
I. Introduction

In June 1982, the Supreme Court, in *Northern Pipeline v. Marathon Pipeline*, held that the bankruptcy court system had been given powers under the jurisdictional provisions of the 1978 Reform Act which were beyond the scope of the Constitution. This decision triggered a crisis in the court system. Legislation dealing with this situation passed the Senate five times, but the House refused to take action. As the years passed, it became apparent that further reforms within the bankruptcy system were necessary.

In February 1984, the Supreme Court, in *NLRB v. Bildisco*, held that a debtor-in-possession may unilaterally reject a collective bargaining agreement if it is found that the agreement is burdensome to the reorganization and the equities favor rejection. Prior to the *Bildisco* decision, the bankruptcy courts had utilized varying standards for rejection of collective bargaining agreements by debtors-in-possession. The *Bildisco* Court approved the business judgment standard. Other courts have used the failure of the reorganization standard, in which rejection would be allowed only if the debtor-in-possession can prove that the reorganization will fail unless he is allowed to reject the contract. However, the Supreme Court went further than any circuit court in holding that the debtor-in-possession could unilaterally reject the labor contract prior to seeking the bankruptcy court's approval.

This holding generated a great deal of controversy, with the Court splitting 5-4 on the issue. The decision spurred Congress and the labor community into action. The House responded to the need for bankruptcy reform by enacting 11 U.S.C. section 1113.

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4. Id. at 1196.
5. Id. at 1194. The terms debtor-in-possession and trustee will be used interchangeably throughout this note.
6. Id.
8. Id. at 1199-200.
II. Bankruptcy and Labor Law

Generally, bankruptcy proceedings take one of two forms. Chapter 7, or straight bankruptcy, governs the collection, liquidation, and distribution of the debtor’s assets to his creditors. Normally, a Chapter 7 proceeding poses no problem as to whether a collective bargaining agreement should be rejected. On the other hand, in a Chapter 11 proceeding, or reorganization petition, problems have arisen concerning the rejection of labor contracts. Congress has indicated that the overriding purpose of Chapter 11 is “to take whatever steps are expedient to preserve the failing business, to prevent a debtor from going into liquidation with an attendant loss of jobs, and possible misuse of economic resources.”

To facilitate reorganization, the Bankruptcy Code gives the debtor broad powers to reject any executory contract prior to confirmation of a reorganizational plan. A contract is executory when performance is due to some extent from both parties. Courts are in agreement that a collective bargaining agreement falls within this definition. To reject an executory commercial contract, the debtor need only show that rejection will benefit the estate. The rejection of the contract


11. But see In re Price Chopper, 19 B.R. 462 (Bankr. S.D. Cal. 1982); In re Alan Wood Steel, 449 F. Supp. 165 (E.D. Pa. 1978) (bankruptcy court was faced with petition to reject collective bargaining agreement even though receivers had permanently shut down the plant).


13. 11 U.S.C. § 365(a) (Supp. II 1978) provides that “[e]xcept as provided in Section 765 and 766 of the title and in sub Sections [sic] (b), (c), and (d) of this Section, the trustee, subject to the court’s approval may assume or reject any executory contract or unexpired lease of the debtor.” See generally Levy & Blum, Limitations on Rejection of the Union Contracts Under the Bankruptcy Act, 83 Com. L.J. 259 (1978) [hereinafter cited as Levy & Blum]. Where the source of this rule is described, “[T]he general rule permitting the rejection of executory contracts, embodied in the Bankruptcy Act, is based on an historical background. It was a long settled rule that equity receivers and assignees in bankruptcy could reject executory contracts, and this rule can be traced to English Jurisprudence.” Id. at 260.


16. See Note, The Bankruptcy Law’s Effect, supra note 10, at 393. Actually two tests for rejection of non-labor executory contracts have arisen. One requires the debtor
must be total; partial rejection is not permitted. The Bankruptcy Code provides that, upon rejection, the date of breach will be deemed to have been the day before the petition was filed. However, if the debtor enters into a contract during the reorganization period, the other party to the contract will be entitled to first priority as a cost of administration.

The primary policy underlying the National Labor Relations Act (NLRA) is "to promote the peaceful settlement of industrial disputes by subjecting labor management controversies to the mediatory influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife."

Section 8(d) of the NLRA provides the framework by which a party to the collective bargaining agreement may terminate or modify such an agreement by forbidding unilateral modification or termination.

These policies conflict when a trustee, because of his labor costs, seeks bankruptcy court approval to reject a collective bargaining agreement as an executory contract. Which policy is to prevail becomes the primary issue which the courts are required to resolve. Further-

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19. See 2 Collier on Bankruptcy § 365.08 (1984); 5 Collier on Bankruptcy § 1123.02(2)(b) (1984); In re IML Freight, 37 Bankr. 556, 559 (Bankr. D. Utah 1982). In re IML Freight held that a collective bargaining agreement entered into after the court had properly allowed the trustee to reject the first was not a true executory contract under § 365(a). Any postpetition agreement, in the event of breach by the trustee, will be entitled to a priority as an administrative expense.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
23. See also Levy & Blum, supra note 13, at 260-61.
more, when the debtor unilaterally rejects a labor contract, the issue arises as to whether such a rejection constitutes an unfair labor practice.\textsuperscript{25}

Congress, in section 365(a)’s legislative history, never indicated whether its provisions were to apply to collective bargaining agreements.\textsuperscript{26} Although several factors suggest that section 365(a) was intended to apply to labor contracts, Congress specifically exempted\textsuperscript{27} collective bargaining agreements subject to the Railway Labor Act, while making no similar exemption for agreements under the NLRA. In addition, more than three years prior to the enactment of the Bankruptcy Code, the Second Circuit, in \textit{Shopmen’s Local No. 455 v. Kevin Steel}\textsuperscript{28} and \textit{Brotherhood of Railway, Airline & Steamship Clerks v. REA Express, Inc.},\textsuperscript{29} held that the trustee could reject collective bargaining agreements as executory contracts. Congress’ failure to express disagreement with this interpretation is significant because of the presumption that Congress is aware of judicial interpretations of statutes and that it adopts those interpretations when it reenacts statutes without change.\textsuperscript{30} Also, Congress cited \textit{Kevin Steel} and \textit{REA Express} as support when it enacted a statute allowing bankrupt municipalities to reject collective bargaining agreements.\textsuperscript{31}

Due to conflict between the labor policies and the bankruptcy

\textsuperscript{25} Bordewieck & Countryman. The author states, "[The] mid-term cancellation of a collective bargaining agreement violates the express directives as well as the underlying policy of the NLRA." However, since the Bankruptcy Code expressly permits the employer to reject such contracts, it would be anomalous to penalize an employer for taking such permissible action. It is the preferred view that a rejection of a labor contract with the bankruptcy court’s approval does not constitute an unfair labor practice. \textit{See also} Bildisco, 104 S. Ct. at 1200 ("A debtor-in-possession does not commit an unfair labor practice by failing to comply with [§ 158(d)] prior to formal rejection of the collective bargaining agreement. . . ."). \textit{See supra} notes 13, 21 & 22 and accompanying text (text of relevant statutes and policies).


\textsuperscript{27} 11 U.S.C. § 1167 (Supp. II 1978) provides:

Notwithstanding section 365 of this title, neither the court not [sic] 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. Section 151 et. seq. (1976)), except in accordance with section 6 of such Act (45 U.S.C. Section 156).

\textsuperscript{28} 519 F.2d 698 (2d Cir. 1975).

\textsuperscript{29} 523 F.2d 164 (2d Cir. 1975), \textit{cert. denied}, 96 S. Ct. 855 (1976).

\textsuperscript{30} Bordewieck & Countryman, \textit{supra} note 24, at 294-95 (construing Lorillard v. Pons, 434 U.S. 575 (1978)).

policies, several tests for rejection of labor contracts in bankruptcy
have been developed. The tests a trustee must meet range from the
very liberal to the very strict. Courts agree, however, that a trustee
cannot seek the rejection of a collective bargaining agreement merely
because it is inconvenient, or to avoid the effect of the laws involving
labor disputes.32

The business judgment test, approved in *Bildisco*, has also been
applied to collective bargaining agreements.33 However, courts generally
agree that a stricter standard should govern the decision to reject a
collective bargaining agreement.34

Prior to *Bildisco*, the two benchmark cases which outlined the
standard for rejection of labor contracts were *Kevin Steel*35 and *REA
Express*.36 In *Kevin Steel*, the court began its analysis by deciding that
a debtor-in-possession is a new entity, legally different from the
prebankruptcy petition employer. As a new entity, the debtor-in-
possession does not become a party to any executory contract unless
he expressly assumes the obligation. The debtor-in-possession was not
subject to the termination procedures of section 8(d) of the NLRA
until he made a new agreement with the union.37 Because of the
NLRA's strong policies prohibiting unilateral modification and
termination, the court determined that it must defer to the NLRA
and not base its decision to allow rejection solely upon the business
judgment test.38 The court stated that rejection should be permitted

32. See *In re Brada Miller*, 702 F.2d 890, 901 (11th Cir. 1983) ("It has long
been held that such an abuse of the bankruptcy and labor laws (employer use of
Chapter 11 and Section 365 for the sole purpose of escaping a union contract) will
not be tolerated under any circumstances."); *In re Mamie Conti Gowns*, 12 F. Supp.
478 (S.D.N.Y. 1935). This is an early case where the debtor-in-possession sought
to reject the contract without proof that its labor costs were disproportionately high.
The court felt that because the debtor's assets largely exceeded its liabilities, it could
not be sure that the entire bankruptcy proceeding was not a sham brought to rid
the debtor of the union. Therefore the court denied the request. See also *Levy & Blum,
supra* note 13.

33. See *In re Ateco*, 18 Bankr. 915 (Bankr. W.D. Pa. 1982); *In re Klaber Bros.,
173 F. Supp. 83 (S.D.N.Y. 1959) ("The Bankruptcy Act makes no distinction among
classes of executory contractors. . . . [T]here should be no differentiation in the treat-
mant of executory employment or collective bargaining contracts as to termination
under the circumstances of this case.").

34. *Bildisco*, 104 S. Ct. at 1195.
35. 519 F.2d 698 (2d Cir. 1975).
36. 523 F.2d 164 (2d Cir. 1975).
37. *Bildisco*, 519 F.2d at 704.
38. Id. at 707. "Such a narrow approach totally ignores the policies of the Labor
Act and makes no attempt to accommodate them." Id. See supra notes 16 and 34,
as well as accompanying text (business judgment rule text).
“only after thorough scrutiny, and a careful balancing of the equities on both sides . . . .”

The following month, in *REA Express*, the Second Circuit was faced with a request by the debtor-in-possession to reject a labor contract under the Railway Labor Act (RLA). Although the court could have limited its holding to cases solely under the RLA, it chose not to differentiate between those and the cases decided under the NLRA. The court added a more stringent requirement to the *Kevin Steel* test for rejection, holding that in order to authorize rejection, a bankruptcy court must carefully weigh all the factors and equities involved to determine whether efforts to save the company would be thwarted by failure to authorize rejection. Relying on *NLRA v. Burns Security Services*,

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40. Section 2 of the Railway Labor Act, 45 U.S.C. § 156 (1970), provides: “No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 156 of this title.” *See REA Express*, 523 F.2d at 168. In addition, § 6 of the resolution of the RLA obligates employers to utilize protracted procedures for resolution of any differences concerning a collective bargaining agreement. Cf. supra note 27.

41. See *REA Express*, 523 F.2d at 168, where the court noted:

The purpose of these provisions of the RLA, like that of §§ 8(d) of the [NLRA], 29 U.S.C. Section 158(d), which was before us in *Kevin Steel*, is to avoid disruptions of commerce by forcing the parties to exhaust collective bargaining procedures and where the RLA applies, to encourage use of arbitration and mediation before engaging in self help, strikes or other forms of unilateral action.

By this statement, the court indicates that not only should the test announced in the instant case apply to labor contracts under the RLA but also to those under the NLRA.

42. The *REA* court stated, “[I]n view of the serious effects which rejection has on the carrier’s employees, it should be authorized only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected; the carrier will collapse and the employees will no longer have their jobs.” *Id.* at 172.

43. 406 U.S. 272 (1972). It was held that the successor employer is ordinarily free to set the terms upon which it will hire the employees of the predecessor. Even though the successor will not normally be bound by the existing labor agreement, it will be required to negotiate with the duly certified representative of the employees. See also *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) (where successor’s employment is substantially and continuously similar to predecessor’s, successor may be required to abide by the terms of the existing labor contract); *In re De Luca*, 38 Bankr. 588 (Bankr. N.D. Ohio 1984) (debtor-in-possession is under a duty to bargain with the union and may enter into a collective bargaining agreement without court approval and will be subsequently bound). The holding of *Local Joint Executive Board v. Hotel Circle*, 613 F. 2d 210 (9th Cir. 1980), was rejected. In *Hotel Circle*, the court held that a receiver, after rejection of a collective bargaining agreement, could not enter into a new agreement with the union because it was beyond the limited scope of the receiver.
the court held that REA Express, as a successor employer, was required to bargain collectively with its employees, subsequent to rejection.\footnote{44}

An even stricter procedural standard emerged in \textit{In re Alan Wood Steel}.\footnote{45} There, the district court adopted a two-part test to determine whether rejection would be authorized. First, the bankruptcy court must determine whether the contract is so onerous and burdensome to the estate that failure to reject would make a successful reorganization impossible. Secondly, the equities must be weighed and found to favor the debtor.\footnote{46} The rigorous procedural requirements of this test could lead, however, to the unusual result that a court could forbid rejection if the equities failed to favor the trustee, even though the enterprise would collapse as a result.\footnote{47}

Most courts have adopted the tests of either \textit{Kevin Steel} or \textit{REA Express}. However, no court has permitted unilateral rejection by the trustee without court approval. In \textit{Bildisco} the Supreme Court rejected the test of \textit{REA Express} and adopted the \textit{Kevin Steel} test for rejection of a collective bargaining agreement under the NLRA.\footnote{48} The Court went further than any previous court in holding that the debtor-in-possession may unilaterally reject the labor contract price to approval by the bankruptcy court.\footnote{49} The Court explicitly rejected the \textit{Kevin Steel} “new entity” theory and held that the debtor-in-possession remains the same entity.\footnote{50} The Court reasoned that a collective bargaining agreement is not an enforceable contract until formal acceptance following the filing of a petition in bankruptcy.\footnote{51} Furthermore, the Court held

\begin{itemize}
\item \textit{REA Express}, 523 F.2d at 170.
\item \textit{See Bordewieck & Countryman, supra note 24. See also In re Blue Ribbon Transp.}, 113 L.R.R.M. (BNA) 3505 (Bankr. R.J. 1983). Applying a two-step analysis similar to that in \textit{Alan Wood Steel’s}, the \textit{Blue Ribbon} court, after weighing the equities, refused to reject a collective bargaining agreement since top heavy management salaries were the price source of the company’s financial distress. The court never moved to step two, though it did comment that once excessive management overhead was reduced, the labor contract would be rejected as burdensome to the reorganization.
\item \textit{Bildisco}, 104 S. Ct. at 1196. “The standard which we think Congress intended is a higher one than that of the \textit{business judgment rule}, but a lesser one than that embodied in the \textit{REA Express} opinion for the Second Circuit.” \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 1200.
\item \textit{Id.} at 1199. The Court determined that if the debtor-in-possession was required to seek bankruptcy approval to reject, such an approval would overly restrict the policy reasons behind the bankruptcy act. The policies of flexibility and providing breathing space to the debtor would be severely curtailed.
\end{itemize}
that the debtor-in-possession may terminate the labor contract unilaterally without court approval and not be guilt of an unfair labor practice under section 8(d) of the NLRA.\textsuperscript{52} The Court also noted that under the successorship doctrine of \textit{NLRA v. Burns}\textsuperscript{53} and \textit{John Wiley & Sons v. Livingston},\textsuperscript{54} the past rejection employer is obligated to confer in good faith with the employees over the terms of a new contract.\textsuperscript{55}

III. \textbf{Legislative History of 11 U.S.C. Section 1113}

On the day that \textit{Bildisco} was decided, Representative Peter Rodino, chairman of the House Judiciary Committee, introduced H.R. 4908,\textsuperscript{56} which prohibited the unilateral rejection of collective bargaining agreements.\textsuperscript{57} The standard of proof for court possession to prove that the reorganization would fail unless the collective bargaining agreement was rejected.\textsuperscript{58} Expedited procedures for bankruptcy court consideration of any rejection petitions also were established.\textsuperscript{59} The date of rejection would constitute a breach of the agreement at the time of rejection instead of having its normal retroactive effect under 11

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there existed the possibility that the employees' wage claims would be granted the status of administrative expenses under 11 U.S.C. § 503(b)(1)(A) instead of general commercial executory contracts.

The Court further reasoned that upon the filing of the bankruptcy petition, the collective bargaining contract is not an enforceable contract within the meaning of NLRA § 8(d). \textit{Id.}

\textsuperscript{52} \textit{Id.} at 1197 ("[T]he Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities." \textit{Id.}).

\textsuperscript{53} 406 U.S. 272 (1972).

\textsuperscript{54} 376 U.S. 543 (1964).

\textsuperscript{55} \textit{Bildisco}, 104 S. Ct. at 1201. \textit{But see Local Joint Executive Bd. v. Hotel Circle}, 613 F.2d 210 (9th Cir. 1980) (Court held that negotiation of a new labor contract was beyond receiver's limited authority).


\textsuperscript{57} Section 2 of H.R. 4908 amend. 11 U.S.C. § 502(g) (1982), by adding the following:

(a) The trustee may reject or assume a collective bargaining agreement which has been made under the authority of title 11 of the Railway Labor Act of the National Labor Relations Act only if and after the court approves the rejection or assumption, as the case may be, of such agreement.

\textsuperscript{58} Section 2 of H.R. 4908 provided: "(e) The court may not approve the rejection of a collective bargaining agreement to which subsection (a) applies unless, absent the rejection of such agreement—(1) the jobs covered by such agreement will be lost; and (2) any financial reorganization of the debtor will fail.

\textsuperscript{59} Section 2 of H.R. 4908 provided:

(c) The court, upon motion of the trustee to reject a collective bargaining agreement to which subsection (a) applies, shall hold an expedited hearing, not less than 7 days not [sic] more than 14 days after the filing of such motion, to determine whether such agreement may be rejected under this title.
U.S.C. section 365(g).\textsuperscript{60} The bill was referred to the House Judiciary Committee and its provisions were later incorporated into H.R. 5174.\textsuperscript{61}

On March 19, 1984, Representative Rodino introduced H.R. 5174. This bill retained the strict standard for rejection of collective bargaining agreements and the necessity for bankruptcy court approval prior to rejection.\textsuperscript{62} In the Senate, Senator Strom Thurmond introduced legislation addressing several bankruptcy issues, but which was silent on the labor-related sections of H.R. 5174.\textsuperscript{63}

The Senate held extensive debates on the standards and procedures to be applied to a rejection of a labor contract in bankruptcy.\textsuperscript{64} On May 21, 1984, Senator Thurmond introduced Amendment 3083, which preserved the “balancing of equities” standard as enunciated in \textit{Bildisco}, but prohibited rejection for at least thirty days subsequent to the filing of a motion.\textsuperscript{65}

\textsuperscript{60} Section 2 of H.R. 4908 provided: “\textit{(f) Notwithstanding any other provisions of this title, the rejection of a collective bargaining agreement to which subsection (a) applies constitutes a breach of such agreement at the time of such rejection.}”


\textsuperscript{62} As stated by the bill’s sponsor: “The bill would require the bankruptcy judge to apply the standard used in the [Second] Circuit’s \textit{RE A Express} opinion in determining whether to approve a request for rejection of a collective bargaining agreement under the bankruptcy laws.” 130 Cong. Rec. H1807 (daily ed. Mar. 21, 1984) (statement of Rep. Rodino). H.R. 5174 was passed by the House 461-250. \textit{Id.} at H1853.

\textsuperscript{63} See Belous, supra note 61, at 077. See also 130 Cong. Rec. S8888 (daily ed. June 29, 1984) (Sen. Thurmond felt \textit{Bildisco} had been correctly decided).


\textsuperscript{65} H.R. 5174, amend. 3083, 98th Cong., 2d Sess., 130 Cong. Rec. S6126 (1984). The relevant provisions of amendment 3083 are:

\begin{enumerate}
  \item In a case under chapter[s] 9, 11, or 13 of this title—
  \item The trustee, after notice and a hearing may assume or reject a collective bargaining agreement which has been made by the debtor under the authority of title II of the Railway Labor Act, the National Labor Relations Act, or other applicable law. A collective bargaining agreement shall be rejected under this section upon the request of the trustee if the court finds that reasonable efforts to negotiate a change in the contractual terms have been made by the debtor or by the trustee and are not likely to produce a prompt and feasible alternative to rejection, that the inability to reach an agreement threatens to impede the success of the debtor’s reorganization under chapter 11 of this title or adjustment of debts under chapter 9 or 13 of this title, that the agreement is burdensome to the estate, and that in considering the needs of the debtor, the employees covered by the agreement, and other parties in interest, the equities balance in favor of the rejection of the agreement.
  \item Thirty days after a request by the trustee under paragraph (1) of this subsection, the collective bargaining agreement shall be deemed not to
Amendment 3083 essentially was a reformulation of the proposals submitted to Senator Thurmond by the National Bankruptcy Conference. Its sponsors felt, Senators Thurmond and Hatch, that the standard required for rejection of a collective bargaining agreement had been decided correctly in *Bildisco*. The sponsors also felt that a thirty day waiting period, before rejection could be allowed, adequately conformed to the labor policies of the NLRA, while still providing a solution to the controversial aspect of unilateral rejection.

be in effect pending a final hearing and determination under paragraph (1) unless the court, after notice and a hearing, orders the agreement continued in effect pending such final hearing and determination. A hearing under this paragraph may be a preliminary hearing, or may be consolidated with the final hearing under paragraph (1). If the hearing under this paragraph is a preliminary hearing—

(A) the court shall order that such agreement shall not be continued in effect, if there is a reasonable likelihood that the trustee will prevail at the final hearing under such paragraph (1); and

(B) the final hearing shall be commenced within thirty days after such preliminary hearing. 

(3) 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 the case of a municipality to the continuation of necessary services, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee.


This provision, thus preserves the tested and tried current law standard of balancing of the equities for rejection of labor contracts. This protects the interests of all parties to a chapter 11 proceeding without favoring any particular position. At the same time, it strikes a reasonable balance by reversing the more controversial aspect of the *Bildisco* decision. Accordingly, this provision would prevent a business from rejecting its collective bargaining agreement without court approval. This provision has the further merit of being the proposal of a group of bankruptcy experts without any bias or prejudice regarding labor issues. They simply know what works in bankruptcy. They feel that *REA Express*, and certainly any standard more onerous than *REA Express* will not work.

Id.
Senate proponents of the amendment argued that H.R. 5174, as passed by the House, imposed too great a burden upon the debtor without adequate Congressional examination of its potential ramifications. However, they did agree that the reorganization must not be used by any party for the purpose of undermining the status of the authorized representatives of the employees. Such an attempt would be prima facie evidence of bad faith and would provide adequate cause for the court to refuse to grant the trustee’s proposal to reject.

The following day, Senator Packwood introduced Amendment 3112, which only allowed the trustee to modify those portions of the collective bargaining agreement necessary to ensure the reorganization. The trustee would be required to bargain with the union to an impasse before seeking court approval to reject the agreement. This included expedited procedures for court examination of the trustee’s rejection petition. The REA Express standard was to be applied by the court in determining whether to grant the trustees petition to reject. Finally, unilateral rejection would be prohibited under any circumstances prior to bankruptcy court approval. Thus the primary purpose of the

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69. *Id.* at S6091.
70. Senator Hatch stated: “In other words, this bill does not allow chapter 11 to be used solely as a union busting tool.” *Id.* at S6092.
72. Amendment 3083 to H.R. 5174 provides:
(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the trustee shall—
(A) make a proposal, based on the most complete and reliable information available, to the authorized representative of the employees covered by such agreement, providing for the minimum modification in such employees benefits and protections that would permit the reorganization, taking into account the best estimate of the sacrifices expected to be made by all classes of creditors and other affected parties to the reorganization.
74. The expediting provisions of amendment 3083 include:
(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than twenty-one days after the date of the filing of such application.
(2) The court shall rule upon such application for rejection within thirty days after the date of the commencement of the hearing.
(3) The court may enter protective orders on terms consistent with the need of the authorized representative to evaluate the trustee’s proposal and the application for rejection.
75. See supra note 42 and accompanying text (*REA Express standard*).
Packwood amendment was to defeat the trustee’s authority to unilaterally reject the contract.  

The basic difference between the Thurmond and Packwood amendments was that the latter would follow the REA Express standard for rejection, while the former would follow the Bildisco standard. Under the Packwood amendment, unilateral rejection was expressly forbidden, whereas under the Thurmond amendment the trustee could unilaterally reject the contract thirty days after the making of the proposal. Furthermore, under the Thurmond amendment, the trustee could unilaterally reject the labor contract at any time if such rejection was necessary to preserve the estate or if the bankruptcy court had not rendered a decision on the trustee’s rejection petition within thirty days. Under the Packwood amendment, the trustee could only seek rejection of those portions of the labor contract that were essential to the reorganization. The Thurmond amendment made no provision for partial rejection. Unlike the Packwood amendment, the Thurmond amendment had no requirement that the trustee bargain to impasse prior to seeking court approval of its rejection petition. Lastly, the Packwood amendment permitted the trustee to seek court approval to reject the labor contract only if the union’s refusal of his proposals was unjustified. The Thurmond amendment contained no similar provision.

The resolution of the labor issue was delayed, and the bill was referred to a joint conference for consideration. There is no written legislative history of this joint conference committee, however, so Congressional intent must be inferred from the statements of the legislative leaders in the Congressional Record.

On June 29, 1984, House Conference Report 98-882 was filed

provided: “(e) No provisions of this title shall be construed to permit a debtor-in-possession or a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement before approval or rejection of such contract under this section.”


79. See 130 Cong. Rec. S6584-85 (daily ed. June 4, 1984) (statements of Sen. Hatch and Sen. Packwood). Senator Hatch felt that the Packwood amendment was even more fundamentally at odds with chapter 11 than the REA Express rule and, therefore, inimical to orderly bankruptcy administration. Senator Packwood felt the Bildisco decision and Thurmond amendment ran contrary to traditional labor/management relationships. He felt his amendment was necessary to restore the proper balance to the collective bargaining process and the bankruptcy laws.

with the Senate and the House. 81 This report embodied most of the provisions of the Packwood amendment 82 and was enacted as Public Law 98-353 without any change in language. 83

IV. ELEMENTS OF 11 U.S.C. § 1113

In keeping with the labor policies of consultation and negotiation, section 1113 limits the trustee's proposed modifications of collective bargaining agreements. 84 Section 1113(b)(1)(A) limits modifications to only those elements necessary to the reorganization, and which assume equitable treatment of the debtor, creditors, and employees. 85 In addition, sections 1113(b)(1)(A) and (B) require the trustee to provide the union's representative with the information necessary to evaluate the proposal. 86 This duty to inform arises from an overriding obligation of good faith, as expressed in section 1113(b)(2). 87 However, this

84. 11 U.S.C. § 1113(a) provides:
(a) The debtor-in-possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.
85. 11 U.S.C. § 1113(b)(1)(A) provides:
(A) [M]ake a proposal to the authorized representative of the employees covered by such agreement based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably . . . .
86. See supra note 85. Section 1113(b)(1)(B) also requires that the trustee “provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.”
87. 11 U.S.C. § 1113(b)(2) provides:
(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

Congress intended that good faith be interpreted under conditions of swiftness, flexibility, and provision of a breathing space to the debtor. See Bankruptcy Amendments of 1984, Pub. L. No. 333, 98 Stat. 390 (codified at 11 U.S.C. § 1113), reprinted
duty is limited by section 1113(d)(3), which allows the court to enter protective orders in order to protect the debtor's position with respect to competitors.\(^8^8\)

Congress had indicated that the parties must bargain to impasse before the debtor may seek court approval of his rejection petition.\(^9^9\) In addition, to obtain court approval of the rejection proposal, the trustee\(^9^0\) must prove:

(1) the proposal relates only to those elements of the agreement necessary to permit the reorganization, and adequate information was provided to the employees upon which to evaluate the proposal;\(^9^1\)

(2) the union has refused to accept the proposal without good cause;\(^9^2\) and


The good faith nature of these negotiations will require that the employees' union representative be given an opportunity to review and accept or reject the business proposal. In the spirit of good faith that should permeate these negotiations, however, the union must not reject the business offer without good cause.

\[\textit{Id. See also 130 Cong. Rec. S8888 (daily ed. June 29, 1984), where Sen. Thurmond expressed the view that good faith should not be interpreted in the traditional labor law sense, but in a workable manner, granting due deference to the exigencies of a reorganization. This would prevent the bankruptcy courts from being turned into versions of the NLRB. This view was shared by most members of Congress.}\]

88. 11 U.S.C. § 1113(d)(3) provides:

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

89. In 130 Cong. Rec. S6182 (daily ed. May 22, 1984), Senator Packwood stated:

Under my amendment, it is to the employer's interest to bargain everyday. If an impasse is going to be reached, the employer can reach it as soon as possible; and you then go to the bankruptcy court and say: "I have bargained with the union in good faith, and we have reached an impasse; we cannot agree. I ask you for the right to discharge the contract."


As in civil litigation generally, it is the applicant—the trustee—who must carry the burden of proving the elements of his case to secure from the court an order permitting the rejection of the agreement.

The trustee has an affirmative obligation to provide all the relevant financial and other information necessary to adequately evaluate the proposal and if that obligation is not met or if the trustee otherwise delays the proceeding, the application should be denied.

91. \textit{See supra notes 85 & 86.}\n
92. 11 U.S.C. § 1113(c)(1), (2) provide:

(c) The court shall approve an application for rejection of a collective
(3) in balancing the equities, rejection is clearly favored.93

Section 1113(e) contains a portion of the National Bankruptcy Conference's proposal, as embodied in the Thurmond amendment, which enables a court to authorize an interim change in the collective bargaining agreement upon a showing by the trustee that such modification is necessary to prevent irreparable damage to the business, or to assure its continuation.94 The standard for authorizing such a change

bargaining agreement only if the court find that
(1) the trustee has, prior to the hearing made a proposal that fulfills the requirements of subsection (b)(1);

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

Two versions of what constitutes good cause emerged in the Senate's debate. The first version favored the policies of the bankruptcy laws and was espoused by the parties that felt Bildisco was correctly decided. Senator Hatch stated:

This opportunity to accept or reject the proposal should be assessed in light of the essentiality of swift and fair resolution of the initial phases of the reorganization. Accordingly, rejection of a proposal should only happen if the cause for rejection is good enough to risk the damage to the business as well as its creditors and employees that delay or protracted negotiations could produce.

Senator hatch justified this position with the following statement: "[C]hapter 11's overriding purpose is to take whatever steps are expedient to preserve the failing business for the benefit of all if possible." 130 CONG. REc. S8892 (daily ed. June 29, 1984).

The adherents of the other version of good cause would have paid greater deference to the policies of the labor laws. They felt REA Express should control in any reorganization that involved rejection of a collective bargaining agreement. Representatives Hughes and Morrisson in their report to Congress wrote:

The phrase without good cause in subsection (e)(2) of new section 1113 of [T]itle 11, . . . is intended to ensure that a continuing process of good faith negotiations will take place before court involvement, and does so by embodying the standard set out by Vern Countryman in The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors, 57 AMERICAN BANKRUPTCY LAW JOURNAL 299, 300, 319 (Countryman feel that the debtor has everything to gain and nothing to lose by seeking and having the court grant rejection. However, if the union guesses wrong as to the necessity of rejection and prevents rejection when rejection is necessary to save the business, the membership will lose their jobs. Because of the union member's strong self-interest in taking the correct position, to at least save their jobs, the court should grant deference to their position).


94. 11 U.S.C. § 1113(e)(3) provides: "[T]he balance of the equities clearly favors rejection of such agreement." See 130 CONG. REc. S8892 (daily ed. June 29, 1984), where Senator hatch stated: "The word clearly is merely intended to assure that rejection is not warranted where the equities balance equally on each side. . . . This harkens back to the [Supreme Court's] Bildisco decision."
is set forth in *REA Express.*

Section 1113 sets up detailed procedural guidelines for any modification or termination of a collective bargaining agreement in a Chapter 11 reorganization. The procedures provide for a speedy hearing and determination by the court. Upon failure of the negotiations, the trustee must file an application for rejection with the court. Notice must be given to all of the parties at least ten days before the hearing, the hearing cannot be heard later than fourteen days after the application, and in the interests of justice, the court may extend the commencement of the hearing for a period not exceeding seven days. If the trustee and the union’s representative agree, additional extensions may be granted.

The court must rule on the trustee’s application within thirty days after the commencement of the hearing, but this time may be extended

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Senator Dole stated:

It seems to follow that where the trustee is unable to clearly prove that failure to reject will unduly burden the estate and that the equities are clearly balanced rejection must be disallowed. A scintilla of proof or a possibility of proof that the contract is burdensome would therefore be reason to refuse the trustee’s request to reject. The burden of proof by this test appears to have been shifted to the trustee.

*Id.* at S8890. 11 U.S.C. § 1113(e) provides:

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

95. See 130 Cong. Rec. H7496 (daily ed. June 29, 1984), where Representative Morrison stated that “[t]he statutory language of [§ 1113] subsection (e) stating the standard for qualifying for interim relief is, in essence, the *REA Express* standard.” See note 42 and accompanying text (discussion of *REA Express* standard).


97. See supra notes 85, 86 & 87.

98. *Id.* § 11139d)(1) provides:

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

99. *Id.*
if both the trustee and the union’s representative agree. If the court fails to rule within thirty days, or the time agreed to by the trustee and the union, the trustee may unilaterally terminate or alter any provisions within the collective bargaining agreement. However, section 1113(f) prohibits the trustee from unilaterally terminating a collective bargaining agreement without first complying with the other provisions of the section.

Lastly, section 1113 was to take effect prospectively. All cases filed under title 11 prior to enactment of section 1113 were not to be governed by this section.

V. ANALYSIS: EFFECT OF SECTION 1113 ON REJECTION OF COLLECTIVE BARGAINING AGREEMENTS UNDER CHAPTER 11

A. Hybrid Nature of Section 1113

Section 1113 is a hybrid, made up primarily of those sections of the Packwood amendment not totally unacceptable to the

100. 11 U.S.C. § 1113(d)(2) provides:
(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees’ representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees’ representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

101. Id. 130 Cong. Rec. S8892 (daily ed. June 29, 1984). Senator Hatch explained the purpose of the expedited procedures: “The conference agreement . . . emphasizes the need for expedition in traversing this entire process . . . This will prevent delays from jeopardizing the reorganization effort or damaging the estate.” But cf. Representative Morrisson’s view: “The courts are expected as a matter of course to meet the time limits set by Congress. In the unlikely event that a particular court should not do so, expeditious mandamus relief would be available in the appellate courts.” Id. at H7496 (daily ed. June 29, 1984).

102. 11 U.S.C. § 1113(f) provides: “No provisions of this title shall be construed to permit a trustee to unilaterally terminate or alter any provision of a collective bargaining agreement prior to compliance with the provisions of this section.”

103. Title 11, U.S.C. Subtitle J—Collective Bargaining Agreements § 541(c) provides: “The amendments made by this section [§ 1113] shall become effective upon the date of enactment of this Act; provided that this section shall not apply to cases filed under title of the United States Code which were commenced prior to the date of enactment of this section.”

For this note’s analysis, this subject is not important. However, this subject was the source of a dispute during the debate on section 1113. Continental Airlines had just filed for reorganization under chapter 11 and simultaneously had unilaterally rejected many of its collective bargaining agreements. Senator Packwood wanted the
Thurmond/Hatch forces, with portions of the National Bankruptcy Conference recommendations\(^\text{104}\) that Senators Thurmond and Hatch felt were essential.

The National Bankruptcy Conference, upon which Senators Hatch and Thurmond relied heavily, felt the Packwood amendment failed to address adequately the important bankruptcy policies of flexibility, expediency, capital formation, and provision of a breathing space for the debtor.\(^\text{105}\) The Thurmond/Hatch forces, after weighing the competing policy provisions in any trustee application to reject a labor contract, strongly supported these bankruptcy policies. Their position is summarized in Senator Hatch’s statement that "[t]his bill [11 U.S.C. § 1113] applies its principles in a manner that will protect the interests of all parties while permitting a distressed business to take whatever steps are necessary to reorganize itself and continue productive contributions to our economy."\(^\text{106}\)

Due to the Bildisco decision, the House immediately included the labor provisions into H.R. 5174\(^\text{107}\) and made it known that unless there was some favorable labor legislation, there would be no bankruptcy legislation.\(^\text{108}\) Thus, the Thurmond/Hatch forces, many

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law to be effective upon enactment to preclude Continental’s acts. Senators Thurmond and Hatch wished for, and obtained, application of the section only to those cases arising after its enactment. See 130 Cong. Rec. S6185 (daily ed. May 22, 1984) and S6191-93, 8889 (daily ed. June 29, 1984).


106. 130 Cong. Rec. S8893 (daily ed. June 29, 1984) (emphasis added). Senator Hatch went on to say, "As my colleagues know, I was a staunch opponent of the amendment proposed by Senator Packwood. . . ." Id.

107. See Belous, supra note 61, at 076.


I think knowing the makeup of the House and knowing how concerned they are about the Bildisco matter and knowing how they jumped right on it within an hour after the Supreme Court decision and withstood every other consideration of the House Judiciary Committee to pass this particular provision, I think if the Packwood Amendment is agreed to they will accept it. However, I think you would have a continual conflict the rest of our lives in this country if the Packwood Amendment is adopted and I think we would in the end lose this bill. . . .

[If the Packwood Amendment passes, I believe this bill will be pulled down. I think that is how strongly certain people feel about this.

Id.

Senator Thurmond commented:

With regard to the labor provisions of this bill, let me first say that, were it not for the critical need to pass this bankruptcy bill, I could not
of whom were more concerned with the other facets of bankruptcy, faced a dilemma. They sought passage of bankruptcy legislation which did not embody the Bildisco decision, and without the emasculation of the policies underlying bankruptcy which many of them believed the Packwood amendment represented. They considered the Packwood amendment, as originally passed, inimical to this goal.

The Packwood forces, on the other hand, accepted the varying formulations to reject a labor contract as exemplified by Kevin Steel, REA Express, and their progeny. They found the Bildisco decision objectionable due to its negation of the labor policies behind section 8(d) of the NLRA. They felt a unilateral rejection as authorized by Bildisco, totally circumvented the policies of negotiation and consultation behind the labor laws. In effect, they regarded Bildisco a blueprint

have agreed to these provisions in subtitle J of this title. I believe that the Bildisco decision was correctly denied and did not require legislative action by Congress. Unfortunately the House interjected this issue into the bankruptcy debate very late in the process. They also made it quite clear that the bankruptcy bill, if there was to be one, would contain a labor provision acceptable to organized labor.


110. The central policies of bankruptcy were explained by Senator Hatch: "Chapter 11's overriding purpose is to take whatever steps are expedient to preserve the failing business for the benefit of all if possible. This provision gives the courts the flexibility to carry out that purpose as long as the labor contract remains in effect."


112. See 130 CONG. REC. S6184 (daily ed. May 22, 1984) (statement of Senator Packwood). See also Summarization of Bildisco's flaws by Senator Mitchell (a former federal district court judge):

[T]he bankruptcy laws provide for a degree of flexibility absent in many areas of the law . . . [b]ut that necessary flexibility is not limitless. . . . [T]he right to breathing space for the debtor must be balanced by a right on the part of the non-debtor party to request a court ruling that a contract be accepted or rejected within a specified period of time. . . .

Congress over many decades has reaffirmed that a duty exists to bargain with employees and Congress has developed a policy whose goal is in the best interests of both parties, not the ascendency of one over the other. [T]he government role in collective bargaining is limited to process not to outcome. The courts have generally recognized that limitation and rejected efforts by one or another party to inject a preferred outcome in the process.

By contrast, the practical effect of the Bildisco decision is to inject a strong preference for one particular outcome by elevating the policies of the bankruptcy law for [sic] above the equality valid purposes of the National
for industrial unrest.\textsuperscript{113} The result was that the bill retained many of the original features of the Packwood amendment,\textsuperscript{114} but also included some features recommended by the National Bankruptcy Conference and the Thurmond amendment.\textsuperscript{115}

\textbf{B. Operative Effect and Potential Problems of Section 1113}

Section 1113(b)(1)(A) limits the trustee’s proposals to those necessary for success of the reorganization.\textsuperscript{116} However, several problems arise from this approach. The trustee is required to make many value judgments early in the reorganization. In effect, the trustee must establish a complete plan for reorganization relatively early in the proceedings. Formulation of such a plan may be virtually impossible within the time period allowed because of the tumultuous state of the enterprise at that time.\textsuperscript{117} As a result, the trustee will often have to seek extensive modification, or even rejection, as a means of adequately assuring success of the reorganization, particularly if he feels the need to protect himself in the event that he has underestimated his labor costs.\textsuperscript{118} In some cases, courts may interpret such a move as prudent business policy. In other cases, it may be argued that this is bad faith on the part of the trustee.

In spite of the limitations placed on the trustee’s initial proposal to the union, if an agreement is not reached, the trustee may then seek court approval to reject the entire labor contract. He need only prove to the court that the contract is burdensome to the reorganization and that the equities clearly favor rejection.\textsuperscript{119} As a result, a whole

\begin{flushright}
Labor Relations Act. . . .  
I believe such limits (standards and procedures to reject collective bargaining agreements) are best set legislatively by Congress . . . .

Had the Supreme Court’s decision given as much weight to the policies of the NLRA as it gave to the Bankruptcy Act, such codification might not be needed.
\end{flushright}

\textit{Id.} at S6199-6200.

\textsuperscript{113} Id. at S6184.

\textsuperscript{114} See 130 Cong. Rec. S8888 (daily ed. June 29, 1984) (statement of Sen. Thurmond). Section 1113’s procedures and standard are essentially the same as those of the Packwood amendment.

\textsuperscript{115} The resulting features included the emergency rejection provision (§ 1113(e)), expedited court procedures (§ 1113(d)(1)), and the necessity of a court ruling within 30 days (§ 1113(d)(2)). See supra notes 92, 98 & 100, respectively.

\textsuperscript{116} See supra note 85.


\textsuperscript{118} See Bordewick & Countryman, supra note 24, at 300, 319.

new range of contract provisions, not previously discussed, may be called into dispute. The union may then argue breach of good faith since it was not presented with all the proposals and relevant information as required by sections 1113(b)(1)(B) and (b)(2).

Operation of section 1113(b)(1)(A) may inadvertently cause some reorganizations to be unduly burdensome and, therefore, deny the debtor the protection of the bankruptcy laws. For example, the trustee may make a proposal early in the reorganization proceedings that appears to be adequate to save the business, but which proves to be inadequate due to unforeseeable future events. Meanwhile, the employees have readily accepted the trustee’s proposal and have precluded the trustee from seeking a court hearing. The trustee may then find himself saddled with an extremely burdensome labor contract which he otherwise would have been entitled to reject in a court hearing under the *Kevin Steel* rule.

Section 1113(c)(2) permits the trustee to seek bankruptcy court approval to reject the labor contract only if the union refuses to accept his proposals without good cause. As previously shown, the trustee has everything to gain and nothing to lose by seeking and gaining rejection of the collective bargaining agreement. In contrast, the union is placed in a precarious position as it must decide correctly. Too ready an acceptance of the trustee’s proposals may vitiate its contract, while refusal to concede on enough proposals may cause the reorganization to fail, with subsequent loss of the employees’ jobs. The union has a strong interest in making a correct, balanced decision. As a result, the court should be hesitant in finding the union’s refusal to accept the trustee’s proposals unjustifiable.

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120. *See In re IML Freight*, 37 Bankr. 556, 559 (Bankr. Utah 1984) (collective bargaining agreement entered into after bankruptcy court approved rejection of prepetition agreement is not an executory contract under 11 U.S.C. § 365(a) and cannot be rejected by the trustee).

121. Courts will not allow an employer to use the bankruptcy courts solely to accomplish a purpose forbidden by the NLRA. Proof of such intent is prima facie evidence of bad faith and reason enough for a bankruptcy court to refuse the employer’s request to reject. *See Bildisco*, 104 S. Ct. at 1201; *In re Mamie Conti Gowns*, 12 F. Supp. 478 (S.D.N.Y. 1935); 130 Cong. Rec. S8899 (daily ed. June 29, 1984) (statements of Reps. Hughes and Morrison).

122. *See 130 Cong. Rec. S6190-91* (daily ed. May 22, 1984) (statement of Sen. Hatch). In some cases a national or international union located elsewhere may allow an ongoing concern to liquidate in order to protect its own interests, such as an industrywide wage pattern. In response, Senator Packwood said the court must direct itself to the company that is going down the drain despite the national or international union’s wishes. *Id.*

123. Bordevieck & Countryman, *supra* note 24, at 319. *See also supra* notes 90, 93 and accompanying text (explanation of party that is to bear the burden of proof).
A potential conflict arises between the requirements that the trustee propose only those modifications necessary to the reorganization and his duty to fully inform. The court, in deciding on a trustee's application to reject, should resolve this conflict by requiring the trustee not only to propose to the union those modifications necessary to the reorganization, but also those elements of the contract he finds burdensome. Thus, the entire labor contract and all the trustee's proposals could be reviewed and negotiated prior to the commencement of any judicial hearing. Both parties would more fully understand the position of the other and not be as ready to allege breaches of good faith due to the withholding of information or failure to make significant concessions. This would allow the union to more clearly understand and appreciate both its own position and that of the business, thereby placing it in a more favorable position to properly evaluate the trustee's proposals. Possibly this would avoid unnecessary litigation.

This proposed application must be interpreted in a reasonable and workable manner. It should not be viewed as requiring the trustee to present every possible proposal and provision he finds burdensome. Instead, he should only present those that he realistically expects will have to be changed to prevent the reorganization from being unduly burdened. Because of the difficulty in structuring a reorganization plan, particularly in the early stages, courts should be reluctant to find a breach of good faith on the part of either the union or the trustee.

Application of section 1113 in this manner will further its sponsor's intention of ensuring full negotiation and consultation prior to the trustee's seeking bankruptcy court approval. Section 1113's sponsors intended to grant as much deference to the NLRB's policies as possible without unduly restricting the bankruptcy laws.

C. Collective Bargaining Agreements Under Section 1113

Enactment of section 1113 may be indicative of a growing Congressional awareness that collective bargaining agreements are somehow different from executory commercial contracts and should be exempted from the strictures of 11 U.S.C. section 365(a).124 Despite overwhelming authority to the contrary, several commentators have made good arguments recognizing the difference between the two.125

Two traditional rules governing the law of contracts prove instructive by analogy to the rules of labor contracts. They are the

124. See supra note 13.
125. See infra notes 137, 138 and text accompanying notes 135-41.
"mirror image" rule and the "perfect tender" rule. Under the "mirror image" rule, if the acceptance contains different or additional terms, the offeree is attempting to create a contract to which the offeror has not assented. The power of acceptance created by the offeror is limited to the terms of the offer.\textsuperscript{126} Section 2-207 of the Uniform Commercial Code modifies the operation of this rule. A seasonable acceptance operates as an acceptance even though it contains additional terms, unless the offeror objects to them or the offer expressly limits acceptance to the terms of the offer. Also, additional terms will not operate as an acceptance if they materially alter the contract.\textsuperscript{127}

Under the "perfect tender" rule, if the seller fails to deliver the exact quantity or quality of the goods in conformity with the contract description of the goods, the buyer is excused from performing, even where he may be adequately compensated in damages.\textsuperscript{128} U.C.C. sections 2-508, 2-601, and 2-608 modify this rule. Under the U.C.C., four conditions must exist before the buyer may reject: (1) a nonconforming tender; (2) absence of effective cure by the seller; (3) absence of acceptance; (4) absence of a contract term prohibiting rejection.\textsuperscript{129}

A court would have no trouble finding a commercial contract invalid if it does not conform, in some respect, to these rules. On the other hand, the collective bargaining agreement is deliberately left vague, with the gaps to be filled in by the common law of the shop, e.g., past practice within the collective bargaining unit.\textsuperscript{130}

Unlike commercial contracts, the ordinary collective bargaining agreement is more akin to a code. The rules cannot be reduced to a few pages. Also, unlike a commercial contract which is entered into voluntarily by the parties, a labor contract is nonconsensual in nature.\textsuperscript{131}

The measure of damages under ordinary commercial contracts is normally the expectation interest, which is readily calculable. A breach of a collective bargaining agreement has an impact quite different from a breach of a commercial contract. The rights provided the employees, such as seniority and grievance procedures, are not reduced readily to monetary terms. Therefore, monetary damages for a rejection of

\textsuperscript{126} 2 MURRAY, MURRAY ON CONTRACTS § 54 (1974) [hereinafter cited as MURRAY].
\textsuperscript{127}  U.C.C. § 2-207 (1983).
\textsuperscript{128}  MURRAY, supra note 126, § 176.
\textsuperscript{129}  2 WHITE & SUMMERS, UNIFORM COMMERCIAL CODE 301-02 (2d ed. 1980).
\textsuperscript{130}  See United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).
a collective bargaining agreement may not adequately compensate employees for the loss of these rights.\textsuperscript{132} Also, a commercial entity normally will spread its risk of loss by entering several similar contracts with other commercial entities. In a labor contract, the employees are unable to spread their risk of loss, and they bear a heavy burden if there is a rejection.\textsuperscript{133}

Rejection of an executory contract in bankruptcy must be total; no partial rejection is allowed.\textsuperscript{134} If the trustee's application to the court for rejection is approved, the entire contract will be rejected.\textsuperscript{135} However, in a sense, section 1113(b)(1)(A) allows partial rejection.\textsuperscript{136} By forcing the trustee to propose only those modifications necessary to the reorganization, and making the union accept these necessary proposals or otherwise risk rejection of the entire contract due to breach of good faith, undesirable portions of the contract have been rejected while favorable portions have been retained.

Admittedly, this comparison of labor contract terms and conditions with commercial contracts is flawed. Since article 2 of the U.C.C. refers to the exchange of goods within a commercial setting, while a labor contract involves the exchange of services, a comparison between the two is weak. Nevertheless, the Supreme Court in Bildisco found little problem in applying the commercial rules of contract to labor matters.\textsuperscript{137} Therefore, notwithstanding this weakness, the comparison retains some validity if one accepts the Court's premise and reasoning in Bildisco.

In holding that a collective bargaining agreement may be rejected unilaterally by a trustee prior to court approval without any liability for an unfair labor practice, the Bildisco Court implied that a collective bargaining agreement is somehow different from an ordinary executory contract. Despite the express language of 11 U.S.C. § 365(a) prohibiting rejection without court approval, and the conflicting language of section 8(d) of the NLRA, the Court's holding that "upon the filing of the petition in bankruptcy until formal acceptance, the

\textsuperscript{132} See In re Overseas Nat'l Airways, 238 F. Supp. 359 (E.D.N.Y. 1965).
\textsuperscript{133} See Bordewieck & Countryman, supra note 24, at 313.
\textsuperscript{134} See supra text accompanying note 17.
\textsuperscript{135} See supra notes 90, 99.
\textsuperscript{136} See supra note 85.
\textsuperscript{137} See Bildisco, 104 S. Ct. at 1195, 1199 (court points out, as justification for unilateral rejection by the employer, that under 11 U.S.C. § 502(g), claims arising after rejection of any executory contract must be presented through the normal administration process by which claims are presented).
collective bargaining agreement is not an enforceable contract"138 appears to be at odds with the general rules concerning rejection of executory contracts.139

D. Balancing the Equities Under Section 1113

In section 1113(c)(3), Congress required that the equities must clearly favor rejection before a court may approve a trustee’s request.140 Congress recognized the profound difference between the burdens of loss carried by the employee of a business and parties to a commercial contract.141 Congress also recognized that courts had often ignored labor policies in bankruptcy reorganizations.142

In balancing the equities, section 1113 does not authorize a free-wheeling consideration of every possible effect. Instead, only the equities that reasonably relate to the success of the reorganization need be considered.143 One reason for this interpretation is that a reorganization plan may take months to formulate. In the early stages of reorganization, while the trustee is seeking relief from his labor costs, structuring an entire reorganization plan may not be feasible.144

A necessary requirement not mentioned by Congress is that of foreseeability. The trustee should not be required to foresee every eventuality that may impact on his decision to seek rejection of the labor contract. Instead, the trustee should only be required to reasonably foresee those aspects that would seriously hinder the reorganization. To require otherwise would be a denial of general bankruptcy policies, particularly that of flexibility.

Congress was concerned that the sacrifices of reorganization be

138. Id. at 1199, 1200.
139. See 2 COLLIER ON BANKRUPTCY § 365.03 (1984) ("In a chapter 11 case rejection can only come about upon order of the court under Section 365(a) or by virtue of the provisions of a confirmed plan. As long as rejection is not ordered the contract continues in existence . . . .").
140. See supra notes 93, 94 and accompanying text.
141. See also Bordevieck & Countryman, supra note 24. Unlike commercial creditors, employees will be significantly injured by loss of their benefits and have no means of minimizing such risk of loss.
142. See, e.g., In re Ateco, 18 B.R. 915 (Bankr. W.D. Pa. 1982); In re Klabor Bros., 173 F. Supp. 83 (S.D.N.Y. 1959) ("The Bankruptcy Act makes no distinction among classes of contracts. I . . . conclude that there should be no differentiation in the treatment of executory employment or collective bargaining contracts as to termination under the circumstances of this case.").
144. See id. S6194 (statement of Sen. Hatch).
evenly shared between creditors and employees and that rejection of
the collective bargaining agreement be in the best interests of employers,
employees, and creditors.145 Other factors to be considered in the balanc-
ing of equities are the likelihood of liquidation if the contract is not
rejected, the effect of a strike if negotiations after rejection are unsuc-
cessful, the effect of employee claims that would arise if the contract
is rejected, the comparison of covered employees' wages with others
in industry, and the good or bad faith of the parties in seeking to
resolve their mutual problems.146

E. Death Knell of the New Entity Fiction

Bildisco and section 1113 sounded the death knell for the new entity
fiction of Kevin Steel. The courts recognized early that the new entity
analysis was a weighty fiction employed by the courts to give effect
to the bankruptcy law provisions in light of the contrary provisions
of the labor laws. Instead of continuing to subscribe to this outdated
fiction, the Supreme Court attempted to legislate a solution.147 The
result was a quick and angry Congressional response.148

The successorship doctrine of John Wiley149 and Burns150 clearly
indicates that the pre-petition and post-petition debtor is the same entity
and retains the same obligation to bargain with his employees. Any
other conclusion flies in the face of logic.

(applying the balancing of the equities test, the court refused to approve rejection
because of top-heavy management salaries. This case was relied upon by the bill's
proponents as an example of the proper approach in balancing the equities).
states:

[T]he government role in collective bargaining is limited to process not to
outcome. The courts have generally recognized that limitation and rejection
efforts by one or another party to a preferred outcome into the process.

By contrast the practical effect of the Bildisco decision is to inject a strong
preference for one particular outcome by elevating the policies of the
bankruptcy law for [sic] above the equally valid purposes of the National
Relations Act.

states: "[T]he only reason that this [standard to reject labor contracts in bankruptcy]
is a provision in this bill at all is because within an hour after the Bildisco case came
down, leaders of the Judiciary Committee in the House, in a flurry said, 'We have
to do something about this.'"

VI. Conclusion

Section 1113 was a reaction to that portion of the Supreme Court’s Bildisco decision which allowed unilateral rejection of collective bargaining agreements. Congress felt that unilateral rejection significantly abridged the important labor policies of consultation and negotiation. Section 1113 was enacted to ensure that a process of negotiation between the employer and the union takes place prior to the commencement of a hearing to reject the collective bargaining agreement.

In addition, Congress recognized the need to preserve the underlying policies of the bankruptcy laws. To protect these policies, Congress added the emergency relief provision of section 1113(c) and retained the balancing of the equities test. However, in any reorganization, speed of negotiation and agreement is a major factor. In light of Congressional intent, the court should allow rejection if the union allows the negotiations to reach a standstill. Similarly, if the trustee resorts to the same tactic, the court should hold him guilty of a breach of good faith.

In weighing the two competing policies, Congress came up with a two-step process. First, there must be a period of negotiation within specified time limits, and such negotiation must be in good faith. Secondly, if the negotiations fail, the trustee is then authorized to seek court approval of his proposal to reject the contract.

Congress’ explicit rejection of the trustee’s authority to terminate the labor contract unilaterally has balanced the competing policies of labor and bankruptcy laws in a bankruptcy reorganization. Although a significant minority of the senators and representatives voted for section 1113 because of the need to pass other bankruptcy legislation, and the pressure of other business, nearly all agreed that unilateral rejection, as espoused by Bildisco, significantly undercut the principal policies of the labor laws to an unacceptable degree.

While the great weight of authority maintains that a labor contract is an executory contract, and is subject to normal rules, the difficulties Congress and the courts have had in dealing with the rejection of labor contracts implies otherwise. The results indicate a subtle shift toward the view that labor contracts are somewhat different, warranting different rules. The same rules which govern a shipment of freight are hardly applicable to the myriad circumstances involved in operating a modern factory.

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