The Duty to Bargain and Rejection of Collective Agreements Under Section 1113 by a Bankrupt Airline: Trying to Reconcile R.L.A. with Bankruptcy Code

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In March of 1989, Eastern Airlines, a major carrier with a rich history in air transportation, filed for bankruptcy[1] and sent a shock wave to all those involved in industrial relations in this country. Many realized that this bankruptcy, along with the three union-strike that had started a few days before the filing, was just the beginning of a labor fight which would largely affect labor relations across the nation.[2]

This bankruptcy, however was simply the culmination of a trend that has characterized airlines for the last decade. Since 1978, when the airline industry was deregulated by Congress,[3] a wave of bankruptcies has hit and directly, or indirectly affected virtually all air carriers. The stormy competition generated by the deregulation of 1978, the entry of new non-

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1. Salpukas, *Eastern Requests Bankrupt Status to Cut Strike Loss*, N.Y. Times, Mar. 10, 1989, at A1, col. 1.

2. *See, e.g.,* Shribman, *Classic Struggle-Strike at Eastern Tests Ability of Big Labor to Re-Establish Itself*, Wall St. J., Mar. 6, 1989, at A1, col. 1.

3. Airline Deregulation Act, 92 Stat. 1705 (1978), 45 U.S.C. § 1301 (1982).

union air carriers with significantly lower labor costs, and the subsequent rate-war that resulted[4] created many financial problems for the major carriers. At the beginning, some of the financial problems could be attributed to the recession and the fuel crisis of the early 80s, but the industry's financial condition in 1985 and 1986[5] show that the crisis was deeper and more persistent than initially thought.[6]

As a result, more than 120 airlines have gone into bankruptcy since 1978.[7] Most of them were small, regional carriers of limited importance to overall labor relations in the airline industry, however, some of them involved airlines employing thousands of employees and did have a tremendous impact on the airline labor scene. For example, Air Florida which went bankrupt in July, 1984, was the eighteenth largest certificated air carrier in the U.S.[8] Braniff Airlines which filed for bankruptcy reorganization in May, 1982, employed 9,000 employees[9] and was among the largest air carriers.[10] When Continental Airlines petitioned for reorganization in September, 1983, it employed 12,000 employees and was heavily unionized.[11] Another recent example is the Eastern Airlines bankruptcy. Eastern was once ranked at the top of the carriers, and its bankruptcy is just another sign of the extent of the problem. It is difficult to exaggerate the impact of bankruptcy upon employment relations. Following Continental's bankruptcy filing, three of its major unions started a strike (A.L.P.A., I.A.M., U.F.A.)[12] which would become the industry's longest and perhaps fiercest strike, at least since deregulation.[13] The strike

4. *See* Jansonius & Broughton, *Coping with Deregulation: Reduction of Labor Costs in the Airline Industry*, 49 J. AIR. L. & COM. 501, 502-03 (1984); Morash, *Airline Deregulation: Another Look*; 50 J. AIR L. & COM. 253, 272-73 (1985); Kandahl, *Let the Process of Deregulation Continue*, 50 J. AIR L. & COM. 285, 287-88 (1985).

5. *See* Brenner, *Airline Deregulation—A Case Study in Public Policy Failure*, 16 TRANSP. L.J. 179, 202 (1988) (with the exception of 1984, the airline industry has suffered continued losses from 1978 through 1986); *see also* Katz, *The American Experience Under the Airline Deregulation Act of 1978—An Airline Perspective*, 6 HOFSTRA LAB. L.J. 87, 96 (1988) (in four of the ten years between 1978 and 1987, the entire industry posted a net loss and in 1987 the profit margin was a low 1.1%).

6. *See, Profits Fall, Revenues Up at UAL*, N.Y. Times, Oct. 27, 1989, at D4, col. 4 (describing the latest economic problems of United and U.S. Air, two of this nation's strongest carriers).

7. Carnevale, *Presidential Air to End Pact Feb. 6 as Feeder for Continental at Dulles*, Wall St. J., Jan. 11, 1988, at 8, col. 1.

8. In re Air Florida Sys., Inc., 48 Bankr. 440, 441 (Bankr. S.D. Fla. 1985).

9. *Braniff Return From Bankruptcy Aided By More Favorable Terms of Union Pacts*, Daily Lab. Rep. (BNA) No. 49, at A-4 (Mar. 13, 1984) [hereinafter *Braniff Bankruptcy*].

10. Salpukas, *Bankruptcy Petition by Braniff*, N.Y. Times, Sept. 29, 1989, at D1, col. 6 (Braniff has filed for bankruptcy a second time) [hereinafter *Braniff Second Bankruptcy*].

11. *Continental Airlines Files Under Bankruptcy Laws, Citing Need for Relief From High Labor Costs*, Daily Lab. Rep. (BNA) No. 187, at A-10 (Sept. 26, 1983).

12. In fact, I.A.M. had started the strike even before the airline filed bankruptcy.

13. *Pilots End Two-Year Strike at Continental, Accept Terms Awarded By Bankruptcy Court*,

ended with the defeat of the unions[14] with only 20% of the carrier's employees remaining unionized as of December 31, 1987[15] and with the company denying A.L.P.A. and I.A.M. their representation status.[16] As for Braniff, the consequences were of no lesser importance. When it resumed operations on March 1984, its work force amounted to only 2,250 as opposed to its former work-force of 9,000 persons; pay-scales and other benefits had been significantly reduced.[17] As for Eastern's bankruptcy it's too early to make any final assessment of its impact upon the future size of the carrier but one thing is sure; after the bankruptcy, Eastern Airlines will never return to its prefiling status.[18]

The impact of bankruptcy is not, however, limited to the cases where it actually occurs. It also has a significant influence upon labor relations when management threatens the unions that it will resort to bankruptcy.[19] Given the financial difficulties that many carriers have faced since 1978, such threats,[20] regardless of their sincerity do seem realistic and do affect labor relations.[21]

The effects on labor law itself are no less important. In such a context the traditional concept of the duty to bargain takes a totally different form. However broadly one defines the scope of this duty, and it has been defined broadly under Railway Labor Act (R.L.A.),[22] this obligation may be rendered a nullity if the employer can circumvent it by filing for

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Daily Lab. Rep. (BNA) No. 213, at A-11 (Nov. 4, 1985) (the exact length of Eastern's Union's strike is still unknown).

14. *Id.*

15. A.L.P.A. v. Eastern Airlines, Inc., 129 L.R.R.M. (BNA) 2644 (D.D.C. 1988).

16. *Id.*

17. *Braniff Bankruptcy, supra* note 9. *See also, Braniff Second Bankruptcy, supra* note 10 (Braniff's second bankruptcy filing in one decade in September 1989 forced it to lay-off more than half of its remaining 4,791 workers).

18. *See Eastern Gaining Support in Bankruptcy Proceedings*, Daily Lab. Rep. (BNA) No. 142, at A-14 (July 26, 1989).

19. *See* Cappelli, *An Economist's Perspective* in CLEARED FOR TAKEOFF 51 (McKelvey ed. 1988) (noting the impressive effect of the threat of bankruptcy on labor concessions) [hereinafter *Economist*].

20. *See* Note, *America's Airlines Discover Chapter Eleven: Is It Reorganization or Union Busting?*, 11 J. CONT. L. 375, 384-86 (1984) (for a list of bankruptcy or shutdown threats); *Frontier Airlines Shuts Down, Threatens Bankruptcy: Dispute Between United, ALPA Delays Planned Purchase*, Daily Lab. Rep. (BNA) No. 165, at A-12 (Aug. 26, 1986); *Employee Aid to Eastern Takes Effect Following Completion of Union Voting*, Daily Lab. Rep. (BNA) No. 37, at A-5 (Feb. 24, 1984).

21. *But see* Capelli, *Competitive Pressures and Labor Relations in the Airline Industry*, 24 INDUS. REL. 316, 325 (1985) (arguing that "it is not the simple threat of bankruptcy that determines the extent of concessions," referring to the willingness of unions to make concessions to management) [hereinafter *competitive pressures*].

22. *See,* McDonald, *Airline Management Prerogative in the Deregulation Era*, 52 J. AIR L. & COM. 869, 870 (1987): the courts historically have construed an air (. . .) carrier's management prerogative to change the nature or direction of its business as more narrowly constrained than

bankruptcy, thus exploring the opportunity according to bankruptcy law to reject the agreement that has been reached through long and often hard negotiations. Moreover, the filing of a bankruptcy reorganization petition, creates certain situations where collective bargaining is required,[23] and the traditional concepts of collective bargaining need to be adjusted to the needs of bankruptcy.[24]

An airline bankruptcy gives rise to complex legal issues. Given the effect of bankruptcies on such an important sector of our economy and labor relations, it is very important to try to provide some answers to these problems. These problems not only involve the difficult legal questions that an attempt to reconcile bankruptcy with labor laws create in general, they also have to do with the fact that airlines are covered in their labor relations by the R.L.A. as will be discussed later, a statute which has a different structure from the National Labor Relations Act (N.L.R.A.).[25]

Unfortunately, all the principal guidelines that exist today in the field of collective bargaining and agreements in the context of a bankruptcy reorganization, namely the *Bildisco* decision of the Supreme Court[26] and section 1113 which was added to the Bankruptcy Code by Congress in 1984,[27] (both which will be discussed later) are concerned with the N.L.R.A. Nevertheless, Congress has extended the coverage of the 1984 amendments to the airline industry[28] without addressing the difficult problems which would be created by the imposition of N.L.R.A. oriented bankruptcy provisions on an industry where a different labor law applies, namely the R.L.A.

In this article we intend to basically reconcile the remedy of rejection of a labor agreement provided by section 1113 with the R.L.A. First the applicable bankruptcy provisions will be discussed.[29] Then we will examine the right of an employer who is in a bankruptcy reorganization process to reject his collective labor agreements.[30] The third part of this article will examine the difficult legal problems that the right to reject an agreement by a bankrupt company, covered by R.L.A., creates as far as

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that of an employer governed by the NLRA, especially where such changes have resulted in loss of employment or other prejudice to the carrier's employees.

23. *See infra* note 125 and accompanying text.

24. *See, e.g.*, HAGGARD & PULLIAM, CONFLICTS BETWEEN LABOR LEGISLATION AND BANKRUPTCY LAW 129 (1987): "The presence of such a threat (of the liquidation of the company) suggests that the NLRA duty to bargain over major operational changes, to the extent that it exists at all, should be abrogated when the employer is in Chapter 11 reorganization. Legitimate interests of the employees and unions would be better served through bankruptcy law itself."

25. *See infra* note 146 and accompanying text.

26. *See infra* note 78 and accompanying text.

27. *See infra* Note 123 and accompanying text.

28. *See infra* note 46 and accompanying text.

29. *See infra* discussion at A. at p. 223.

30. *See infra* discussion at B. at p. 225.

the duty to bargain is concerned.[31] Our discussion will distinguish between the problems arising before the court's decision whether to reject an agreement,[32] and those presented after the court has issued its decision.[33] Finally, we will discuss the competing interests to be balanced in a bankruptcy reorganization when collective bargaining and agreements are threatened by the needs and pressures of reorganization.[34] Based on this balancing, we will conclude that the best approach for a court which is called to reconcile bankruptcy law and the R.L.A. will be the one that will encourage dialogue between the parties, of course, within the time limits that a bankruptcy always exercises upon both management and labor.

A. Rejection of Collective Agreements in Airlines: R.L.A. or Bankruptcy Code?

Bankruptcy law is currently governed by the Bankruptcy Code of 1978,[35] which was amended in 1984[36] to provide for the particular procedures for rejection of a collective agreement. In section 1167, the Bankruptcy Code states that:

> [N]otwithstanding section 365 of this title, 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 (45 U.S.C. 151 et. seq.) except in accordance with section 6 of such Act.[37]

The R.L.A. which was passed in 1926 initially covered only railway labor relations.[38] However, the R.L.A. was amended in 1936 to include the airlines.[39] The question was then whether bankruptcy labor proceedings in the airlines are covered by R.L.A. or by the Bankruptcy Code?

Despite the explicit language of section 1167, which did not distinguish between airlines and railroads, bankruptcy courts have ruled that airlines' bankruptcies are covered by the Code and not by the R.L.A. as to the rejection of the collective agreements. One court[40] gave emphasis to the fact that section 1167 appears in Subchapter IV of Chapter 11 which

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31. *See infra* discussion at C. at p. 238.
32. *See infra* discussion at C.2. at p. 240.
33. *See infra* discussion at C.3. at p. 243.
34. *See infra* note 19 and accompanying text.
35. Pub. L. No. 95-598, 92 Stat. 2549 (1978).
36. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 33 (1984).
37. It is this section of the R.L.A. that provides for the procedures through which collective bargaining must take place under the R.L.A.
38. 45 U.S.C. § 151 (1982).
39. 45 U.S.C. § 161 (1982).
40. In re Air Florida Sys., Inc., 48 Bankr. 440, 444 (Bankr. S.D. Fla. 1985).

explicitly states that it covers only railroad employees.[41] Another court[42] relied on the past history of section 1167 which derives from section 77(n) of the Bankruptcy Act of 1898. The latter provided that "[N]o judge or trustee acting under this Title shall change the wages or working conditions of railroad employees except in the manner prescribed in sections 151 to 163 of [R.L.A.]."[43] For the court, the change of the language from "railroad employees" to "collective bargaining agreement that is subject to the Railway Labor Act" was not indicative of a change in the Congressional intent on this issue.[44]

These arguments were never challenged on an appellate level, and are not completely persuasive. The explicit language of section 1167 cannot be ignored just because of the position of the section in a particular chapter of the Code. As to the Congressional intent, the similarity of the treatment of labor relations in the airlines and the railroads rendered the adoption of the literal interpretation of section 1167 even more convincing.[45]

With the passage, however, of the 1984 amendments the issue was finally clarified. Thus, in section 1113, concerning the rejection of collective bargaining agreements, a provision was inserted which excludes from its coverage, only Title I of the R.L.A., which applies to railroads and not to the air carriers who are covered by Section II.[46]

Given the later development, as well as the traditional insistence of the bankruptcy courts[47] to subject airlines to the bankruptcy law of rejecting collective agreements, there is no doubt that in the future section 1113 along with the R.L.A. will govern this area of labor relations. The extent to which section 1113 will replace the R.L.A. is an unsettled problem which will be discussed later in this article.[48] Before this, however, it will be necessary to discuss the right to reject a collective agreement and

41. Section 103(g) provides that "Subchapter IV . . . applies only in a case . . . concerning a railroad."

42. In Re Braniff Airways, 25 Bankr. 216, 217 (Bankr. N.D. Tex. 1982).

43. This section was embodied in the Bankruptcy Act by Pub. L. No. 420, Ch. 204, 47 Stat. 1467, 1481 (1933).

44. In re Braniff Airways, Inc., 25 Bankr. 216, at 217 (Bankr. N.D. Tex. 1982). A similar view has been expressed in McDonald, *Bankruptcy Reorganization: Labor Considerations for the Debtor-Employer*, 11 EMPLOYEE REL. L.J. 7, 30 n.9 (1985).

45. For a similar opinion *see* Pulliam, *The Rejection of Collective Bargaining Agreements Under Section 365 of the Bankruptcy Code*, 58 AM. BANKR. L.J. 1, 10-38 (1984).

46. 11 U.S.C. § 1113(a) (1985 Supp. III). "The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee . . . covered 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."

47. For one exception to this, *see* In re Overseas National Airways, Inc., 238 F. Supp. 359 (E.D.N.Y. 1965) which found that the R.L.A. alone is applicable in airline bankruptcies.

48. *See infra* discussion at C.2. at p. 240.

how it has developed in the last fifteen years in the courts, in Congress, and mainly in industries covered by the N.L.R.A.

B. The Labor Provisions of Bankruptcy Law in General

Chapter 11 of the Bankruptcy Code refers to the reorganization of companies as an alternative to liquidation. One of the main weapons that this chapter offers to companies which resort to reorganization procedures is the ability to reject the contracts that they deem burdensome to the reorganization efforts.[49] The code provides in pertinent part: " . . . the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."[50]

Executory contracts were defined by Congress as "contract[s] on which performance remains due to the same extent on both sides."[51] From the language used, it becomes obvious that Congress did not make any particular reference to collective bargaining agreements. Up until the 1984 amendments to the Code, there was no specific provision for the labor agreements. By the time, however, that the Supreme Court considered the *Bildisco* case,[52] it had already become settled law that section 365(a) included collective bargaining agreements.[53]

Thus, given that an employer engaged in bankruptcy reorganization may reject a collective agreement with his unions, a tension is immediately created between bankruptcy and labor law.[54] The N.L.R.A. provides that an employer may change a collective agreement only upon its

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49. *See* George, *Collective Bargaining in Chapter 11 and Beyond*, 95 YALE L.J. 300, 309 (1985) ("The ability to reject burdensome or unprofitable contracts is obviously one of the most significant privileges granted the debtor by the Bankruptcy Code.") *See also* White, *The Bildisco Case and the Congressional Response*, 30 WAYNE L. REV. 1169, 1170 (1984) ("[P]ractically, it would be impossible for many corporations to undergo a successful reorganization if made to carry every onerous executory contract.") Merrick, *The Bankruptcy Dynamics of Collective Bargaining Agreements*, 19 J. MARSHAL L. REV. 301, 326 (1986).

50. 11 U.S.C. § 365(a) (1982).

51. S. REP. No. 989, 95th Cong., 2d Sess. 58 (1978). *See also* Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973), defining executory contracts as ones "under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."

52. N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513 (1984).

53. *But see* the reference made to them by West, *Life After Bildisco: Section 1113 and the Duty to Bargain in Good Faith*, 47 OHIO ST. L.J. 65, 78-9 (1986). *Cf.* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 111-13 (1986) arguing that collective labor agreements, being specifically enforceable, should be treated differently from those of unsecured creditors. The problem which in theory is a very interesting one, in practice has been resolved by Congress which in 1984 provided for the procedure of rejecting these agreements, thus accepting that they are subject to rejection.

54. George, *supra* note 49, at 309.

expiration[55] and only after giving sixty days notice to the union which is party to this contract.[56] Furthermore, before implementing these changes, an employer has to bargain to impasse with the union.[57]

Tension between the provisions of labor and bankruptcy law is not easy to resolve nor is it easy to accommodate the differing purposes of these laws. The interest in maintaining harmonious relations between labor and management by promoting collective bargaining and holding the parties bound to their contractual obligations may in many cases conflict with the goal of preserving the viability of a financially troubled company. The courts, at least until the 1984 amendments, have been generally willing to give precedence to bankruptcy law and undermine the policies carried out by labor law.[58]

Before examining the landmark *Bildisco* case which crystallized case law on the issue prior to the 1984 Act, we should take a brief look at two cases decided in 1975 under the old Bankruptcy Act which had a provision similar to section 365(a) concerning the rejection of executory contracts.[59] These cases are very interesting to the extent that they represented two different approaches to the problem of rejecting collective bargaining agreements.

The first case was *Shopmen's Local Union No. 455 v. Kevin Steel Products*,[60] in which the Second Circuit rejected the unions' argument that collective agreements are excluded from the rejectionable contracts provision of section 313(1). The court reasoned that a debtor-in possession "is not the same entity as the pre-bankruptcy company."[61] Applying the successorship doctrine,[62] the court said that "[u]ntil the debtor here assumes the old agreement or makes a new one, it is not a 'party' under section 8(d) (of N.L.R.A.) to any labor agreement with the union and is

55. 29 U.S.C. § 158(d)(4) (1982). *See also* Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 104 U.S. 157, 185 (1971).

56. 29 U.S.C. § 158(d)(1) (1982).

57. 29 U.S.C. § 159(a) (1982). The problem is similar under the R.L.A.

58. *See* White, *supra* note 49, at 1184-85 estimating that during the 1975-84 period management had obtained judicial approval of collective agreements' rejection in 22 out of 33 cases.

59. "[U]pon the filing of a petition . . . the court may . . . permit the rejection of the 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." The Bankruptcy Act of 1898, Sec. 313(1).

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

61. *Id.* at 704.

62. The Supreme Court has taken a very restrictive approach to the issue of the survival of the collective agreement after a change in the person of the employer. *See* NLRB v. Burns Int'l Society Services, 406 U.S. 272 (1972); Howard Johnson v. Detroit Local 31, 417 U.S. 249 (1974). *See also* Comment, *The Unenforceable Successorship Clause: A Departure from National Labor Policy*, 30 U.C.L.A. L. REV. 1249 (1983); Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach*, 57 MINN. L. REV. 1051 (1973); Morris and Gaus, *Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns*, 59 VA. L. REV. 1359 (1973).

simply not subject to the termination restrictions of the section."[63] Citing the then existing section 77(n)[64] which excluded railroad employees from the Act's coverage as far as rejection of collective agreements are concerned, the court said that "Congress knew how to remove labor agreements from the scope of a general power to reject executory contracts."[65] By not extending such an exception to N.L.R.A. contracts, it was the court's opinion that Congress wanted to permit their rejection in bankruptcy.

The court also opined that it is unlikely that permitting an employer to reject collective agreements would encourage him to file for bankruptcy to avoid his labor obligations. "The adverse consequences of bankruptcy are far too harsh for that" said the court.[66]

The second and more controversial issue encountered by the court in *Kevin Steel* was the standard to be applied for permitting rejection of labor agreements. The Second Circuit stated that:

> [T]he decision to allow rejection should not be based solely on whether it will improve the financial status of the debtor. Such a narrow approach totally ignores the policies of the Labor Act and makes no attempt to accommodate them . . . A bankruptcy court should permit rejection of a collective bargaining agreement only after thorough scrutiny, and a careful balancing of the equities on both sides.[67]

A few weeks later, the same court was called on to decide another case, in a R.L.A. context this time. In *Brothers of Ry. Clerks v. REA Express*,[68] the court ignored the explicit provisions of section 77(n), and found that railroad labor relations are also subject to section 313(1) which provides for the rejection of executory contracts.[69] As two commentators have said, "the appellate court wanted to permit rejection at any cost"[70] and it thus tried to draw a doubtful analogy between section 6 of R.L.A.[71] and section 8(d) of the N.L.R.A.[72]

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63. Shopmen's Local Union No. 455 v. Kevin Steel Products, 519 F.2d 698, 704 (2d Cir. 1975).

64. *Id.*

65. *Id.*

66. *Id.* at 706.

67. *Id.* at 707.

68. Brothers of Ry. Clerks v. REA Express, 523 F.2d 164 (2d Cir. 1975).

69. *Id.* at 169. *But see* In re Michigan Interstate Ry. Co., 34 Bankr. 220 (Bankr. E.D. Mich. 1983): "[A]lthough the Court realizes that the debtor railroad's financial problems made it increasingly difficult to uphold its part of collective bargaining agreements, however, neither financial problems nor bankruptcy relieves the Railway of its contractual obligations."

70. HAGGARD & PULLIAM, CONFLICTS BETWEEN LABOR LEGISLATION AND BANKRUPTCY LAW 129 (1987).

71. *See supra* note 37. For a more analytical discussion of the R.L.A., *see infra* discussion at C.1. at p. 238.

72. *See supra* notes 39, 40 and accompanying text.

In any case, the *REA* court proceeded to rule that R.L.A. railroads' contracts are subject to rejection under bankruptcy laws.[73] Possibly realizing that it had gone too far,[74] the Second Circuit tried to balance things to some extent. Thus it imposed a strict standard for the rejection of the agreement, a standard that was much stricter than the one it had imposed just a few weeks earlier in *Kevin Steel*. The court said in particular that:

> in view of the serious effects which rejection has on the carrier's employees, it should be authorized only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the carrier will collapse and the employees will no longer have their jobs.[75]

Thus, two different standards were formulated by the same Circuit in the rejection of collective bargaining agreements by a bankrupt employer. The *Kevin Steel* standard essentially means that an agreement will be rejected if this will help the success of the reorganization. Under the *REA* standard, rejection will be granted only if it is a *sine qua non* condition for the survival of the company.[76]

The rising number of bankruptcies that was the consequence of the early 80s recession, as well the controversial issues that the conflict between bankruptcy and labor law purposes creates, inevitably led the Supreme Court to grant certiorari in the *Bildisco* case. The issues that the Supreme Court was called upon to decide were whether the *REA* or *Kevin Steel* standard for rejection was the appropriate one and second, an issue that up until *Bildisco* had not yet been raised:[77] whether an employer may unilaterally change terms of a collective bargaining agreement before the bankruptcy court authorizes rejection of the agreement.[78]

Bildisco was a partnership which in April, 1980, filed a voluntary petition for bankruptcy reorganization under Chapter 11 of the Bankruptcy Code. Before and after filing, Bildisco had violated some of its contractual obligations with the employees and unilaterally altered the terms of the then existing collective agreement. The union charged the employers with unfair labor practices and the N.L.R.B. ruled in favor of the union.[79] Meanwhile, on December 1980 Bildisco petitioned the bankruptcy court

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73. *See* Brothers of Ry. Clerks v. REA Express, 523 F.2d 164, 170 (2d Cir. 1975).

74. *See, e.g.,* HAGGARD & PULLIAM, CONFLICTS BETWEEN LABOR LEGISLATION AND BANKRUPTCY LAW 129 (1987).

75. Brothers of Ry. Clerks, 523 F.2d at 172.

76. The Supreme Court read the *REA* standard as requiring the debtor to show "that its reorganization will fail unless rejection is permitted." N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 524 (1984).

77. *Cf.* White, *supra* note 49, at 1200, ("By authorizing a right unilaterally to reject a collective bargaining agreement, the Supreme Court gave management something that many management lawyers never expected to receive. It freed them not just from the clutches of the N.L.R.B., but also from the requirements of getting a bankruptcy judge's approval.").

78. N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 516 (1984).

79. *Id.* at 517.

to authorize rejection of the agreement, a request that was granted.[80] The union appealed the court's decision and Bildisco appealed the Board's ruling. The Court of Appeals consolidated the two appeals and later ruled against the Board and in favor of the employers.[81] The Supreme Court granted *certiorari* to Bildisco in 1984.

Since no party disputed that collective bargaining agreements are subject to rejection, the Supreme Court proceeded to deal with the appropriate standard for rejection of collective bargaining agreements. A unanimous Court first emphasized that:

> [B]ecause of the special nature of a collective bargaining contract, and the consequent 'law of the shop' which it creates, . . . a somewhat stricter standard [than the one used for rejecting ordinary contracts, namely the business judgment standard] should govern the decision of the Bankruptcy Court to allow rejection of a collective agreement.[82]

It then dismissed the strict *REA* standard that we have already seen. A unanimous Supreme Court found that the *REA* standard is "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code."[83] It reasoned that the burden of satisfying such a standard would "present difficulties to the debtor in possession that will interfere with the reorganization process."[84] Thus, the Court found preferable a test adopted in *Re Brada Miller Freight System, Inc.*,[85] which was essentially the same as the test found in *Kevin Steel*. According to this test, rejection must be authorized "if the debtor can show that collective bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract."[86] Among the factors to be considered by a bankruptcy court in balancing the equities, the Court mentioned "the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees."[87]

The Court also said that in order for the rejection to be granted, it must be shown by the employer that "reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution."[88] It reasoned that "national labor policies of avoiding labor strife and encouraging collective bargaining . . .

80. *Id.* at 518.
81. *See, e.g.*, 682 F.2d 42 (3d Cir. 1982).
82. Bildisco, 465 U.S. at 524.
83. *Id.* at 525.
84. *Id.*
85. In re Brada Miller Freight System, Inc., 702 F.2d 390 (11th Cir. 1983).
86. Bildisco, 465 U.S. at 526.
87. *Id.* at 527.
88. *Id.* at 526.

generally require that employers and unions reach their own agreements as terms and conditions of employment free from governmental interference."[89] But a unanimous Supreme Court was very quick to limit what it had just said by stating that reasonable efforts to reach an agreement and not bargaining to impasse are enough to satisfy the bargaining requirement.[90] Thus, the Supreme Court rejected the idea that bargaining to impasse should be required in a bankruptcy situation before rejection of the agreement is possible.

The second issue divided the Justices. A majority of five justices[91] found that the employer does not commit an unfair labor practice by "[u]nilaterally rejecting or modifying a collective bargaining agreement before formal rejection by the Bankruptcy Court action."[92]

The majority opinion, written by Justice Rhenquist, first rejected the new entity theory previously applied by several courts including the two cases of the Second Circuit previously discussed.[93] Rehnquist opined that "[I]t is sensible to view the debtor in possession as the same 'entity' which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing."[94]

This finding however did not prevent the majority from ruling that the employer could unilaterally change the terms of employment before the bankruptcy court's approval. The Court first reasoned that "reorganization may succeed only if new creditors infuse the ailing firm with additional capital" and that such "beneficial recapitalization could be jeopardized if the debtor-in-possession were saddled automatically with the debtor's prior collective bargaining agreement."[95]

Justice Rehnquist also reasoned that if the employer is estopped from unilaterally changing the conditions of employment, he would receive very little, if any, benefit from the rejection of the collective agreement.[96]

Another argument used by the majority in justifying unilateral alteration of the working conditions was the following: since the filing of bankruptcy renders all contracts, including collective agreements, unenforceable, unless specifically assumed by the debtor with the Court's

89. *Id.*

90. *Id.*

91. Interestingly enough, Justice Stevens was in this majority while Justice White was in the minority.

92. Bildisco, 465 U.S. at 527.

93. *Id.* at 528.

94. *Id.*

95. *Id.*

96. *Id.* at 529.

approval, the employer cannot be required to adhere to the terms of an agreement that is unenforceable.[97]

Finally, Justice Rehnquist rejected the union's claim that prior to modification of the terms of the contract, bargaining to impasse should be required. He reasoned that "imposing such a requirement as a condition precedent to rejection of the labor contract will simply divert the Bankruptcy Court from its customary area of expertise into a field in which it presumably has little or none."[98] The employer, however, "is obligated to bargain collectively with the employees' certified representative over the terms of a new contract pending rejection of the existing contract or following formal approval of rejection by the Bankruptcy Court."[99]

The minority disagreed with Justice Rehnquist on the second issue, accusing the majority that it "has completely ignored important policies that underlie the N.L.R.A., as well as [the other] parts of its [own] opinion".[100] Writing for the minority, Justice Brennan said:

> [A]n examination of the policies and provisions of both statutes [i.e. N.L.R.A. and Bankruptcy Code] inexorably leads to the conclusion that Congress did not intend the filing of a bankruptcy petition to affect the applicability of section 8(d) [of N.L.R.A.] and that, as a result, a debtor in possession commits an unfair labor practice when he unilaterally alters the terms of an existing collective bargaining agreement after a bankruptcy petition has been filed but prior to rejection of that agreement.[101]

In rejecting the non-enforceability argument of the majority, Justice Brennan said that "it is simply incorrect to suggest that the collective bargaining agreement does not retain sufficient vitality after a bankruptcy petition has been filed to be reasonably termed 'in effect' within the meaning of the statute."[102] For the minority, saying a contract is unenforceable is one thing; to say that it has no consequence at all is quite another, and it is wrong.[103]

Justice Brennan also emphasized that the majority's holding would

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97. *Id.* at 532.

98. *Id.* at 533.

99. *Id.* at 534. This part of the decision is not clear at all. The Court seems to suggest that bargaining for rejection and bargaining for the terms of the new collective agreement are two different things and this is correct. However, given the laxity of the standard for controlling the employer's behavior in this bargaining it is doubtful whether this requirement would prove anything more than an illusion. For a severe criticism of the bargaining requirements of *Bildisco* which seem to be quite inadequate, as well as of the confusion by which the decision is characterized, *see* George, *supra* note 49.

100. Bildisco, 465 U.S. at 535.

101. *Id.* at 541.

102. *Id.* at 545. Justice Brennan refers to the N.L.R.A., where the requirements for altering a collective agreement presuppose a contract "in effect."

103. *Id.* at 545. ("[A]lthough enforcement of the contract is suspended during the interim period, the contract clearly has other characteristics that render it 'in effect' during the interim period" and giving several examples of these effects).

contribute to labor unrest. After rejection of the agreement, the unions are free to strike, something detrimental for the prospects of reorganization. For the dissent, "the need to prevent 'economic warfare' resulting from unilateral changes in terms and conditions of employment is as great after a bankruptcy petition has been filed as it is prior to that time."[104] In a footnote, the dissent cited the Continental Airlines case[105] and said that "[r]ecent events make it clear that the fear of labor unrest resulting from postfiling unilateral modifications is not merely a hypothetical possibility."[106]

Finally, the dissent opined that prohibiting the employer from unilaterally altering the terms of an agreement prior to court approval will make the employer think more and bargain with the unions to reach a mutually acceptable new contract.[107] The unions of the bankrupt employer will also have strong incentives to reach an agreement because they know that the threat of the company's liquidation is hanging over them and their members.[108]

Not surprisingly, *Bildisco* gave rise to stormy reactions from the unions.[109] The decision was a blow to the unions interests not only because of the second part of the opinion where the Supreme Court was divided, but also because of the general philosophy of this decision which, "signals a subtle yet disturbing erosion of national labor policy."[110] Moreover, "the fact that the Court so readily accepted the management position by a 9-0 decision may cause union negotiators to predict a ready acceptance of that position in the future and may thus weaken their bargaining position."[111] What becomes obvious from this decision is that the Supreme Court is ready to sacrifice policies enhanced by labor law adjudication for the survival needs of the company. In theory this may seem inevitable if employees are to save their jobs. In practice, however, this approach neglects the possibility for abuses by the employer and it also severely undermines the positive effect that collective bargaining may have on the very survival of a company.[112]

These problems in the Supreme Court's approach, which will be discussed at the end of this article as well as the more general implications upon the future development of the Court's approach to collective bar-

104. *Id.* at 548.
105. *Id.* at 549.
106. *Id.*
107. *Id.* at 552.
108. *Id.*
109. *See* West, *supra* note 53, at 104; HAGGARD & PULLIAM, *supra* note 24.
110. George, *supra* note 49, at 303.
111. White, *supra* note 49, at 1202.
112. *See* George, *supra* note 49, at 344-45.

gaining, were immediately realized by the unions.[113] The unions, already concerned with the results of bankruptcy upon their interests even before *Bildisco*, reacted by intensely lobbying members of Congress.[114] The very day that the Supreme Court delivered its decision in *Bildisco*, Representative Rodino introduced to the House a bill to "clarify the circumstances under which collective bargaining agreements may be rejected."[115] The bill actually endorsed the *REA* standard for rejection of the collective agreements. A few weeks later, the House of Representatives passed a different bill again introduced by Rodino, modeled along the lines of the initial bill.[116]

That Bill provided in section 1113(d)(1)(A) that before applying for rejection of the collective bargaining agreements, the employers would have to "meet and confer in good faith with the authorized representative of the employees who are subject to a collective bargaining agreement."[117] It also provided that the proposed modifications to the agreement must be necessary "for successful financial reorganization of the debtor and preservation of the jobs covered by such agreement."[118] The standard for judicial rejection, according to section 1113(g)(2), was that "absent rejection of such agreement, the jobs covered by such agreement will be lost and any financial reorganization of the debtor will fail."[119] It finally stated that "no provision of this title shall be construed to permit the trustee unilaterally to terminate or alter any of the wages, hours, terms and conditions established by a collective bargaining agreement."[120]

The Senate however, was deadlocked between two proposed bills.[121] The one advanced by conservative Senator Thurmond adopted the proposals of the National Bankruptcy Conference and while endorsing *Bildisco*'s standard for rejection of the collective agreements, the only change was that it obliged the employer to wait for thirty days after the

113. *See* White, *supra* note 49, at 1202, ("The dramatic impact of *Bildisco*, however, and the one I suspect that truly called for the outraged response from union spokesmen, is the symbolic one. Here all nine members of the Court rejected the union position on the standard to be applied").

114. *See, e.g., Impact of Airline Deregulation, Bankruptcies Discussed by Labor, Congressional Leaders*, Daily Lab. Rep. (BNA) No. 203, A-9. No. 203, at A-9 (Oct. 19, 1983).

115. H.R. 4908, 98th Cong., 2d Sess., 130 CONG. REC. H 809 (daily ed. Feb. 22, 1984).

116. H.R. 5174, 98th Cong., 2nd Sess. § 1113(d)(1)(A), 130 Cong. Rec. H1842 (daily ed. March 21, 1984).

117. *Id.* at § 1113(d)(1)(A).

118. *Id.* at § 1113(d)(1)(B)(2)(A).

119. *Id.* at § 1113(g)(2).

120. *See Senate Fails to Reach Agreement on Bankruptcy Labor Provisions*, Daily Lab. Rep. (BNA) No. 100, at A-10 (May 23, 1984).

121. H.R. 5174, 98th Cong. 2nd Sess. § 1113, 130 CONG. REC. S6181-82 (daily ed. May 22, 1984).

filing of petition for rejection before implementing the changes.[122]

The second bill,[123] introduced one day later by Democratic Senator Packwood was similar to H 5174 passed by the House. It imposed a thirty day period as a deadline for the court to rule on the petition for rejection, extendable for fifteen more days if the court so decides. It also differed from Rodino's bill in that it required that the proposals of the employer take into account "the best estimate of the sacrifices expected to be made by all classes of creditors and other affected parties to the reorganization."[124]

The debate on the floor of the Senate was heated. What made things even more complex was that Congress was simultaneously trying to pass a bill which would bring changes in the status of bankruptcy judges, in accordance with the Supreme Court's 1982 ruling that held the judicial provisions of the Bankruptcy Code unconstitutional.[125]

Under such conditions, with much political maneuvering and lobbying by various interest groups, the two Houses finally passed the Bankruptcy Amendments and Federal Judgeship Act of 1984.[126] The amendment concerning rejection of collective bargaining agreements was very close to the one proposed by Senator Packwood. Senator Thurmond and his supporters in the Senate were very eager to pass other amendments to the Act but they were forced to compromise in order to get their views through on the other issues.[127]

Thus, section 1113 was added to the Bankruptcy Code by the 1984 Act. It provided that prior to applying for rejection of a collective bargaining agreement, a bankrupt employer will have to make a proposal to the

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122. *Id.* at 130 CONG. REC. S6181-82 (daily ed. May 22, 1984).

123. H.R. 5174, 98th Cong. 2nd Sess. § 1113(b)(1)(A).

124. *See* 130 CONG. REC. S 6182 et seq. (daily ed. May 22, 1984).

125. In Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982) the Supreme Court held that it was constitutionally required to provide bankruptcy judges life tenure and salary guarantees, something which the Code failed to do. The Supreme Court however, postponed the application of its decision twice in order to give Congress time to amend the Code.

The efforts to pass such a legislation were entangled in politics and it was only in June, 1984 that such legislation was passed along with § 1113 that we are about to see. The pressures under which this legislation was passed resulted in a statute that was characterized by a commentator as "one of the sloppiest jobs Congress has ever done enacting a law." (Bladgett, *Bad Law?*, 70 A.B.A. J. 28 (Dec. 1984).

126. Pub. L. No. 98-353, 98 Stat. 333 (1984). *See also* 130 CONG. REC. H 7489, H 7499-500, S 8887, S 8900 (1984).

127. 130 CONG. REC. S 6186 (daily ed. May 22, 1984) (*see, e.g.* Senator Dole's statement

> if the Packwood Amendment should be adopted, that is the end of the bill. And if it is not adopted, it is probably the end of the bill. Some of us want to get down to other areas in addition to this very important provision with reference to the Bildisco case.

See also Note, *Rejection of Collective Bargaining in the Aftermath of 11 U.S.C. Section 1113: What Does Congress Intend?*, 9 DEL. J. CORP. L. 701, 718-9 (1984).

union. The proposal, "based on the most complete and reliable information available at the time of such proposal" will provide "for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor . . ."[128] The proposal must treat "all the creditors, the debtor and all of the affected parties . . . fairly and equitably."[129]

It is also provided that after the proposal and before the petition to the court for rejection, the employer will "meet at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement."[130]

The court will approve the petition for rejection if: (1) the employer or trustee has fulfilled his above listed bargaining obligations; (2) the union has refused to accept the above proposal "without good cause" and; (3) "the balance of equities clearly favors rejection of such agreement."[131]

The section further provides that a hearing will be held within fourteen days after the filing of the petition, a deadline that may be extended for another seven days if the court so decides.[132] The court will issue its ruling within thirty days from the first day of the hearings, otherwise, the employer is free to "terminate or alter any provision of the collective bargaining agreement pending the ruling of the court on such application."[133]

Finally, while the employer is going through the procedures of section 1113 which have previously been discussed, he may ask for interim relief if he can show that this is a *sine qua non* to avoid liquidation:

> 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.[134]

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128. 11 U.S.C. § 1113(b)(1)(A) (Supp. III 1985).

129. *Id.*

130. *Id.* at § 1113(b)(2).

131. *Id.* at § 1113(c).

132. *Id.* at § 1113(d)(1) (1978).

133. *Id.* at § 1113(d)(2) (1978).

134. *Id.* at § 1113(e). The language of this provision allows the interpretation that an application for interim relief may be made even if the employer has not sought to reject the agreement through 11 U.S.C. § 1113 (1978). *See*, West, *supra* note 53, at 144-145.

However, both the legislative history of this provision—130 CONG. REC. § 8899, H7496 (daily ed. June 29, 1984) (statements of Reps. Hughes and Morrison)—and the character of the relief as temporary, indicate that an application for interim relief must be accompanied by § 1113 procedures. It does not matter whether the petition for interim relief will be submitted before or after the initiation of § 1113 proceedings, as long as at some time the employer begins bargain-

Thus, the present statutory law governing rejection of the collective bargaining agreements was formulated. Just to give an overall view of how the rejection process operates now, it will helpful to mention the nine steps that a bankruptcy court has used to determine whether or not to reject an agreement:

1. The debtor in possession must take a proposal to the union to modify the collective bargaining agreement.
2. The proposal must be based on the most complete and reliable information available at the time of the proposal.
3. The proposed modifications must be necessary to permit the reorganization of the debtor.
4. The proposal must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.
5. The debtor must provide to the union such relevant information as is necessary to evaluate the proposal.
6. Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the union.
7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.
8. The Union must have refused to accept the proposal without good cause.
9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.[135]

Even a cursory reading of these nine steps reveals that interpretation problems are indeed enormous. The language is quite obscure and all of the terms are subject to varying interpretations.[136] As a commentator said, the law "will make the trial judge's decision more discretionary and speculative; it will introduce greater guesswork into the lives of those who must advise management and unions about their rights."[137] As expected, litigation quickly arose out of the interpretation of these provisions.

The author does not intend to go into detail regarding this litigation

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ing with the union under § 1113. It was the desire of Congress to promote collective bargaining when bankrupt employers want to reject and change existing agreements. An interpretation that would totally dissociate interim relief from the process of § 1113 would allow the employer to avoid the bargaining required by § 1113 by simply applying for interim relief.

135. In re American Provision Co., 44 Bankr. 907, 909 (Bankr. D. Minn. 1984).

136. Cosetti & Kirshenbaum, *Rejecting Collective Bargaining Agreements Under Section 1113 of the Bankruptcy Code—Judicial Precision or Economic?* 26 DUQ. L. REV. 181, 183 (1987), ("Because it (§ 1113) is a compromise, it is loaded with terms of compromise . . . Given the ambiguity of the statute, and the tension inherent in situations where the debtor must seek rejection of its collective bargaining agreement, the potential for frequent, complex litigation seems great.").

137. White, *supra* note 49 at 1197.

since it is beyond the scope of this article. It suffices to say that one of the main controversies that is evolving in the courts concerns the new standard of rejection. Two Circuits have already taken differing approaches.[138] While the Third Circuit[139] said that for a collective agreement to be rejected, the rejection must virtually be a *sine qua non* for the success of the reorganization of the company,[140] the Second Circuit[141] ruled that it suffices to show that the rejection will facilitate the reorganization.[142] In their reasoning, the courts looked at the legislative history of the 1984 amendments but reached completely different conclusions. They even resorted to linguistic arguments as to the meaning of "necessary" and "essential" to justify their divergent rulings![143]

This conflict alone demonstrates how legalistic arguments are useless if one does not have a clear-cut view of the needs and the interests involved in a conflict between labor and bankruptcy law. If *Bildisco* serves to demonstrate anything, it is mainly that the answer to a complex legal problem will often be arrived at by resorting to one's convictions about economic and social problems involved in a labor dispute with a bankrupt company. It is these problems which will be discussed at the end of this article. First, however, we will examine the particular legal problems created by the application of section 1113 to an industry governed by the R.L.A.

As to the overall impact that the new legislation will have upon the courts and their approach towards the problem of labor relations in bankruptcy situations, it is still too early to draw any definite conclusions. Some early estimates show that the bankruptcy courts are less willing to approve rejection of the agreements now,[144] but it remains to be seen whether this reflects a permanent change in the courts' approach.

C. Reconciling Section 1113 and R.L.A.

Even though there are some, (albeit weak) indications about how the courts will interpret the 1984 Amendments, there is no hint as to how the courts will deal with the application of these amendments to the airline industry, since the R.L.A. and not the N.L.R.A. applies. Reconciling section 1113 and the R.L.A. will prove to be a very difficult task for the courts,

138. *See*, Case Comment, *The Standard for Rejecting Collective Bargaining Agreements in Bankruptcy: Labor Discovers It Ain't Necessarily So*, 63 N.D.L. REV. 79 (1988).

139. Wheeling-Pittsburgh Steel v. United Steelworkers, 791 F.2d 1974 (3d Cir. 1986).

140. The standard is very similar to that adopted in REA, *supra* note 68.

141. Truck Drivers Local 807 v. Carey Transportation, Inc., 816 F.2d 83 (2d Cir. 1987).

142. This standard is virtually the same with that adopted in Bildisco, *supra* note 52.

143. Wheeling v. United Steelworkers, 791 F.2d at 1088.

144. *See, e.g.*, Note, *Rejection of Collective Bargaining Agreements in Chapter 11 and the Problem of Strikes: Tipping the Balance of Equities*, XV REV. L. & SOC. CHANGE 513, 525 (1987).

and, since there has been no attempt by any bankrupt air carrier to reject existing collective agreements under section 1113 there are no precedents.[145] It is these delicate problems which will be examined in this section. In order to do this a brief review of the relevant provisions of the R.L.A. is necessary. It should be emphasized that the R.L.A. is a statute which is largely unknown outside the airline and the railroad industries which it covers.[146]

THE R.L.A. PROVISIONS

The R.L.A. was the product of an agreement between railroad employers and unions reached in 1926 and subsequently passed by Congress that same year with few changes.[147] In 1936, it was amended to cover the airlines.[148] The new law was the first comprehensive labor legislation covering an entire industry in this country and the first one to impose a duty to bargain between the two parties in labor relations, something which would be followed ten years later by the N.L.R.A.[149] Among the stated purposes of this act was the maintenance of an undisturbed transportation system.[150] This was to be achieved by settlement

145. Continental, Air Braniff and Air Florida filed for bankruptcy before the enactment of the 1984 Amendments.

As for the Frontier Airlines, its bankruptcy in 1986 did create labor problems but they were soon settled with the purchase of the carrier by Texas Air. Unions agreed with the purchaser to waive most of their claims against the bankrupt carrier in exchange for rehiring the employees of Frontier by the subsidiaries of Texas Air. *See*, *Frontier Unions, Employees Waive Claims, Become Eligible for Jobs at Continental*, Daily Lab. Rep. (BNA) No. 203, at A-6 (Oct. 21, 1986).

More recent and certainly more important was the case of Eastern's bankruptcy. In June 1988 the bankrupt company filed a § 1113 petition for rejection of its collective agreement with the pilots union which had expired but was still in effect as negotiations under R.L.A. were in process for its renewal. *See*, Eastern Seeks Court Okay for Cuts in Pilots' Contract, Daily Lab. Rep. (BNA) No. 120, at A-16 (June 23, 1989). Negotiations under the § 1113 started between the two parties but they were fruitless and there was a strong possibility that the court would reject management's petition for rejection. Thus, Eastern withdrew its application. *See*, Eastern Airlines Withdraws Request for Court Approval to Change ALPA Contract, Daily Lab. Rep. (BNA) No. 143, at A-16 (July 27, 1989).

146. For the most comprehensive up to date presentation of the R.L.A.'s provisions, *see*, THE RAILWAY LABOR ACT AT FIFTY (N.M.B. ed. 1976). *See also*, LECHT, EXPERIENCE UNDER LABOR LEGISLATION (2d Cir. 1968); Wilner, *The Railway Labor Act: Why, What and for How Much Longer, Part I*, 55 TRANSP. PRACT. J. 242 (1988); Comment, *Airline Labor Policy: The Stepchild of the Railway Labor Act*, 18 AIR L. & COM. 461 (1951).

147. LECHT, *supra* note 124 and accompanying text.

148. *See, supra* note 39 and accompanying text.

149. *See* Roukis, *Should the Railway Labor Act Be Amended?* 38 ARB. J. 16, 18 (March 1983) (calling the Act "the nation's oldest comprehensive collective bargaining statute".) For the legislative history of this Act *see*, Wilner, *The Railway Labor Act: Why, What, and For How Much Longer, Part I*, 55 TRANSP. PRACT. J. 242 (1988); Comment, *Airline Labor Policy: The Stepchild of the Railway Labor Act*, 18 AIR L. & COM. 461 (1951). *See generally*, THE RAILWAY LABOR ACT AT FIFTY (N.M.B., ed. 1976).

150. 45 U.S.C. § 151(a)(1) (1982).

of all labor disputes which might arise between management and unions.[151]

The Act obliges both parties to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes."[152]

The R.L.A. also distinguishes between two kinds of disputes. First, there are "major disputes" created by one of the parties' attempt to change the "rates of pay, rules, and working conditions;" and second, there are "minor disputes" which are those disputes arising out of grievances or from the interpretation or application of existing agreements.[153]

The major disputes are settled by a complex procedure described in the R.L.A. The party desiring to make a change in a collective agreement serves a thirty day advance notice of its intention to the other party.[154] Bargaining then takes place between the parties regarding the proposed change, and if it fails, then either party may invoke the mediation services of the National Mediation Board (N.M.B.).[155] The N.M.B. is the administrative agency whose main authority is to mediate between labor and management in the airline and railroad industries.[156] The N.M.B. has absolute discretion to prolong its mediation efforts for as long as it deems fit[157] and during this time no party may implement its intended changes, nor to resort to economic action.[158]

When N.M.B. determines that its efforts have failed, then it may advise the two parties to accept arbitration. If they refuse, there is a period of thirty days after which each party may implement its decisions and economic war may begin.[159]

Having seen the relevant provisions of the R.L.A. we can now understand what basic change section 1113 brings in a case of bankruptcy. Absent section 1113, an air carrier who would like to, among other things, reduce the wages of his employees which were set by a collective agreement, would have to wait until the expiration of the collective agreement.[160] Only then could he undergo all these lengthy procedures in

151. 45 U.S.C. § 151(a)(4), (5) (1982).

152. 45 U.S.C. § 152 (1982).

153. The terms "major" and "minor" are not actually mentioned in the statute but were judicially created. *See, e.g.*, Elgin v. Burley, 325 U.S. 711, 723 (1945).

154. 45 U.S.C. § 156 (1982).

155. 45 U.S.C. § 155 (1982).

156. The other main authority of the N.M.B. is to conduct union certification elections. 45 U.S.C. § 152 (Ninth) (1982).

157. International Ass'n of Machinists v. N.M.B., 425 F.2d 527 (D.C. Cir. 1970).

158. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378 (1969).

159. 45 U.S.C. § 155 (1982).

160. This would be required if the collective agreement is of a fixed term which is the case in virtually all labor agreements in the airline industry. The R.L.A. does not contain any article like

order to unilaterally impose the lower rates of payment, if no agreement is reached with the unions. However, with the introduction of the right to reject an agreement in the case of bankruptcy, the employer is relieved of these obligations, and he simply has to follow the expedited procedures of section 1113.

But from this point on the problems begin. For the purpose of a more systematic analysis the problems can be divided into those referring to the process leading to the rejection of the collective agreement, and to the ones that occur after the decision of the court on the petition on rejection. We will examine them separately.

2. *Bargaining Before the Court's Decision on the Petition for Rejection*

The first problem which may arise in the context of an airline bankruptcy also has to do with the unique structure of the R.L.A. In the usual cases of labor disputes involving solvent airlines, many controversies arise over the distinction between major and minor disputes. While major disputes are lengthy and the employer is prevented from implementing his decision until the exhaustion of these procedures, this is not the case with minor disputes. In minor disputes, which mainly concern interpretations of a collective agreement, the dispute is resolved by arbitration and the employer does not have to wait for the outcome of this process in order to implement his decision.[161] By contrast, the union cannot go on strike in a minor dispute.[162] Not surprisingly, airlines and railroads, which are covered by the R.L.A., usually try to convince the courts that a decision which they have made does not change the collective agreement and thus does not create a major dispute. Instead, they claim their dispute with the unions is just a matter of contractual interpretation and therefore, is a minor dispute.[163]

It is, therefore, possible that a bankrupt carrier might argue in the bankruptcy court that certain decisions they have made are in conformity with the existing collective agreements and that they were not rejecting the agreement. Thus any objections of the unions should be submitted to

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N.L.R.A.'s § 8(d), which prohibits mid-term modification of a collective agreement. *See* Perritt, *Aspects of Labor Law Affecting Labor-Management Cooperation in the Railroad and Airline Industries*, 16 PEPPERDINE L. REV. 501, 529 (1989). However, a mid-term modification of a fixed term contract under R.L.A. means that the employer is violating his contractual obligation and therefore he would be subject to the jurisdiction of the arbitration board.

161. *See, e.g.,* Consolidated Rail v. Railway Labor Executives' Ass'n., 109 S. Ct. 2477 (1989).

162. Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R., 353 U.S. 30, 39-42 (1957).

163. *See, e.g.,* A.L.P.A. v. Eastern Airlines, 863 F.2d 891 (D.C. Cir. 1988); International Ass'n of Machinist v. Eastern Airlines, 849 F.2d 1481 (D.C. Cir. 1988).

arbitration and in the meantime the employer may proceed with his decision. It is not the author's intention to examine the difference between major and minor disputes. This delicate decision has given rise to vast litigation and the Supreme Court has taken differing approaches to the issue.[164] A discussion of this distinction would itself require a separate article. The problem to be answered at this point, however, is what court should resolve the controversy over whether a managerial decision creates a major or a minor dispute: the bankruptcy courts or the traditional courts?

The author believes that a bankruptcy court is not the right place for such a delicate legal problem to be resolved. The distinction between major and minor disputes is at the core of R.L.A. litigation and only courts which have previous experience with this issue should hear cases relating to it. There are no bankruptcy considerations which should be taken in account by a court in dealing with this distinction and the resolution of this problem is purely a matter of labor law.[165]

The next problem which has to be answered is what type of bargaining must take place under section 1113 before the rejection of the agreement. The phraseology used by Congress strongly resembles that used in the N.L.R.A.[166] The question thus is whether the N.L.R.A.'s requirement of bargaining to impasse applies also in bankruptcy or whether reasonable efforts without reaching an impasse will suffice as stated in the *Bildisco* case.

This is a difficult question because legislative intent is not buttressed with a committee report and the statements made by the Congressmen are contradictory.[167]

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164. *See, e.g.*, Elgin, 325 U.S. 711 (1945); Order of Telegraphers v. Chicago & N.W. Ry. Co., 362 U.S. 330 (1960); Consolidated Rail v. R.L.E.A., 109 S. Ct. 2477 (1989). But the case where the total confusion over the major-minor distinction is more than apparent was A.L.P.A. v. Eastern Airlines, Inc., 863 F.2d 891 (D.C. Cir. 1988), *reh. den. en banc*, 863 F.2d 913 (1989) (where the D.C. Circuit *en banc* denied rehearing the case by a 7-4 decision and six separate opinions.)

For an article discussing this distinction *see* Case Comment, *Merging the RLA and the NLRA for Eastern Airlines: Can It Fly?*, 44 U. MIAMI L. REV. 539 (1989).

165. *Cf.* In re Goodman, 873 F.2d 598 (2nd Cir. 1989). In that case, the Second Circuit ruled in a successorship case of a bankrupt employer that it was the N.L.R.B. and not the bankruptcy courts which has jurisdiction to resolve the issue of successorship. In its reasoning the court said that "there is no reason for the Bankruptcy Court to decide the successorship issue, because no bankruptcy issue hinges on the successorship determination." *Id.* at 603.

166. 29 U.S.C. 158(d) (1982 Ed.). This point is also made by West, *supra* note 53, at 123.

167. Compare Senator Moynihan's statement that "[t]his provision . . . embodies the basic principles of collective bargaining established by Congress in National Labor Relations Act," 130 Cong. Rec. S8900 (daily ed. June 29, 1984) with Senator Hatch's statement: "this process will involve good faith negotiations between the parties. This was the requirement articulated by the Supreme Court in the *Bildisco* case. The Conference once again preserved the spirit of that court holding by requiring good faith efforts to confer . . .," 130 Cong. Rec. S8892 (daily ed. June 29, 1984).

In the case of the airlines, the problem takes a different form since the extensive case law under the N.L.R.A. regarding the duty to bargain to impasse, are the normal cases, not bankruptcies, and do not exist under the R.L.A. Under the latter, the courts have traditionally abstained from dealing with such problems,[168] and have deferred to the judgement of the N.M.B. In any case, the N.M.B. does not have the authority to impose any sanctions; its power is rather indirect: if it finds that one party does not bargain in good faith it prolongs the mediation process so that additional pressure is exerted upon this party.[169] Consequently, no concept of bargaining to impasse has been developed in the airline industry. Are we going to introduce it in the case of bankruptcies through section 1113?[170]

The answer must be negative because the introduction of concepts which are alien to both parties, and especially when this is done in the emergency atmosphere that a bankruptcy usually creates, can cause great uncertainty. It is preferable if the court makes a thorough investigation of the negotiations and finds whether the employer really bargained with an intention to reach an agreement. If this examination is done in the proper manner by the court, it will not be necessary to get confused with the "bargaining to impasse" concept.[171] After all, these issues are mainly determined on a factual basis rather than in terms of legal standards. If the bankruptcy judge is negatively influenced by the behavior of the employer, he will rule against him regardless of the legal standard and vice versa.[172] The primary problem for the unions does not lie in the standard by which the courts will evaluate the employer's behavior in the negotiations, but rather on the courts' easy acceptance of the employers' argument that the financial problems of the company require the rejection of the agreement.[173]

168. To be sure, the Supreme Court has ruled in Chicago & N.W. Ry. Co. v. United Transportation Union, 402 U.S. 570 (1971) that the obligation "to exert every reasonable effort" to reach an agreement—which is the R.L.A.'s equivalent of N.L.R.A.'s duty to bargain in good faith—is legally enforceable. The decision however did not have any substantial impact since the issue whether the two parties bargained in good faith under the auspices of N.M.B. is not raised in litigation.

169. *See* Detroit & Toledo S.L.R. Co. v. United Transportation Union, 396 U.S. 142, 150 (1969) (saying that prolonging mediation process and the status quo obligations of the Act "frequently make it worthwhile for the moving party (here the employer) to compromise with the interests of the other side and thus reach an agreement without interruption to commerce.")

170. Of course, the creation of such a problem presupposes that the courts will adopt the bargaining-to-impasse standard of rejection for bankrupt N.L.R.A. companies—something which is yet unknown.

171. In fact, West, *supra* note 53, at 89, argues that even under the N.L.R.A. there is no significant difference between the factors that are traditionally considered by the courts and the N.L.R.A. to determine a "good faith" bargaining and those that should be weighed according to *Bildisco*'s "reasonable efforts" standard.

172. *See* Cosetti, Kirshenbaum, *supra* note 136, at 217-19.

173. *Cf.* White, *supra* note 49, at 1198.

3. THE DUTY TO BARGAIN AFTER THE COURT'S DECISION

The discussion thus far has been about the collective bargaining which takes place before the rejection of the agreement. It is unclear however what happens after that decision, when section 1113 ceases to apply and the R.L.A. again comes into play.

Before getting to this point, we should make clear that now, the R.L.A. comes again to life. The special and exceptional procedures that section 1113 has provided for the rejection of the agreements have been exhausted. Since Congress did not widen the bankruptcy exception to cover the post-rejection situation, labor law, and in this case the R.L.A., comes into play.[174] Under this perspective, if the court denies rejection of the labor contract, things are clear. The collective agreement continues in existence and binds the employer until its expiration.[175] Upon expiration, the employer will have to invoke the normal R.L.A. procedures for major disputes in order to renew the agreement, or if negotiations and mediation fail, to unilaterally implement his new terms. Of course, nothing will prevent him from reapplying for rejection of the agreement, before the latter expires, if he can persuade the court with new evidence that rejection is necessary according to section 1113.[176]

The problem occurs in the situation where the court has granted rejection of the labor agreement. What happens next? Is the employer free to initiate his own terms and conditions of employment? Does rejection of the agreement also means its automatic modification according to the employer's wishes? Unfortunately Congress has not dealt with this problem and the answer will have to be given by the courts. Some courts in N.L.R.A. cases seem to have indirectly and without any discussion accepted the idea that the employer is free after the rejection to impose his own terms and conditions of employment.[177] This approach however seems not to perceive the legal situation that is created after the rejection of the agreement.

When the collective bargaining agreement is rejected there is no change in the duty of the employer to bargain with his certified union. As a commentator accurately said, "[W]hen a collective bargaining agree-

174. *See also* West, *supra* note 53, at 157-8.

175. Take for example the case of the Eastern bankruptcy. Eastern's attempt to reject the collective agreement through management resumed the normal negotiations with A.L.P.A. under the procedures of the R.L.A. in order to renew the existing collective agreement. *ALPA Talks With Eastern Airlines Enter New Phrase Under Mediation Board*, Daily Lab. Rep. (BNA) No. 175, at A-6, (Sept. 12, 1989).

176. *See* West, *supra* note 53, at 151.

177. *See, e.g.*, In re Salt Creek Freightways, 47 Bankr. 835 (Bankr. D. Wyo. 1985); In re Allied Delivery Sys., 49 Bankr. 700 (Bankr. N.D. Oh. 1985). *See also* West, *supra* note 53, at 154-55.

ment is rejected . . . the parties' underlying relationship remains unchanged. The employees continue as employees, the union continues as their representative, and the employer remains obligated to deal with that agent; only the contractual structure of the relationship has been removed."[178] In the airline context therefore, a duty to bargain arises under the R.L.A.

While it is difficult for anyone to deny that the employer has a duty to bargain with the union even after rejection of the agreement,[179] the critical question is whether the employer will be required to retain the existing actual working conditions during the negotiations. The situation is similar to the case when collective bargaining in a solvent corporation takes place after the expiration of a collective agreement. Justice Brennan rightfully pointed out in *Bildisco* that "it has widely been held that an employer generally may not make unilateral changes in matters that are mandatory subjects of bargaining even after a collective agreement has expired,"[180] and argued that even if the agreement is unenforceable because of the bankruptcy, the employer cannot alter actual working conditions pending negotiations.[181]

The same can be said about R.L.A. cases. The status quo requirements during the negotiations are the cornerstone of the R.L.A.'s approach to collective bargaining, as has already been discussed.[182] It is indeed impossible to conceive how the process of the R.L.A. would work without these provisions which provide the appropriate climate for the collective negotiations and the mediation efforts to effectively take place.[183]

Retaining the status quo during negotiations is even more important under the R.L.A. than under the N.L.R.A. Under the R.L.A. there is no administrative agency like the N.L.R.B. with an authority to impose sanctions when one of the two parties does not bargain in good faith.[184] The courts, as we have already said, do not usually inquire into the good faith

178. George, *supra* note 49, at 310.

179. Even the Supreme Court said in *Bildisco* that the employer is "obligated to bargain collectively with the employees' certified representative over the terms of a new contract pending rejection of the existing contract or following approval of rejection by the Bankruptcy Court." 465 U.S. at 534 (emphasis added).

180. 465 U.S. at 546, n.14.

181. *See also* West, *supra* note 53, at 156-57.

182. *See Toledo*, 396 U.S. at 150 (1969) (characterizing the status quo requirements of the R.L.A. as "central to its design.")

183. *Id.*

> In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout.

184. Perritt, *supra* note 157, at 519.

of the parties under the R.L.A.[185] Thus, the only pressures upon the employer to seriously bargain are the prolonged mediation procedures of the R.L.A. and the status quo obligations that accompany them.[186] If these requirements are abolished, collective bargaining after the rejection of an agreement will be rendered meaningless.

Thus, consistent with the requirements of the R.L.A. it should be held that when the employer starts the negotiations with the union after rejection of the agreement, the employer will have to retain the existing working conditions. These will be either the ones existing at the time that the employer sought rejection of the agreement, or the conditions imposed by interim relief, in case the employer has successfully petitioned the court to grant him such a remedy.[187]

It might be questioned, however, and the Supreme Court has done so in *Bildisco*,[188] that if bargaining over the new terms is required after rejection, what is the benefit for the employer from the rejection of the agreement? The answer is that there is a benefit and it is large: the employer, by being allowed to reject the agreement before the end of its term, now has the opportunity to press the unions for concessions and, if they do not concede, to unilaterally implement his own terms after exhausting the procedures of the R.L.A. for major disputes.[189]

Another question raised regarding post-rejection collective bargaining is that since there has been bargaining before the rejection, what is the need for new bargaining, especially if impasse has been reached? This point neglects the difference in the situations under which the bargaining takes place. Before rejection, the union always has the hope that the agreement will not be rejected by the court at least to the extent that the employer wants. After the judicial authorization of the rejection, however, the union confronts a new situation; it knows that unless an agreement is reached, the employer will ultimately be able to impose his own terms. Moreover, under the R.L.A., in the airline industry, the N.M.B.'s[190] mediation services will now be offered, giving another dimension to the collective bargaining taking place after the rejection.

One should not overlook the fact that this mediation process is a pro-

185. *See supra* note 165.

186. *See supra* note 169 and accompanying text.

187. *See* West, *supra* note 53, at 153-54 (arguing that granting of interim relief creates a "new status quo").

188. Bildisco, 465 U.S. at 529.

189. For this argument *see also* George, *supra* note 49, at 331.

190. One question is whether the N.M.B. will play any role in the bargaining before the rejection. I think that this will require the consent of both parties, who of course are always free, if they both agree, to invoke the services of any mediator. If however, one party does not consent the N.M.B. will not be allowed to intervene since § 1113 excludes any other procedure when rejection of the agreement is at stake.

longed one[191] which will be dangerous to the process of reorganization. We should not forget, however, that the employer is offered the remedy of an interim relief. Thus, if any delay is really detrimental for the survival of the company, the employer has a remedy to deal with it.[192]

Further than that, it can reasonably be hoped however, that the N.M.B. will take into account the special needs of the bankruptcy situation and conclude its efforts in a short time.[193] It will also have to take into account the negotiations that took place before the rejection as an indication, but no more than that, of what the chances are for reaching an agreement. In any case, if this process proves in practice to be too long for bankruptcy needs, then some legislative action might be required to impose time limits upon the post-rejection bargaining and mediation under the R.L.A.

Until then, it is conceivable that in cases where the mediation process is unreasonably prolonged by the N.M.B., the bankruptcy court may intervene and order a termination of the mediation or, more accurately, a release of the employer from his status quo obligations. It does not escape attention that under R.L.A. case-law the courts cannot intervene in the mediation process and that the N.M.B. has absolute discretion to prolong the mediation.[194] However, this was a judicial interpretation of the law and one may assume that the exceptional circumstances of a bankruptcy would allow the bankruptcy courts to interfere with the N.M.B.'s efforts after an agreement has been rejected. After all, it was exactly on these exceptional circumstances that the Supreme Court based its decision in *Bildisco*, even if this required the Court to disregard some fundamental principles of this country's labor policy.[195] One wonders why the

191. *See* Burgoon, *Mediation Under the Railway Labor Act*, in R.L.A. AT FIFTY, *supra* note 146, at 79 (estimating that the average time of mediation is 7-8 months.) It is my belief that during the eighties, the average length of mediation has increased.

192. *See* West, *supra* note 53, at 157-58.

193. Many critics of the N.M.B. would counter that in certain cases, like Eastern Airlines's recent negotiations with I.A.M., the N.M.B. prolonged the mediation for over a year and did not take into account the financial troubles of the company which thus worsened. *Cf. e.g.* Katz, *supra* note 5, at 90 (accusing N.M.B. of being biased in favor of the unions).

The problem however might lie not in any Board's mistake but in the lack of good faith on the part of one of the two parties and the belief of the Board that the two parties had not made every reasonable effort to reach an agreement as R.L.A. requires. *Cf. Mediation Board Chairman Defends Delays in Pursuit of Airline Industry Settlements*, Daily Lab. Rep. (BNA) No. 73, April 16, 1984, p. A-8. In the case of bankruptcy however, N.M.B. will have to take in account that the court has already approved the need for the rejection of the agreement and has thus accepted the employer's arguments. It will be hard therefore for N.M.B. to dispute the arguments that management is making in the negotiations and thus prolong the mediation process.

194. International Ass'n of Machinists v. N.M.B., 425 F.2d 527 (D.C. 1970). *See supra* note 121 and accompanying text.

195. *See* George, *supra* note 49, at 336 (talking about "a disheartening erosion of the very foundation of the National Labor Relation Act—the duty to bargain.")

Supreme Court would not tolerate a judicial innovation of much lesser magnitude, such as the one proposed here.

Whether this approach will be adopted by the courts and ultimately by the Supreme Court is unknown. No case has yet arisen concerning the duty to bargain in bankruptcy after the enactment of section 1113.[196] Furthermore, as has already been said, no bankruptcy of a major air carrier has yet been decided under the 1984 Act.[197] Thus, the difficult task of accommodating section 1113 and the duty to bargain under the R.L.A. has not been addressed by the courts. The *Bildisco* case, however, indicates that economic considerations and ideological approaches to the labor-management relations rather than legal principles will play an important role in the outcome of the cases.[198] Therefore, it will be necessary to supply the solutions that have been proposed so far, with the necessary economic and social justification in order to make them convincing. This is the focus of the next part of this article.

D. Policy Considerations in Bankruptcy-Labor Law Dilemmas

It should be emphasized that the most important issue for a court facing the conflict of labor and bankruptcy laws is that it should not view the collective agreement as just another debt burdening the bankrupt company. Nor should the court treat the employees and the unions as another debtor.[199] The employees have more at stake in the survival of the company than the other creditors.[200] Furthermore, the collective agreement that may arise after the section 1113 procedures and the resultant collective bargaining—especially in the airline industry which is a labor intensive one—and has the potential of becoming the salvation plan of the company. A collective bargaining agreement is not only about wages and other benefits; it also concerns productivity rules, work-rules etc., the importance of which, to the airlines, cannot be underemphasized. If these issues are successfully dealt with under the section 1113 procedures, then bargaining will not only result in alleviating some of the financial burdens of the company but they can also become *de*

196. In some N.L.R.A. cases however, bankruptcy courts seem to have implied that no bargaining is required after bankruptcy. *See, e.g.*, In re Salt Creek Freightways, 47 Bankr. 835 (Bankr. D. Wyo. 1985), and In re Allied Delivery Sys., 49 Bankr. 700 (Bankr. N.D. Oh. 1985).

197. *See supra* note 145.

198. *Cf.* White, *supra* note 49, at 1202 (noting about other authors writing on bankruptcy-labor law conflicts that "the conclusions [they] arrived at were not reached primarily by legal analysis but from *a priori* judgments.")

199. *See* Cosetti, Kirshenbaum, *supra* note 136, at 222; Merrick, *supra* note 49, at 331-32 (1986).

200. *Cf.* Merrick, *supra* note 49, at 328: "Different standards are applied with respect to rejection, not because the contract is different from the other contracts, but because the parties are different from other parties."

facto labor reorganization plan of the bankrupt company. As one commentator said, "[R]ejection of the contract may decide technical matters related to claims on liquidation. It will be a waste of time [however] if it does not result in a new economic bargain."[201] When the stakes are so high, the court must make sure that even the last chance of a productive dialogue has been exhausted.[202]

It must always be kept in mind that a sense of community of interests is a prerequisite for a successful effort of a company to return to a healthy financial situation.[203] Of course, no imposition of legal obligations alone, will create such relations.[204] But serious collective bargaining, encouraged by law, will increase the flow of information between management and the union. Better informed parties are less likely to behave in a way that will destroy the company.[205] Especially when viewed from the union's side, increased information might convince it that management demands are justified and they are the only chance for the company's very survival. A major problem in bankruptcies is that unions and the employees, even if they realize the extent of the financial problems of the company, do not believe that the proposed concessions by the employer are either necessary or effective.[206] Collective bargaining will reduce the risk of such suspicion when the latter is unjustified.

By this latter reference to suspicion we come to another important aspect of the problem: any right we give to one or the other party may be detrimental to the process of reorganization if it is abused by its owner. Airlines have been characterized, since 1978, by hostile labor relations

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201. Cosetti, Kirshenbaum, *supra* note 136, at 226.

202. *Id.* "Nor should the courts allow the judicial process to be used as a substitute for bargaining."

203. The relative success of Continental's reorganization, despite confrontational labor relations, should not be used as evidence justifying judicial tolerance towards an extensive use of bankruptcy rights against labor by a bankrupt employer. The issue is not whether this particular use of bankruptcy procedures has enabled Continental to continue its operations. It is rather whether a more restricted use of bankruptcy laws would have provided the same result. Undermining unionism and creating a war-like climate in labor relations of a particular company is too high a price to be paid if it can be avoided through stricter requirements for rejection of collective agreements. This point becomes even more important if one takes in account that Continental's reorganization is still far from being successful. *See, Needed Fast at Continental: Profits*, N.Y. Times March 28, 1989, p. D-1, col. 3.

204. Merrick, *supra* note 49, at 346, "No employer-union relationship will become a cooperative venture simply by stating it should be so, but it is the Supreme Court's obligation to promote that result."

205. *Cf.* Simkin, Fidandis, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 141 (1986): "Many strikes are caused by ineptness. The *knowledgeable* persons on both sides of the table know about where the settlement area is, with or without a strike." (emphasis added)

206. *See* Merrick, *supra* note 49, at 362: "The sphere of uncertainty for a union always will be what are the probabilities that the business will succeed if concessions are made, and if they are not made."

between a management anxious about fierce competition from non-union low cost carriers vis-a-vis labor heavily unionized and weary about the erosion of the benefits that it had enjoyed during the regulation era.[207] In such a setting, the fear of abuse is a realistic one.

To be sure, an employer has a lot of incentives against filing for bankruptcy. Losing a substantial part of its managerial freedom or being replaced by a trustee in bankruptcy and seeing the good will of its company being seriously injured, are a few examples.[208]

This should not lead us to underestimate the danger of abuses of bankruptcy from the part of the employer.[209] The increase in the number of holding companies, controlling more than one airline or even controlling companies in different kinds of industry, diminishes the incentives that an employer has against filing for bankruptcy reorganization.[210] For example, when Eastern filed for bankruptcy, Texas Air, owner of Eastern, actually made that decision, and had less to lose than the employer (Eastern Airlines). The road of bankruptcy reorganization is becoming more and more an alternative for large and/or diversified companies; an alternative which is certainly a painful one but which sometimes seems better than the selling of the troubled company. Again Eastern Airlines proves this point.[211] And as a matter of principle, there is no reason for the law to make the bankruptcy reorganization alternative seem to the employer more or equally preferable to the selling of the company.[212]

The problem with using bankruptcy to attack unions is not whether an employer will choose to go bankrupt for this reason. Rather, the problem is whether the employer will use the opportunity created by the bankruptcy that he has filed for legitimate business reasons, in order to avoid his labor law obligations to an extent unjustified by the needs of reorgani-

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207. *See generally*, Cassell, Spencer, AIRLINE LABOR RELATIONS UNDER DEREGULATION: FROM OLIGOPOLY TO COMPETITION AND RETURN? (1986); Katz, *supra* note 5; Cappelli, *Competitive Pressures, supra* note 21.

208. WHITE, *supra* note 49, at 1186-87. *Cf.* COSETTI, KIRSHENBAUM, *supra* note 136, at 183 "[T]he fear by organized labor that employers would rush to bankruptcy courts to rid themselves of unions has not materialized."

209. *But see* WHITE, *supra* note 49, at 1186.

210. *Cf.* Comment, *An Economic and Legal Analysis of Union Representation on Corporate Boards of Directors*, 138 U. PA. L. REV. 892, 929-30 (1982) (investors insure themselves from losses by diversifying their investments.)

211. *See Ueberroth Says Plan to Buy Eastern Is Off, Carrier Says It Will Rebuild*, Daily Lab. Rep. (BNA) (70 DLR) A-11 (April 13, 1989).

212. It seems a bit ironic that the Supreme Court has justified its approach to the successorship doctrine by the need of a failing company to avoid bankruptcy and be sold to a new owner. *See* Burns Int'l Sec. Svcs., Inc. v. N.L.R.B., 406 U.S. 272, 288 (1972) (noting that "saddling such an employer (a successor) with the terms and conditions contained in the old collective-bargaining contract may . . . inhibit and discourage the transfer of capital.")

The irony is that in *Bildisco* the court gave the employer incentives to prefer bankruptcy reorganization to the selling of the company.

zation. This danger is highlighted in an industry like the airlines where management seems not to have a very high opinion about the concept of unionism.

The fear that prolonged collective bargaining may harmfully delay the process of reorganization is a legitimate one. There is also the problem that a union may act in a strategic way with the purpose of retaining whatever gains it can from the existing agreement, even if this endangers the process of reorganization.[213] It is also possible that a union that represents employees in more than one company, (and this is the case with almost all unions in the airlines), may sacrifice the interests of the employees of that particular company, in order to promote the interests of the union as a whole, for example, by giving signs of toughness towards management on a national level.[214] In practice, however, this possibility is very small in the context of the American labor movement with its highly decentralized structure and the great independence that each branch of a certain union has from the other branches and the central administration of that union. Anyone who is familiar with the fights between branches of the same unions in different companies during mergers, so as to protect the interests of the employees of their own company, must realize that the fear expressed above is a very distant one.[215]

On the contrary, counteractive strategic behavior is more probable on the part of management. Seeing an opportunity to crash the union and be permanently relieved from its pressure, management will be tempted to use the exigency of bankruptcy as an excuse for its union busting tactics and it will be hard to prove in the courts an anti-union animus.[216] Even worse, when a company is merely one part of the business of a larger company[217] management may sacrifice the interests of the particular company in order to gain an advantage over unions in the rest of its

213. This fear has been apparent in the recent major labor cases decided by the Supreme Court, First National Maintenance Corp. v. N.L.R.B., 452 U.S. 666, 681 (1981), and *Bildisco*.

214. For such an interpretation of unions' motives, *see Classic Struggle—Eastern's Strike Tests Ability of Big Labor to Re-Establish Itself*, Wall St. J., March 6, 1989, at 1-1, col. 1.

215. For the decentralized organization of most unions in the airlines, *see* Cappelli, *Economist, supra* note 19, at 55.

216. This remark becomes even more relevant after the unfortunate decision of the D.C. Circuit in A.L.P.A. v. Eastern, 863 F.2d 891, 902 (D.C. Cir. 1988) to introduce into the R.L.A. the *Wright* doctrine. *See* Wright Line, 251 N.L.R.B. 1083 (1980), *enforced* in N.L.R.B. v. Wright Line, 662 F.2d 899 (1981), *cert. denied*, 455 U.S. 989 (1982). Thus, in *Eastern* the Court held that an anti-union behavior during collective bargaining is not unlawful if there are other legitimate business reasons which would make the employer behave in the same way even in the absense of anti-union animus. For a criticism of this approach, *see* Judge's Mikva's dissent from the Circuit's decision to refuse *en banc* rehearing of the case. A.L.P.A. v. Eastern Air Lines, Inc., 863 F.2d 891, 915 (D.C. Cir. 1988).

217. So far Delta has purchased Western, T.W.A. owns Ozark, Northwest has acquired Republic, and Texas Air has four airlines. *See* Brenner, *supra* note 5, at 187.

business.[218]

Furthermore, it should be noted that the usual deference of the courts to the employers' business judgment in solvent companies,[219] is not justified, at least to the same extent, in the case of bankruptcy. After all, a bankruptcy, to some extent, means a failure of management[220] and there is every reason for a court to be hesitant to accept the solutions proposed by a bankrupt employer for reorganization. The appointment of a trustee is a measure to be taken only in extreme cases.[221] The reasoning for this approach is well established: the managers of the company "know the persons involved, the industry, the competition, and the business data. They are involved on a daily, rather than an intermittent, basis in managing the company."[222] If these considerations are strong enough to cause us to overlook some degree of failure that management might have shown before the bankruptcy, they do not preclude us from enforcing those institutions which might assist management in the execution of its duties after the bankruptcy filing. When labor costs are the main issue in a given bankruptcy, the increase of dialogue with the unions is a good alternative.[223] It is also of less severity than the appointment of a trustee or even an examiner. This alternative has the potential of leading to better solutions other than ones that can be unilaterally offered by a manage-

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218. Just to give an example, we should remind the reader that when Eastern filed for bankruptcy in March 1989, the N.M.B. was considering an application by Eastern's unions to hold that Eastern and Continental are one bargaining unit and thus, Eastern's unions should also represent Continental's non-union employees. The application had many chances of success and it is not difficult to understand the negative impact that such a decision would have upon Texas Air's—the parent company of Eastern and Continental—management. *See Texas Air Faces Test in Bargaining Ruling*, N.Y. Times, Dec. 12, 1988 D-25, col. 5. After the filing of the bankruptcy, the possibility of such a ruling becomes quite remote and this is a shortfall that Texas Air gained for Continental because of Eastern's bankruptcy.

219. *See* George, *supra* note 49, at 343: "The Court has traditionally refused to second-guess the reasonableness of an employer's bargaining demands."

220. To be sure, there are many external factors for a company's failure. The very fact however that in the airline industry some particular companies actually went bankrupt and others made profits means that there are always important substantive factors for the failure of an airline.

221. *See, e.g.* In re Hotel Associates, Inc., 3 Bankr. 343, 345 (1980) ("resort to the appointment of a trustee may be an extraordinary remedy and an additional financial burden to a hard pressed debtor seeking relief under Chapter 11.") *See also* E. WARREN & J. WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 435 (1986).

222. Nimmer & Feinberg, *Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees and Exclusivity*, 6 BANK. DEV. J. 1, 11 (1989).

223. There will of course be cases where the unions will share some of the responsibility for the company's failure. *See, e.g.*, Perritt, Jr., *supra* note 157, at 523 (1989) (describing the railroad unions' stubbornness in face of Penn Central's management's demand for modifications in labor agreements so as to prevent financial collapse). But the blame for a failure is usually commensurate with the degree of authority one has over conduct of a company. Thus, the management will often have the lion's share of responsibility for the bankruptcy.

ment whose ability has been questioned by filing bankruptcy.[224]

Another point which is not usually raised in the debate about labor law problems in bankrupt companies is the following: there are two ways of controlling the employer's behavior in order to prevent abuses—the courts, or collective bargaining. The first can have limited effectiveness since it is rare for a judge not to defer to the employer's judgment when the former faces the troubling financial situation of the bankrupt company.[225] Thus, collective bargaining is the only available method and, therefore, must be encouraged. Dialogue and dissemination of information restricts to a certain degree, the possibilities for abuses.[226] Moreover, these negotiations are often the only way through which a court may get some idea of whether the claims made by the employer about the burden that a collective agreement imposes upon him are really made in good faith. Finally, in a bankruptcy situation the employees usually have the greatest pressure upon them.[227] In an era of high capital volatility and increasingly diversified capital holding, management has less to lose. As for the unions, their main weapon (strike), loses much of its strength in a bankruptcy situation. The unions are often caught in a no-win situation: the strike is either going to fail because of their members's unwillingness to participate based upon the fear that the company may thus collapse or "succeed" in terms of participation in which case the company may end up in a financial disaster.

All things being equal, the balance of economic power in bankruptcy weighs against the employees. To give them the right of collective bargaining is not only a matter of fairness; it is a necessary, even if not sufficient, step towards prevention of abuses of bankruptcy that may be detrimental to the long term stability of labor relations in this country.

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224. *Cf.* Countryman, *Is the National Labor Policy Headed for Bankruptcy?* 1984 ANN. SURV. BANK. L. 159, 162-63 ("Another factor that might have something to do with the profit and loss statement is never mentioned by management: managerial inefficiency. . . .").

225. *See* White, *supra* note 49, at 1181 (arguing that whatever test is applied for the rejection of the labor contract will be "merely a cynical facade used to obscure the true standard, namely, that the business judgement test prevails."). *See also* Note, *supra* note 17, at 386 ("if a company is in financial trouble and labor costs represent a significant portion of a company's problems, bankruptcy courts will continue to approve reorganization petitions that reject labor contracts.").

226. *See* Note, *Rejection of Collective Bankruptcy Agreements Under the Bankruptcy Amendments of 1984*, 71 VA. L. REV. 983, 1008 (1985) ("Because of the employees' stake in a successful reorganization, a union refusal to accept proposed modifications should alert the bankruptcy court to possible overreaching on the part of the debtor.").

227. *See* White, *supra* note 53, at 1189; Note, *supra* note 20, at 385 ("[N]o longer can the unions demand, 'if we don't get what we want, we'll take a walk . . .' That walk may now be nothing more than a one-way trip."). *Cf. also* West, *supra* note 53, at 99.

But see the Wheeling-Pittsburgh strike in a bankruptcy situation where the company finally retreated from its positions. *See* Note, *supra* note 141, at 517.

CONCLUSION

This article has traced the problems which are created by the power a bankrupt airline has under section 1113 of the Bankruptcy Code. Also examined was the development of the right to reject an agreement in traditional N.L.R.A. cases. Then, an attempt was made to identify the problems which are created in the particular context of the R.L.A. and to suggest the appropriate solutions. As it was impossible to list and discuss all the potential problems that may be created, since there is no relevant experience as of yet, we developed at the end the general philosophy under which such problems must be addressed by the courts in the future. The emphasis was on the benefits that bargaining creates for bankruptcy reorganization and the potential for abuses that each party has in such a process. The major conclusion was that the courts should encourage dialogue between the two parties, the employer and the union, while at the same time making sure that the collective bargaining process does not become an interminable process to the detriment of the reorganization process.