id.} In \textit{In re Price Chopper Supermarkets}, the court directed the employer to attempt to renegotiate the contract prior to the petition for rejection of the collective bargaining agreement. 19 Bankr. 462, 466 (Bankr. S.D. Cal. 1982) Courts will view favorably attempts by the employer to negotiate with the union. \textit{See In re Alan Wood Steel Co.,} 449 F. Supp. 165, 169 (E.D. Pa. 1978), \textit{appeal dismissed}, 595 F.2d 1211 (3d Cir. 1979); \textit{In re Ryan Co.,} 16 CBC 101 (D. Conn. 1978).

\textsuperscript{141} \textit{Brada Miller,} 702 F.2d at 901 (quoting \textit{In re Bildisco,} 682 F.2d at 81)).

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} \textit{See Group of Institutional Inv. v. Chicago, Mil., St. P. & Pac. R.R.,} 318 U.S. 523 (1943); \textit{In re Minges,} 602 F.2d 38 (2d Cir. 1979); \textit{In re Tilco, Inc.,} 558 F.2d 1369 (10th Cir. 1977); Feldman v. Trans-East Air, 497 F.2d 352 (2d Cir. 1974); \textit{In re OPM Leasing Serv.,} 23 Bankr. 104 (Bankr. S.D.N.Y. 1982); \textit{In re Marina Enter.,} 14 Bankr. 327 (Bankr. S.D. Fla. 1981).

\textsuperscript{144} \textit{In re Klaber Bros. Co.,} 173 F. Supp. 83 (S.D.N.Y. 1959). This court noted that the Bankruptcy Act delineated no distinction between classes of executory contracts. Thus, rejection of the collective bargaining agreement should be permitted where it is to the advan-
Express and Brada Miller, several lower courts still continued to apply this very flexible standard of review.\textsuperscript{145}

In \textit{In re Ateco Equipment, Inc.},\textsuperscript{146} the debtor, a chapter 11 company, wished to reject its collective bargaining agreement. The bankruptcy court acknowledged the line of cases beginning with \textit{Kevin Steel}, yet determined that because these cases were decided under the Bankruptcy Act, they were not controlling under the Code.\textsuperscript{147} Moreover, in light of the comprehensive nature of the new Code and congressional awareness of cases such as \textit{Kevin Steel}\textsuperscript{148} during the enactment of the Code, it was deemed relevant that no special test was established for collective bargaining agreements in general.\textsuperscript{149} Further, the court noted that it is now easier for aggrieved union members to file damage claims under section 502(c) of the Code than under section 93(d) of the Act.\textsuperscript{150} This reveals possible congressional intent to protect employees' rights through that mechanism.\textsuperscript{151} The court thus concluded that it would not legislate into section 365(a) special pro-

tage of the estate. \textit{Id.} at 85. It seems, however, that either the \textit{Kevin Steel} or \textit{REA Express} ruling would control in the Second Circuit.


\textsuperscript{146.} 18 Bankr. 915 (Bankr. W.D. Pa. 1982).

\textsuperscript{147.} \textit{Id.} at 916. The court quoted from \textit{Collier on Bankruptcy}: “Although a mere showing that rejection would improve the financial condition of the debtor did not suffice under the Act, the result may be different under the Code due to the failure of Congress to incorporate a requirement of burdensomeness into section 365.” 2 \textit{Collier on Bankruptcy}, ¶ 365.03, at 365-18 (15th ed. 1980).

\textit{Collier}, however, further states that “[i]n any event, due to the serious nature of the financial consequences of the rejection of a collective bargaining agreement, courts may continue to require a strong showing of burden and consideration of the interests of the employees.” \textit{Id.} at 365-17 to 18.


\textsuperscript{149.} 18 Bankr. at 916-17.

\textsuperscript{150.} \textit{Id.} at 916. The court noted that Congress must have known how to exclude collective bargaining agreements from the workings of chapter 11 due to the specific exception for such contracts subject to the RLA. \textit{See} 11 U.S.C. § 1167 (1982), \textit{supra} note 95.

\textsuperscript{151.} Under former 11 U.S.C. § 93(d) (1976), now codified at 11 U.S.C. § 502(c) (1982), the claims of the employees arising from the breach caused by the rejection might not have been allowable if the court determined that the claims were not capable of reasonable estimation, that is, they were too speculative. Under § 502(c) of the Code, any contingent or unliquidated claims must be estimated for the purpose of settling the bankrupt estate. 11 U.S.C. § 502(c) (1982). Thus, losses attributable to the rejection of a collective bargaining agreement, such as seniority rights or fringe benefits, shall be estimated.
tection for collective bargaining agreements. Rejection of the contract was permitted simply because it would be beneficial to the debtor company.  

In sum, at one time or another, three different approaches had been utilized to determine if rejection of the collective bargaining agreement was appropriate. It is thus not surprising that the Supreme Court decided the time had come to develop a uniform standard of review for the rejection of collective bargaining agreements in bankruptcy. The time also had come to resolve the analytical problem concerning the ability of the NLRB to find the debtor in possession guilty of an unfair labor practice for unilaterally modifying or terminating the agreement prior to receiving permission from the bankruptcy court to reject the agreement.

II. NLRB v. BILDISCO & BILDISCO

A. The Statutory Conflict Resolved

In *NLRB v. Bildisco & Bildisco*, the United States Supreme Court held that after a sufficient showing that reasonable, yet unsuccessful, efforts have been made to negotiate a contract modification, a bankruptcy court may permit a debtor in possession to reject its collective bargaining agreement with a union. The Court unanimously ruled that the standard to be used by the bankruptcy court in determining whether rejection of the labor contract should be permitted requires a showing that the collective bargaining agreement burdens the estate and that the equities balance in favor of rejection. Further, a divided Court held that a debtor's unilateral termination or modification of the collective bargaining agreement, prior to formal approval of contract rejection by the bankruptcy court, does not constitute a violation of section 8(d) of the NLRA. The majority balanced the policies of the Code and the NLRA in reaching its standard for rejection of a collective bargaining agreement in bankruptcy. The Court, however, failed to balance the policies of the Code and the NLRA in concluding that the post-petition unilateral modification does not violate section 8(d).

Writing for the majority, Justice Rehnquist first addressed the applicability of section 365 to collective bargaining agreements under the NLRA. He focused on the plain language of section 365 and indi-

---

152. *Ateco Equip.*, 18 Bankr. at 917.
154. *Id.* at 1196-97.
155. *Id.* at 1196.
156. *Id.* at 1200.
157. *Id.* at 1194.
158. See supra note 7 and accompanying text.
cated that the term "executory contract" includes unexpired collective bargaining agreements. Further, he noted that the existence of section 1167, which exempts collective bargaining agreements subject to the Railway Labor Act from the operation of section 365(a) of the Code, reveals congressional ability to draft an exclusion for certain collective bargaining agreements. Justice Rehnquist concluded that Congress' failure to develop a similar exemption for the labor contracts at issue in Bildisco indicates that the legislators intended to apply section 365(a) to collective bargaining agreements covered by the NLRA.

The Court then addressed the standard by which a bankruptcy court may authorize the debtor in possession to reject its labor contract. Recognizing the special nature of a collective bargaining agreement and the consequent "law of the shop" that it creates, the Court reasoned that a standard stricter than the "business judgment" test should be used. It considered the very strict REA Express standard advocated by the union and the NLRB. While acknowledging the canon of statutory construction that Congress is presumed to be aware of judicial interpretations of a statute, the Court rejected as irrelevant the fact that the legislative history of the law of municipal bankruptcies had expressly noted the REA Express decision. It observed that the Kevin Steel decision also was mentioned in the legislative history of municipal bankruptcy law. Because the legislative report did not indicate a preference for either decision, the Court inferred that Congress merely had approved a higher standard of review than the business judgment test.

The Court examined the utility of the strict REA Express test in light of the Code's purposeful grant of flexibility to the debtor. It noted that this strict test reduces the myriad competing considerations to a single issue: whether rejection of the collective bargaining agreement is necessary to prevent the debtor from going into liquidation. The Court asserted that

---

159. 104 S. Ct. at 1194.
160. See supra note 95.
161. 104 S. Ct. at 1194-95.
162. Id. at 1195.
163. See supra notes 11, 13, 16.
164. 104 S. Ct. at 1195; see supra notes 143-52 and accompanying text.
165. See supra note 148.
166. 104 S. Ct. at 1196; see supra note 16.
167. 104 S. Ct. at 1196; see supra note 16. The Court noted that these two cases reflect different formulations of the appropriate standard for rejecting collective bargaining agreements. 104 S. Ct. at 1196; see supra notes 105, 117 and accompanying text.
168. See supra note 16.
169. 104 S. Ct. at 1196.
170. Id.
the *REA Express* test could present an evidentiary burden for the debtor in possession that could interfere with its effective reorganization, thereby contravening the Code's interest in ensuring flexibility for the chapter 11 business. Thus, the Court held that, in order to receive permission from the bankruptcy court to reject a labor contract, the debtor in possession must show that the collective bargaining agreement is burdensome to the estate and that the equities balance in favor of rejection of the agreement.\footnote{171}

Justice Rehnquist further emphasized that, prior to acting on a petition to modify or reject a collective bargaining agreement, a bankruptcy court should be satisfied that reasonable efforts have been made to negotiate a voluntary modification of the agreement and that these efforts have failed to produce a satisfactory solution.\footnote{172} He maintained that this requirement comports with the NLRA's policies of avoiding industrial strife and encouraging collective bargaining.\footnote{173} Justice Rehnquist concluded that, after this requirement is fulfilled, the bankruptcy court may act upon a petition to reject because the policies of the NLRA would have been served adequately.\footnote{174}

Finally, the Court reasoned that, because the policy of chapter 11 is to rehabilitate the debtor, rejection should not be allowed unless that policy would be served in light of all the interests affected by the reorganization process.\footnote{175} It stated that, in determining what constitutes a successful reorganization, a court must balance the interests of the debtor, the creditors, and the employees.\footnote{176} Because the bankruptcy court is a court of equity, the Court asserted that it must be granted the flexibility to consider all evidence relevant to the balancing issue.\footnote{177}

The majority then considered whether the NLRB can find the debtor in

\begin{itemize}
\item \textbf{171.} *Id.*
\item \textbf{172.} *Id.*
\item \textbf{173.} *Id.*
\item \textbf{174.} *Id.; see supra* notes 11-13 and accompanying text.
\item \textbf{175.} 104 S. Ct. at 1197.
\item \textbf{176.} *Id.*
\item \textbf{177.} In detailing this balancing, the Court stated:
\begin{quote}
The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmation and the hardship that would [be] imposed on them, and the impact of rejection on the employees. In striking the balance the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardships each may face.
\end{quote}
*Id.*
\item \textbf{178.} *Id.*
\end{itemize}
possession guilty of violating the NLRA where it has unilaterally terminated or modified the collective bargaining agreement prior to receipt of bankruptcy court approval to reject the contract. The Court initially examined the post-petition employer's status. Rejecting the "alter ego" and "successor employer" classifications, the Court characterized the debtor in possession as the same entity that existed before the filing of the bankruptcy petition. It asserted that the prepetition and post-petition entities, however, are distinguishable in that the latter has statutory powers to deal with contracts in a manner not possible absent the bankruptcy filing. This debtor needs the vital power to reject executory contracts in order to fulfill the basic purposes of chapter 11 and to complete a successful reorganization. Thus, the Court reasoned, labeling the post-petition modification as an unfair labor practice in violation of section 8(d) would undermine the ability of the debtor in possession to request rejection of the contract.

The Bildisco Court analyzed several Code sections to discover the post-petition status of the collective bargaining agreement with respect to section 8(d) of the NLRA. It noted the more liberal time constraints imposed upon a debtor in possession in a chapter 11 proceeding than those imposed upon a trustee in a chapter 7 liquidation proceeding to assume or reject a contract. The Court inferred that Congress intended to give a chapter 11 debtor more flexibility in deciding whether to reject a contract. Further, the Court observed that section 365(g)(1) of the Bankruptcy Code specifies that the rejection of an executory contract constitutes a breach of such contract that relates back to the date immediately preceding the filing of the bankruptcy petition. It also stated that claims arising after the filing of the bankruptcy petition, such as those for breach of the collective bargaining agreement, are presented through the normal administrative process that treats such claims as though they had arisen before the date of filing.

179. See supra note 40 and accompanying text.
180. See supra note 114 and accompanying text.
181. 104 S. Ct. at 1197. Thus, the "new entity" theory adopted by the lower court and the Second Circuit in Kevin Steel and REA Express was rejected. See supra notes 92-95, 113 and accompanying text.
182. 104 S. Ct. at 1197; see supra note 16. The Court maintained that, were the debtor in possession automatically saddled with a burdensome executory contract, the rehabilitative infusion of capital by creditors into the ailing firm might be jeopardized. 104 S. Ct. at 1197; see supra note 132.
183. 104 S. Ct. at 1197-98.
184. Id.
185. Id. at 1198; see supra note 7.
186. 104 S. Ct. at 1198.
187. Id. at 1198-99; see supra note 32.
the filing of the bankruptcy petition. The Court concluded that suits may not be brought against the debtor in possession under the post-petition contract but only through the Code's normal administrative process that bases such claims on the pre-petition collective bargaining agreement. The Court further concluded that, because the filing of the petition in bankruptcy means that the labor contract is no longer immediately enforceable, the NLRB is precluded from filing unfair labor charges against the debtor in possession under section 8(d). Thus, the Court found that because the NLRB could not require adherence to the terms of the contract (the practical result of enforcing section 8(d)), there was no violation of the NLRA.

The Bildisco Court concluded by noting that although the debtor in possession does not commit an unfair labor practice when it unilaterally terminates or modifies the labor contract, such conduct does undermine the policies of the NLRA. The Court emphasized that the debtor in possession must bargain in good faith under section 8(a)(5) with the employees’ representatives over the terms of a new contract pending rejection of the existing contract or following official approval by the bankruptcy court to reject the former contract.

Justice Rehnquist cautioned, however, that, despite this duty to bargain, the debtor in possession does not commit an unfair labor practice by unilaterally modifying the collective bargaining agreement prior to formal bank-

---

188. 104 S. Ct. at 1198-99; see supra note 32. In a footnote, the Court referred to several Code sections that it thought indicated the extent to which Congress wished to afford special protection for claims of employees arising out of the rejection of the collective bargaining agreement. 104 S. Ct. at 1199 n.12. See 11 U.S.C. § 502(c), supra note 151; 11 U.S.C. §§ 503(b)(1)(A), 507(a)(3), supra note 138.

189. 104 S. Ct. at 1199.

190. Id. The Court set forth another rationale supporting the inapplicability of § 8(d). It noted that this statutory provision applies to unilateral actions of a party to the collective bargaining agreement. See supra note 13. The Court stated that in a chapter 11 case, however, the modification of the contract has been accomplished by operation of law, not by the employer's actions. Thus, the Court reasoned, because the filing of the bankruptcy petition made the contract unenforceable, the § 8(d) requirements are not applicable to the employer's unilateral termination or modification of an already unenforceable contract. 104 S. Ct. at 1200.

The Court further ruled that it would not require the employer to "bargain to impasse" before enabling it to seek rejection of the contract by the bankruptcy court. The Court reasoned that rejection of the requirement of full compliance with the § 8(d) procedures also necessitated the subordination of any corresponding duty to bargain to impasse under § 8(a)(5) to the exigencies of bankruptcy. Id.; see supra note 12, infra notes 245-48 and accompanying text.

191. 104 S. Ct. at 1200.

192. Id. at 1201.
ruptcy court action.\textsuperscript{193}

Justice Brennan, writing for the dissent, disagreed with the majority's assertion that suspension of the enforcement of the collective bargaining agreement serves the policies of the Code and therefore Congress could not have intended for the restrictive requirements of section 8(d) still to control.\textsuperscript{194} He maintained that the majority did not adequately accommodate the policies of both statutes.\textsuperscript{195} Thus, he reasoned that an examination of the policies and provisions of both statutes was necessary.\textsuperscript{196}

Justice Brennan considered the applicability of section 8(d) absent the countervailing provisions and policies of the Code. He maintained that section 8(d) must be construed with sufficient flexibility so as not to defeat the policies of the NLRA,\textsuperscript{197} and that deference should be accorded to NLRB interpretations of the NLRA.\textsuperscript{198} Because the Board has ruled that the filing of a bankruptcy petition does not affect the applicability of section 8(d),\textsuperscript{199} Justice Brennan asserted that this determination should be
In examining the language of the NLRA, Justice Brennan noted that section 8(d) applies only to parties to a contract that is “in effect.” Although agreeing with the majority’s rejection of the “new entity” theory, he maintained that, in contrast with the majority’s assertion that the post-petition collective bargaining agreement is not an “enforceable contract,” the agreement does retain sufficient vitality to be considered “in effect” within the meaning of the NLRA. Justice Brennan pointed to various indicia of the contract’s effectiveness during the post-petition interim period. He noted that if the debtor in possession assumes the contract, that assumption relates back to the filing of the petition, and all compensation earned by the employees under the contract becomes a first priority administrative expense. Brennan emphasized that the employees, however, will have general unsecured claims resulting from the breach of the collective bargaining agreement and that some of these claims will have originated from the employer’s obligations under the contract. Therefore, he concluded, the Code itself reveals that whether the agreement is rejected or accepted, it will support a claim arising out of the contractual obligations in the post-petition period. Thus, the contract is “in effect” for the purposes of section 8(d).
Justice Brennan also focused briefly on the definitional language of the NLRA. He inferred that Congress intended for the section 8(a)(5) duty to bargain to apply to debtors in possession. Justice Brennan reasoned that because the debtor in possession is considered an employer within the NLRA, and because the section 8(a)(5) and section 8(d) bargaining requirements are imposed on "employers," the logical inference is that Congress intended the restrictions on unilateral modification to apply to debtors in possession.

In analyzing the applicability of the section 8(d) requirements from a policy-oriented perspective, Justice Brennan underscored the fundamental aim of the NLRA to establish industrial peace and the crucial role collective bargaining plays in the achievement of that goal. In his view, the section 8(d) requirements are designed specifically to prevent the labor unrest that will result from an employer's unilateral modification of contracts. Justice Brennan rejected the proposition that the threat to industrial peace is any less one day after the filing of the bankruptcy petition than it is one day before the petition was filed. He concluded that

tracts and Unexpired Leases in the Bankruptcy Code, 64 MINN. L. REV. 341, 370 (1980). Thus, in Justice Brennan's view, the contract must be deemed sufficiently "in effect" for the purposes of § 8(d). 104 S. Ct. at 1207.

In a footnote, Justice Brennan also cited several cases in which the courts characterized the contract as remaining "in effect" until rejected. Id. at 1207 n.13. For instance, in Federal's, Inc. v. Edmonton Inv. Co., 555 F.2d 577 (6th Cir. 1977), the court characterized the executory contracts as remaining "in effect" until rejected. Id. at 579 (quoting 8 COLLIER ON BANKRUPTCY ¶ 3.15[6] (14th ed. 1976)). In Smith v. Hill, 317 F.2d 539, 542 n.6 (9th Cir. 1963), the court stated that the executory contract "continues in effect" unless rejected. Id. at 542 n.6 (quoting 8 COLLIER, supra at ¶ 3.15[6]).

Justice Brennan also asserted a fallback position presuming the contract was not "in effect." In a footnote, he analogized the unilateral modification of a contract not "in effect" with the Court's holding in NLRB v. Katz, 369 U.S. 736 (1962). 104 S. Ct. at 1207 n.14. In Katz, the parties had yet to complete their negotiation for an initial collective bargaining agreement. Nevertheless, the Court stated that an "employer's unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5) for it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal [to negotiate]." 369 U.S. at 743. Thus, if an employer cannot change the employment conditions before a contract is achieved, it follows that it should not be able to do so post-petition before the contract is rejected, yet nonetheless unenforceable. 104 S. Ct. at 1207.

104 S. Ct. at 1207; see supra notes 12, 13.
11. See supra note 12.
12. See supra notes 12, 13.
13. 104 S. Ct. at 1207.
14. Id. at 1207-08; see supra note 11.
15. 104 S. Ct. at 1208 (citing Pittsburgh Plate Glass, 404 U.S. at 157); see supra note 13.
16. 104 S. Ct. at 1208. In a footnote, Justice Brennan noted several instances of labor unrest resulting from post-petition unilateral modifications. Id. at 1208 n.16. On Sept. 24, 1983, Continental Airlines filed a chapter 11 petition and subsequently reduced wages of
permitting unilateral modifications of the collective bargaining agreement in violation of section 8(d) during the post-petition period seriously under-
mines the NLRA's goal of maintaining industrial peace. Therefore, he reasoned, Congress must have intended the requirements of section 8(d) to remain applicable following the filing of a bankruptcy petition.\textsuperscript{217}

Justice Brennan then examined the policies and provisions of the Code and found nothing that rendered section 8(d) inapplicable. He considered whether the application of section 8(d) would so undermine the policies of the Code that, despite substantial impairment of the aims of the NLRA, Congress could not have intended this section to be applicable following the filing of the bankruptcy petition. He recognized that the option to reject a contract is vital to accomplishing the rehabilitative goals of the Code.\textsuperscript{218} He rejected, however, the majority's conclusion that an employer needs the power to violate a collective bargaining agreement, before it is formally rejected, to assure a successful reorganization. If the contract were so burdensome that even temporary adherence might invite liquidation, the debtor could seek immediate rejection.\textsuperscript{219} Justice Brennan rea-
soned that, since a unilateral modification frequently will lead to labor difficulties\textsuperscript{220} that are inimical to a successful reorganization, such modifi-
cations might actually decrease the prospects for successful reorganization.\textsuperscript{221}

Justice Brennan next addressed the conflict between the Code's flexibility and the rigid requirements of section 8(d). He noted that Code section 365(d)(2)\textsuperscript{222} permits the nondebtor party to a contract with the debtor in possession to request the bankruptcy court to restrict the time period within which the debtor must assume or reject the contract. Justice Bren-
nan inferred from this provision that Congress never intended to give the debtor in possession unlimited flexibility.\textsuperscript{223} He concluded that section 365(d)(2) reveals congressional intent to protect the rights of nondebtor parties.\textsuperscript{224} He further suggested that the danger of a debtor in possession

\textsuperscript{217} 104 S. Ct. at 1208-09.
\textsuperscript{218} Id. at 1209; \textit{see supra} note 16.
\textsuperscript{219} 104 S. Ct. at 1209.
\textsuperscript{220} See, \textit{e.g.}, \textit{supra} note 216.
\textsuperscript{221} 104 S. Ct. at 1209.
\textsuperscript{222} \textit{See supra} note 6.
\textsuperscript{223} 104 S. Ct. at 1210.
\textsuperscript{224} \textit{Id.}
prematurely rejecting a favorable collective bargaining agreement because of financial pressures placed upon him to assume or reject in light of the restrictions of section 8(d) is largely illusory.\textsuperscript{225} Employees recognize that they will lose their jobs should the reorganization fail\textsuperscript{226} and thus the debtor in possession should be able to negotiate a contract at least as favorable as the one rejected.\textsuperscript{227} Thus, Justice Brennan concluded, that holding the post-petition debtor to the requirements of section 8(d) will not thwart the aim of the Code by seriously undermining the chance for a successful reorganization.\textsuperscript{228}

Finally, Justice Brennan noted that allowing the debtor to disregard the collective bargaining agreement after the filing of a bankruptcy petition would deprive the parties to the agreement of their negotiated "law of the shop."\textsuperscript{229} He asserted that without this system of industrial government, the resolution of the parties' disputes would be determined by the opponents' relative strengths.\textsuperscript{230} Stating that this potential for industrial strife is antithetical to the policies of the NLRA, Brennan concluded that the prospects of a successful reorganization would not be jeopardized by holding section 8(d) applicable.


\textit{Bildisco} and the Bankruptcy Amendments Act\textsuperscript{231} require that a bankruptcy court permit rejection of a collective bargaining agreement if the debtor can demonstrate that the contract burdens the estate and that the equities balance in favor of rejection of the labor contract.\textsuperscript{232} In arriving at this conclusion, the Court and Congress correctly recognized the special

\begin{itemize}
  \item \textsuperscript{225} Id.
  \item \textsuperscript{226} Id.; see supra note 83 (citing to instances where unions aided their troubled employers to avoid liquidation of the firm and the consequent loss of jobs).
  \item \textsuperscript{227} 104 S. Ct. at 1210.
  \item \textsuperscript{228} Id. at 1210-11.
  \item \textsuperscript{229} Id. at 1211.
  \item \textsuperscript{230} Id.
  \item \textsuperscript{231} In enacting the Bankruptcy Amendments Act, Congress accepted the \textit{Bildisco} analysis and conclusion with respect to the appropriate standard to apply in ruling on an application to reject a labor contract. See supra notes 66, 78. With respect to this issue, therefore, the following examination of \textit{Bildisco} is also applicable to the Bankruptcy Amendments Act.
  \item \textsuperscript{232} See 104 S. Ct. at 1196, supra notes 66, 78 and accompanying text. It is not clear under the Bankruptcy Amendments Act whether a bankruptcy court or a district court will rule on the application to reject the contract. See supra note 72.
\end{itemize}
nature of the collective bargaining contract and the consequent need to impose a stricter standard of scrutiny than the business judgment rule.\textsuperscript{233} This elevated degree of scrutiny is necessary in order to accommodate the competing policies of the Code and the NLRA.\textsuperscript{234} Nevertheless, Congress and the Court should have sought not only to reconcile the competing policies, but should have done so with as little violence to one as is consonant with preserving the other.\textsuperscript{235}

\textbf{a. A Statutory Analysis}

Having rejected the business judgment test, the Court turned its attention to the \textit{Kevin Steel}\textsuperscript{236} and \textit{REA Express}\textsuperscript{237} tests, both of which accommodated the policies of the Code and the NLRA, as possible standards to apply in ruling on a rejection petition. The Court implied that neither test properly harmonized the competing statutory policies.\textsuperscript{238} It buried the \textit{REA Express} test by simply noting that the evidentiary burden associated with this stricter standard,\textsuperscript{239} although not insurmountable, would pose difficulties to the debtor in possession.\textsuperscript{240} The Court's cursory treatment of these potential difficulties and its summary acceptance of the \textit{Kevin Steel} balancing of the equities test\textsuperscript{241} provide an analytically insufficient basis for rejecting the \textit{REA Express} test. From a standpoint of statutory accommodation, however, the rejection of the \textit{REA Express} test by the Court and Congress was warranted.

In reconciling the competing statutory policies, the Court grafted a new requirement onto the \textit{Kevin Steel} standard. It announced that, before the bankruptcy court permits rejection of the collective bargaining agreement, it must be persuaded that reasonable efforts have been expended to negotiate a voluntary modification of the agreement.\textsuperscript{242} Further, the Bankruptcy

\begin{itemize}
\item \textsuperscript{233} See supra notes 66, 78, 164 and accompanying text.
\item \textsuperscript{234} See Bildisco, 104 S. Ct. at 1195-96.
\item \textsuperscript{236} See supra notes 96-99, 105 and accompanying text.
\item \textsuperscript{237} See supra note 117 and accompanying text.
\item \textsuperscript{238} 104 S. Ct. at 1195-97. After rejecting the stringent \textit{REA Express} test, the Court supplemented the \textit{Kevin Steel} balancing of the equities test with a bargaining requirement. See supra notes 173-74 and infra note 242 and accompanying text.
\item \textsuperscript{239} The Third Circuit, when addressing the \textit{REA Express} standard, asserted that there was an associated evidentiary problem— it might be impossible to predict the outcome of the reorganization until very late into the arrangement. 682 F.2d at 80; see supra note 51.
\item \textsuperscript{240} 104 S. Ct. at 1196.
\item \textsuperscript{241} See supra notes 171-72 and accompanying text.
\item \textsuperscript{242} 104 S. Ct. at 1196. It should be noted that this bargaining requirement extended the lower court's ruling that only required the employer to bargain with the union after the contract was rejected. See 682 F.2d at 80.
\end{itemize}
Rejection of Collective Bargaining Agreements

Amendments Act, although demanding compliance with a more structured negotiation process, in actuality requires no more than the bargaining efforts mandated by Bildisco.243 This good faith requirement arguably falls short of adequately accommodating the underlying Code and NLRA policies. It invites abuse of the bankruptcy procedure by those who would file chapter 11 proceedings not primarily for the purpose of reorganization, but to unnecessarily abrogate a labor contract or to gain bargaining leverage.244

Harmony between the Code and the NLRA would be maximized, however, if the debtor in possession were required instead to “bargain to impasse” with the union prior to receiving permission to reject the contract. “Bargaining to impasse” is the generally accepted standard required of parties in negotiating a labor contract.245 It is applied by courts to maintain the integrity of the duty to bargain in good faith under the NLRA.246 The requirement of bargaining to impasse, which is stricter than the “reasonable efforts” or “good faith” standards,247 is fulfilled when the parties

243. See Bankruptcy Amendments Act § 1113(b)(2), supra notes 66, 70 and accompanying text. Bildisco requires that reasonable efforts to negotiate a voluntary modification have been made. See supra notes 173-75 and accompanying text. The Bankruptcy Amendments Act similarly request the parties to meet at reasonable times and confer in good faith. See Bankruptcy Amendments Act § 1113(b)(2), supra note 66.

244. Within the past several years there have been several major bankruptcy filings by relatively healthy companies. On September 24, 1983, Continental Airlines filed in bankruptcy. Brownstein, Going Bankrupt—Is it Just a Way to Get Out of Labor Contracts?, 15 NAT'L J. 2353 (Nov. 12, 1983). At the time of the filing, however, Continental had $62 million in cash reserves. Id. at 2354. The President of Continental related that the corporation’s “sole problem was labor.” Id. Further, companies are using the threat of going into bankruptcy as a routine component of requests for wage concessions. See id. at 2353. Finally, some companies are entering bankruptcy not on the basis of current insolvency but on the threat of future insolvency. One notable example is the Manville Company, which entered bankruptcy claiming that the 16,500 product liability suits pending against the company would cause its collapse. Cooper, Bankruptcy’s Thriving Business, 41 CONG. Q. 863 (Nov. 18, 1983). Nevertheless, many business executives and labor specialists maintain that there will not be a rash of bankruptcy filings due to the social stigma associated with filing for bankruptcy. See Wall St. J., Feb. 24, 1984, at 1, col. 6.

245. See supra note 173 and accompanying text.

246. See F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 157 (1977); B. FELDACKER, LABOR GUIDE TO LABOR LAW 127 (1980) (“The duty to bargain arises as soon as the union is certified by the [NLRB] or recognized voluntarily by the employer—even before formal contract negotiations begin. The employer must bargain to impasse before making a change in any mandatory subject of bargaining.”); see also NLRB v. Katz, 369 U.S. 736 (1962). Katz reveals the basic duty to bargain to impasse even though the parties have yet to conclude negotiations on an initial contract. Id. at 743. This duty, then, remains applicable even under Bildisco’s holding that the collective bargaining agreement becomes unenforceable once the bankruptcy petition is filed because in both situations, there is no enforceable contract.

247. See supra notes 66, 70, 173-75 and accompanying text; R. GORMAN, BASIC TEXT ON
have exhausted all prospects of concluding an agreement and further discussion has become fruitless.\footnote{248} Thus, an employer's unilateral change in employment conditions prior to impasse violates section 8(a)(5) as it effectively circumvents the duty to bargain and amounts to a flat refusal to negotiate.\footnote{249} This stricter bargaining requirement should apply in the bankruptcy context because, when compared with the "reasonable efforts" standard, it comports more closely with the actual bargaining duty of the parties even within the context of Bildisco's "unenforceable contract" theory. It should be noted that this theory and the entirety of the Bildisco holding retain vitality with respect to bankruptcy cases pending as of the date of the enactment of the Bankruptcy Amendments Act.\footnote{250} Under the "unenforceable contract" theory, the status of the post-petition, unenforceable collective bargaining agreement is analogous to that of an expired labor contract, neither of which is immediately enforceable. The bargaining to impasse requirement, therefore, would not be inconsistent with the majority's reasoning. Finally, in the view of the NLRB and most courts, an employer, after bargaining to impasse, may unilaterally modify the

Labor Law, 446-50 (1976). Gorman states that, after bargaining to impasse, an employer's announcement unilaterally implementing changes is no longer viewed as either an avoidance of the duty to bargain or as a disparagement of the representative status of the union because the employer has complied with the requirements of the NLRA.

248. The NLRB has stated that an employer violates his duty to bargain if: when negotiations are sought or are in progress, he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his preimpasse proposals.

Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1965); see also NLRB v. Webb Furniture Corp., 366 F.2d 314, 316 (4th Cir. 1966); Dallas General Drivers Local 745 v. NLRB, 355 F.2d 842, 844 (D.C. Cir. 1966). Whether "bargaining to impasse" has occurred is a factual determination. Taft noted several points of observation to aid in this determination: "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations . . . ." Taft Broadcasting Co., 163 N.L.R.B. at 478. After impasse is reached, however, the employer may institute unilateral changes that are no more favorable than it previously offered prior to impasse. Cf. NLRB v. Katz, 369 U.S. 736, 747 (1962) (unilateral changes after the expiration of a contract cannot be instituted prior to impasse). Although not expressly mandated by the Bankruptcy Amendments Act, it has been suggested that the court should not award interim, emergency modifications beyond the proposal made by the trustee. See supra note 79 and accompanying text. Thus, depending on how the courts interpret \S\ 1113(e) of the Bankruptcy Amendments Act, the ultimate effect of the bargaining to impasse requirement may be incorporated into the new legislation.


250. See Bankruptcy Amendments Act \S\ 541(c), supra note 66.
contract. Thus, the bargaining to impasse duty would lend support to the Court's ruling that the debtor in possession does not commit an unfair labor practice when it unilaterally modifies the agreement prior to receiving formal permission to reject it.251

From an equity-oriented standpoint, however, the Bankruptcy Amendments Act and the Bildisco standard for rejecting an agreement falls short of achieving the optimum balance between labor and bankruptcy legislation and between the interests of employees and creditors. Employees risk irreparable injury upon the breach of a contract. A collective bargaining agreement normally provides employees with many nonmonetary rights that govern the industrial order and the economic security of the workers. These benefits include seniority rights, pension rights, grievance and arbitration rights, and no-strike/no-lockout rights.252 When a labor contract is rejected, these substantial rights are no longer enforceable. Although the debtor's rejection may constitute a breach for which monetary damages may be awarded,253 such damages are clearly inadequate to compensate employees for the loss of these rights.254 Moreover, employees are wholly dependent upon their employer for their wages. Creditors, on the other

251. See supra note 246. In those pending situations where the Bankruptcy Amendments Act is inapplicable and the employer is verifiably incapable of surviving a negotiation process through to impasse, the debtor in possession should be permitted to receive an expedited bankruptcy court hearing, wherein, after a sufficient demonstration of financial hardship and good faith reasonable efforts to renegotiate, the debtor may request permission to reject a collective bargaining agreement. Relaxing the bargaining to impasse requirement realistically acknowledges the situation of many chapter 11 debtors. Where the Bankruptcy Amendments Act is applicable, § 1113(e) of the Bankruptcy Amendments permits the court to authorize the business to make interim alterations in the labor contract to avoid irreparable harm. See supra notes 66, 79, 249 and accompanying text. This procedure may be implemented during the negotiations prior to rejection application being filed or any other time "when the collective bargaining agreement continues in effect." Bankruptcy Amendments Act § 1113(e), supra note 66. The availability of such an emergency relief provision would permit the application of this stricter statutorily appropriate standard with minimal risk of the debtor being forced into liquidation. The burden, however, will be on the employer to establish that absent the interim alterations pending the outcome of the negotiations, the company will be forced into liquidation. Id. Although not expressly provided, the applicable standard the court will use to determine whether interim alterations are appropriate is probably REA Express. See supra note 79 and accompanying text.

252. See supra note 99. The focus of this section concerns the irreparable hardships associated with the rejection of a labor contract. Because the fair and equitable treatment requirement of § 1113(b)(1)(A) applies only with respect to the debtor's proposal for contract modifications, it will not help protect the employee's lost nonmonetary rights when the labor agreement is rejected. See supra note 66-70, 76-78 and accompanying text.

253. See supra notes 138, 151.

254. Courts have frequently noted that employees cannot obtain adequate relief when a labor contract is rejected. See Brada Miller, 702 F.2d at 899-900; In re Southern Electronics Co., 23 Bankr. 348, 363 (Bankr. E.D. Tenn. 1982).
hand, generally spread their risk among numerous customers. Creditors are also in a better position than employees to mitigate their losses by ceasing performance. The only viable recourse available to employees is the strike, which may become economically impossible to sustain. Thus, in light of the unique hardships that may be imposed on employees, the Bildisco and Bankruptcy Amendments balancing of the equities standard is inadequate. Under this standard, it appears that most collective bargaining agreements will be rejected. The majority of debtors should be able to prove that the contract burdens the estate simply by showing a high union wage scale and a consequent deprivation of assets. Additionally, the structured negotiation procedure established by the Bankruptcy Amendments may not preclude a debtor desiring to reject a labor contract from accomplishing this purpose. Many terms were broadly defined in order to provide the debtor with the needed flexibility to survive the reorganization. Although a qualitative balancing of the interests test, similar to that proposed by Bildisco, theoretically will consider the unique interests of the employees, it will not protect these interests to the same extent as the REA Express test.

b. The "Partial Rejection" Resolution

In order to protect these nonmonetary interests and maintain the legislatively mandated balancing of the equities test, the courts should consider permitting the partial rejection of collective bargaining agreements. It is a well-established principle, however, that commercial contracts cannot be partially rejected. The requirement of "total rejection" is designed to prevent the debtor from retaining only the favorable features of a contract
while rejecting the unfavorable ones.259 This rule also has been applied to collective bargaining agreements.260 Nevertheless, the totality requirement should be inapplicable to the area of rejection of collective bargaining agreements in a chapter 11 proceeding where the goal is to successfully rehabilitate the debtor company. Were a court permitted to approve the rejection of only the onerous, monetary wage and benefit provisions, a major financial burden on most debtors in possession would be assuaged, thereby facilitating the reorganization. Moreover, by requiring the retention of the less burdensome, nonmonetary provisions,261 the court would be showing respect for the labor laws, thereby promoting increased union cooperation. This “partial rejection” approach, therefore, would facilitate the successful reorganization of the debtor company.262

2. The Unfair Labor Practice Issue

The majority, the dissent, and the NLRB agreed that the debtor in possession need not comply with the protracted termination and modification procedures before seeking permission to reject the contract from the bankruptcy court.263 These lengthy procedures are not consistent with the need for an expeditious adjustment of the contract should it be necessary to ensure a successful reorganization.264 Accordingly, the Bankruptcy Amendments Act reflects the recognized need for expedition in the rejection process by providing specific time constraints for judicial consideration of a rejection petition.265 Further, an employer’s unilateral implementation of changes in the agreement without a prior court hearing, permitted under Bildisco,266 is strictly forbidden under the Bankruptcy Amendments Act.267 An analysis of the Court’s reasoning in Bildisco will serve to confirm the necessity for the Bankruptcy Amendments Act legislation precluding the unilateral alteration or termination of the labor agreement

260. Id.
261. See supra note 99.
262. Minimal weight should be accorded the Klaber Bros. decision, supra note 259. In that case, the court did not acknowledge the special nature of a collective bargaining agreement and permitted rejection using the antiquated “business judgment” standard. 173 F. Supp. at 85.
263. See 104 S. Ct. at 1204 n.9 and Brief for NLRB at 41. Justice Brennan, for instance, noted in a footnote that he would not require the debtor in possession to comply with the notice requirements and waiting periods of section 8(d) before seeking rejection. 104 S. Ct. at 1204 n.9.
264. See supra note 13.
265. See supra notes 66, 73-75 and accompanying text.
266. See supra notes 179-93 and accompanying text.
267. See supra notes 66, 71-75 and accompanying text.
immediately after filing the bankruptcy petition. The concept of court approval of rejection prior to the implementation of wage and benefit alterations, however, is not as rigidly established due to the interim modification provision and the thirty-day unilateral modification condition. Although enacted as emergency relief provisions, depending on judicial interpretation of the provisions, their eventual effect may be to perpetuate the spirit of Bildisco.

As will be developed below, the Bildisco Court's holding that the NLRB may not find that the debtor committed an unfair labor practice by unilaterally changing the terms of the agreement during the period following the filing of the bankruptcy petition and before the bankruptcy court authorizes rejection is not supported by the policies and provisions of the Code or the NLRA. There are two basic flaws with the majority's reasoning. First, the Court failed to develop effectively its "unenforceable contract" theory. Instead of removing the employer from the labor agreement, as the "new entity" theory attempted, the "unenforceable contract" theory merely accomplishes the reverse by rendering the labor agreement inoperative. Second, the Court failed to examine carefully the conflicting goals and provisions of the Code and the NLRA. The majority, inconsistent with its scrutiny of the standard for the rejection of a labor contract, devoted the vast majority of its discussion to the policies and provisions of the Code alone. As the dissent aptly noted, such an incomplete analytical approach naturally results in a predetermined conclusion that section 8(d) is inapplicable. Thus, the provisions and policies of the Code and the NLRA support the Bankruptcy Amendments Act legislation incorporating the notion that the contract is "in effect." The significance of this concept is that, not only may unilateral changes without court approval give rise to contract claims as administrative expenses, such changes might also give rise to unfair labor practice charges because the alterations are unprotected modifications of employ-

268. See supra notes 66, 79 and accompanying text.
269. See supra notes 66, 81 and accompanying text.
270. See supra notes 79, 81 and accompanying text.
271. See supra notes 185-90 and accompanying text.
272. See supra notes 92-95, 113 and accompanying text.
273. 104 S. Ct. at 1199. The majority stated that "the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer enforceable, and may never be enforceable again." Id.
274. See id. at 1203-04 (Brennan, J., concurring in part, dissenting in part).
275. In its opinion, the majority, while addressing the unfair labor practice issue, devoted less than one full paragraph to the policies of the NLRA. See 104 S. Ct. at 1200.
276. Id. at 1204 (Brennan, J., concurring in part, dissenting in part).
277. See supra notes 138, 151.
ment terms in violation of section 8(d). 278

a. Statutory Examination

The statutory language of the Code and the NLRA support the holding that the agreement is "in effect" for the purposes of section 8(d). As the dissent noted, should the debtor elect to assume the contract, this assumption relates back to the time of the filing of the petition. 279 Thus, any wages earned by the employees under the contract become a first-priority administrative expense. 280 Even if the contract is rejected, some of the damages arising from the breach will originate in the employer's obligations under the agreement. 281 Thus, as the dissent also noted, the post-petition collective bargaining agreement will support a claim whether or not it is rejected. The agreement should, therefore, be deemed in effect for the purposes of section 8(d). 282

The plain language of the NLRA also supports the proposition that Congress did not intend the filing of a bankruptcy petition to affect the applicability of section 8(d). The debtor in possession is an employer within the meaning of the NLRA. 283 Section 8(a)(5) further imposes a duty to bargain on employers. 284 The requirements of section (d) form part of that duty. 285 The logical inference is that Congress intended the debtor in possession to be subject to the strictures of section 8(d).

Arguably, the majority incorrectly analyzed the purpose and relevance of section 365(g)(1), which relates the breach of the contract back to the date of the filing of the bankruptcy petition. 286 It concluded that this section limits the debtor in possession's liability to the reasonable value of the services performed and that the debtor is not responsible for its obligations under the contract. 287 The legislative history, however, confirms that the purpose of section 365(g)(1) is to ensure that the claims based on the rejection of executory contracts are treated as prepetition claims or general unsecured claims. 288 Consequently, section 365(g)(1) refers only to the

279. 104 S. Ct. at 1206.
280. See supra note 138.
281. See supra note 208 and accompanying text.
282. See supra notes 203-09 and accompanying text.
283. See supra note 12.
284. Id.
285. See supra notes 12, 13.
286. See supra note 32.
287. 104 S. Ct. at 1199.
288. See supra notes 32, 138.
priority of the claims based on rejection of the contract, and not to the existence of the contract in the post-petition period. The court's reliance, therefore, on this section to find the contract unenforceable or not "in effect" is misplaced.289 Thus, from a statutory perspective, the Bankruptcy Amendments Act serves to clarify the congressional intent misinterpreted by the Supreme Court.

b. Policy Examination

The policies of the NLRA and the Code also support the conclusion that section 8(d) is applicable during the post-petition period when the debtor is seeking to modify or terminate a collective bargaining agreement. A fundamental aim of the NLRA is the maintenance of industrial peace, accomplished through the promotion of collective bargaining. The requirements of section 8(d), components of the duty to bargain,290 are designed specifically to prevent the industrial strife that would result from the unilateral modification of labor contracts by employers. Such a modification is equivalent to a circumvention of collective bargaining.291 It is reasonable to conclude that the threat to industrial peace is as pressing the day after the filing of the bankruptcy petition as the day before.292 The Court's conclusion that the policies of the NLRA, although admittedly undermined by its holding, are somehow less frustrated by the requirement that the employer must still bargain with the employees' representatives after

289. It is well established that the contractual obligations of the debtor continue to exist during the period following the chapter 11 petition. The court in Truck Drivers Local No. 807 v. Bohack Corp. stated that "[i]f the contract is rejected by the bankruptcy court, it will be deemed to have been breached as of the date of the filing of the petition in chapter 11. But like any other unilateral breach of contract, it does not destroy the contract . . . ." Bohack Corp., 541 F.2d 312, 321 n.15 (2d Cir. 1976), cert. denied, 439 U.S. 825 (1978); see also In re W.T. Grant Co., 620 F.2d 319, 321 (2d Cir.), cert. denied, 446 U.S. 983 (1980); In re Unishops, Inc., 553 F.2d 305, 308 (2d Cir. 1977).

Perhaps as a fallback argument, the majority, inconsistent with its "unenforceable contract" theory, addressed the application of § 8(d), specifically focusing on the fact that a violation of this provision requires a unilateral modification by a party to the collective bargaining agreement. See supra note 13. This discussion would be totally unnecessary were the "unenforceable contract" theory viable because there would be no agreement to which § 8(d) could be applied. In any event, the Court stated that the modification in the agreement was "accomplished not by the employer's unilateral action, but rather by operation of law." 104 S. Ct. at 1200. This was the same reasoning the lower courts used to find the debtor in possession a "new entity" and thus not bound to any contract. See supra notes 92-98, 113 and accompanying text. The Court, however, expressly rejected this "new entity" analysis earlier in its opinion. 104 S. Ct. at 1197. The Court's inconsistency with regard to this fiction hints at its insecurity with the "unenforceable contract" theory.

290. See supra notes 12, 13.
291. See supra note 13.
292. 104 S. Ct. at 1208.
unilateral modification by the debtor in possession or following formal rejection approval by the bankruptcy court, therefore, is insufficient in light of the possibility of destructive, economic warfare.

The policies of the Code also permit the application of section 8(d). A debtor in possession certainly needs the option to reject executory contracts. The right, however, to modify the agreement unlawfully is not necessary in securing a successful reorganization. Where a labor contract is so burdensome that even temporary adherence to its terms would be fatal to the company, the debtor may seek immediate rejection through the Bankruptcy Amendments Act's application of time limits for judicial consideration of a rejection application. Under the balancing of the equities test now embodied in the Code, the rejection petition should be granted.

3. Practical Consequences of the Bankruptcy Amendments and Federal Judgeship Act of 1984

Congress enacted the labor section of the Bankruptcy Amendments Act with the intention of reversing the Supreme Court's ruling that the debtor in possession does not commit an unfair labor practice when, after filing a bankruptcy petition yet prior to receiving judicial permission to reject the contract, it unilaterally modifies or terminates the collective bargaining agreement. Thus, foremost among Congress' changes to the Code was the incorporation of a rejection procedure wherein an employer is not permitted to unilaterally alter the contract without judicial approval. This important aspect of the Bankruptcy Amendments Act reflects Congress' desire to safeguard the policies of the NLRA by perpetuating the

293. Id. at 1200.
294. There is also a fundamental unfairness in allowing the debtor to unilaterally modify the agreement in violation of § 8(d). Rejection of a contract operates to retroactively cancel the terms of an agreement. See supra note 32. This retroactivity insulates the debtor from liability on the contract. The debtor could be disadvantaged only if the court refused to permit rejection. If rejection is approved, the debtor would then be responsible only for the prepetition terms of the contract. See Countryman, supra note 95, at 484; Fogel, supra note 209, at 376. Debtors, therefore, are encouraged to disregard contractual obligations far in advance of when they would be entitled to reject the contract. Further, there is no incentive for the employer to bargain with the union over the contract modification—at least not beyond the minimal "reasonable efforts" standard promulgated by the majority. Without the ability to condemn the unilateral modification of the contract by the debtor as an unfair labor practice, the NLRB would be powerless to preclude debtors from modifying their contracts at the first opportunity. The inevitable result would be industrial strife. Thus, the Bankruptcy Amendments Act's general provision requiring a judicial ruling on a rejection petition prior to contract modification revitalizes § 8(a)(5) and § 8(d) of the NLRA in the bankruptcy context. See Bankruptcy Amendments Act § 1113(d)(1), (d)(2), supra note 66.
295. See supra notes 66, 81, 179-93 and accompanying text.
296. See supra notes 60, 71-78 and accompanying text.
equality in bargaining power between the representatives of the company and the representatives of labor.\textsuperscript{297} Moreover, the requirements of a judicial hearing and ruling prior to contract rejection and modification further promote the basic policy of the NLRA by encouraging the collective bargaining process.\textsuperscript{298} The new legislation precludes an employer from entering bankruptcy and immediately unilaterally altering the terms of the labor agreement—an action equivalent to a circumvention of the duty to bargain. Thus, if judicial enforcement of the new modification procedures of the Code is consistent with declared congressional intent, the courts will consequently discourage bad faith bankruptcy filings by companies that desire merely to cancel or significantly modify their labor contracts.\textsuperscript{299}

In order, however, to accommodate the Code's policy of granting the debtor sufficient flexibility to survive the reorganization process,\textsuperscript{300} Congress incorporated into the Bankruptcy Amendments Act two emergency relief mechanisms:

1. under section 1113(e), after notice that satisfies the needs of the trustee, and a hearing, the court may authorize interim modifications of the labor contract where essential to the continuation of the debtor's business;\textsuperscript{301} and

2. pursuant to section 1113(d)(2), if the court fails to rule on the rejection application within thirty days of the commencement of the rejection hearing, the debtor may unilaterally alter or terminate any of the provisions of the collective bargaining agreement pending the court's decision.\textsuperscript{302}

Depending upon judicial interpretation of the new legislation, the practical results of the inclusion of these exceptions may be the continuation of the spirit of \textit{Bildisco} where the Supreme Court permitted contract modification immediately after the filing of the bankruptcy petition.\textsuperscript{303} Under \textit{Bildisco}, the debtor could enjoy the benefits of his contract modification throughout the period prior to the court's ruling on the rejection application. If the contract were subsequently rejected, the employees had general unsecured claims for damages arising from the breach.\textsuperscript{304} If the contract were not rejected, the employees were entitled to any compensa-

\textsuperscript{297} See supra notes 11-13 and accompanying text.
\textsuperscript{298} Id.
\textsuperscript{299} See supra notes 68-82, 216, 244.
\textsuperscript{300} See supra note 7.
\textsuperscript{301} See Bankruptcy Amendments Act § 1113(e), supra note 66.
\textsuperscript{302} See Bankruptcy Amendments Act § 1113(d)(2), supra note 66.
\textsuperscript{303} See supra notes 179-93 and accompanying text.
\textsuperscript{304} See supra notes 138, 151.
tion lost because of the contract modification as a first priority administrative expense.305

The situation may be similar under the Bankruptcy Amendments Act. Immediately after the filing of a bankruptcy petition the debtor may request interim modifications of the labor contract pending a ruling on the rejection application.306 Although the language of the statute appears to demand strict scrutiny of such requests, it would seem fairly easy for a debtor to assert that the contract alterations are essential to the survival of the business and even more difficult for a court to deny such a request based on the record of an expedited hearing and a consideration of the policy behind the inclusion of this emergency relief provision. Similar to the situation under Bildisco, if the court subsequently permits rejection of the contract, which is just as probable under the Bankruptcy Amendments Act as Bildisco because the court will apply the same balancing of the equities test,307 the employees will merely have general unsecured claims for damages.308 If the court does not approve contract rejection, the employees will have a right to lost wages and benefits as administrative expenses.309 In either case, therefore, it is to the debtor’s advantage to seek interim modifications of the contract to enjoy the benefits of lower labor costs for the interim period. The ultimate result of such a strategy is similar under Bildisco or the new amendments.

Further, should the court fail to rule on the rejection application within the prescribed time limits, the debtor may initiate any unilateral contract modifications desired.310 It has been suggested that a debtor operating within that scenario is in essentially the same position as he was under Bildisco.311 Thus, in spite of the declared intention of Congress to prohibit unilateral contract modifications, it seems the practical result of the Bankruptcy Amendments Act may be merely the creation of a more structured environment that will make Bildisco contract modifications more difficult, yet certainly not impossible or improbable.

III. Conclusion

In NLRB v. Bildisco & Bildisco, the United States Supreme Court ruled that, before a bankruptcy court acts on a petition to reject a collective bar-

305. See supra notes 138, 206 and accompanying text.
306. See Bankruptcy Amendments Act § 1113(e), supra notes 66, 79.
307. See Bankruptcy Amendments Act § 1113(c)(3), supra notes 66, 78.
308. See supra note 138.
309. Id.
310. See Bankruptcy Amendments Act § 1113(d)(2), supra notes 66, 81.
311. See supra note 81.
gaining agreement, it must be persuaded that reasonable efforts have been made to negotiate a voluntary modification of the agreement and that these efforts are not likely to result in a successful solution. Further, the Court defined the standard that the bankruptcy court must use in determining whether the labor contract may be rejected: the debtor must show that the contract is burdensome to the estate and that the equities balance in favor of rejection. Finally, the Court held that the NLRB may not find the debtor guilty of an unfair labor practice for modifying a collective bargaining agreement before formal approval to reject is granted by the bankruptcy court. Although the Court attempted to accommodate the Code and the NLRA in arriving at the standard for rejection, it opened the door to the possibility that bankruptcy proceedings could be used to effect the abrogation of labor contracts.

The Bankruptcy Amendments and Federal Judgeship Act of 1984 attempts to preclude the use of bankruptcy proceedings as a means of canceling a collective bargaining agreement. The Bankruptcy Amendments Act demands compliance with a more structured negotiation process than the "reasonable efforts" required under Bildisco before a rejection application will even be entertained. Further, it is only after these negotiations fail that a court will become involved, ruling on a rejection petition within the time constraints imposed by the amendment. At any time in this process, however, a debtor may petition the court for such interim contract modifications as are necessary to prevent irreparable harm to the reorganizing business. In the event that the court does not rule on the rejection application within the prescribed time limits, the debtor may unilaterally modify or terminate the labor agreement pending the outcome of the court's ruling. Finally, the Bankruptcy Amendments Act preserves the application of Bildisco with respect to cases pending as of the date of enactment of the new legislation. Thus, the Supreme Court's holdings are not without continued vitality.

The Bankruptcy Amendments Act incorporates the contract rejection standard propounded by the Supreme Court. The Bildisco standard is statutorily appropriate, except that "bargaining to impasse," instead of simply "reasonable efforts" toward negotiating contract modifications, should be required of the debtor before a bankruptcy court will permit rejection. The "balancing of the equities" requirement is too broad, enabling a bankruptcy court to reject the contract in almost any instance. Under Bildisco, the many intangible, noncompensable benefits that employees receive from the collective bargaining agreement are in jeopardy.

Considerations of practicality mandate that the section 8(d) procedures
for contract modification, such as the extensive waiting periods, be set aside for the sake of expeditiousness when seeking court approval for rejection. Nevertheless, in permitting the debtor unilaterally to modify the collective bargaining agreement prior to rejection approval, with only nominal bargaining, the Court incorrectly subordinated the most basic precepts of the NLRA. The Bankruptcy Amendments Act, which strives to preclude unilateral modification of the labor agreement prior to a court ruling, therefore constitutes a sound accommodation of the competing policies of the Code and the NLRA. With the inclusion of the emergency contract alteration relief provisions, however, and the Supreme Court's application of the balancing of the equities test for contract rejection, the practical results of the bankruptcy amendments may be the creation of a structured process that will make *Bildisco* modifications more difficult, yet not impossible or improbable. The lower courts now face the task of applying the Bankruptcy Amendments Act and ensuring the effectuation of the congressional goal of precluding *Bildisco* unilateral contract modifications while preserving the integrity of the reorganization effort.

Christopher Capuano