

# Bankruptcy: Rejection of Collective Bargaining Agreements Before and After the 1984 Amendments. *NLRB v. Bildisco and Bildisco*, 104 S. Ct. 1188 (1984).

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## NOTES

### **BANKRUPTCY — Rejection of Collective Bargaining Agreements Before and After the 1984 Code Amendments.** *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188 (1984).

#### I. THE STATUTORY ORIGINS OF CONFLICT

The struggle between the often competing interests of corporate management and organized labor has given rise to a plethora of legislation designed to promote the peaceful and orderly resolution of conflict. One such piece of legislation, the National Labor Relations Act (NLRA),<sup>1</sup> was designed by Congress, in part, to establish and protect a uniform system for “collective bargaining.”<sup>2</sup> Section 8(a)(5) of the NLRA states, “[i]t shall be an unfair labor practice for an employer to refuse to bargain collectively with the [employees’] representatives,” and elaboration upon the specific conduct constituting unfair labor practices is provided in section 8(d).<sup>3</sup> The purpose of these sections, and the NLRA in general, is to promote “the flow of commerce by removing certain recognized sources of industrial strife and unrest . . . .”<sup>4</sup>

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1. 29 U.S.C. §§ 151-169 (1982).

2. 29 U.S.C. § 158(d) (1982) defined “collective bargaining” as “[t]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .”

3. *Id.* § 158(a)(5). 29 U.S.C. § 158(d) (1982) provides in pertinent part:

[T]he duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party . . .

(1) serves a written notice upon the other party . . .

(2) offers to meet and confer . . .

(3) notifies the Federal Mediation and Conciliation Service . . . and,

(4) continues in full force and effect . . . all the terms and conditions of the existing contract . . . .

4. *Id.* § 151. See also *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272, 282-83 (1972) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937), which stated, “[t]he theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act itself does not attempt to compel.”); *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 103 (1970) (“The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to

A similar substantive body of law has evolved in order to protect the interests of corporate debtors. Chapter 11 of the Bankruptcy Code<sup>5</sup> permits a debtor to avoid liquidation by reorganizing under the supervision of the court. Upon filing a petition in bankruptcy pursuant to Chapter 11, the debtor is granted a unique set of powers designed to provide it with the flexibility necessary to affect a successful reorganization of the business.<sup>6</sup> Section 365(a) of the Bankruptcy Code confers the power to reject executory contracts<sup>7</sup> upon the debtor in possession.<sup>8</sup> By permitting the debtor in possession to reject its executory contracts, Congress intended to facilitate reorganization and thus promote economic efficiency. "The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are much more valuable than those same assets sold for scrap."<sup>9</sup>

The nexus between the NLRA and the Bankruptcy Code lies in the fact that a collective bargaining agreement is a type

mutual agreement."); *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964); *NLRB v. North Arkansas Elec. Corp., Inc.*, 446 F.2d 602, 608 (8th Cir. 1971).

5. 11 U.S.C. §§ 1101-74 (1982).

6. See H.R. REP. NO. 595, 95th Cong., 2d Sess. 220 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6179-80; S. REP. NO. 989, 95th Cong., 2d Sess. 116 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5902.

7. 11 U.S.C. § 365(a) (1982) provides that "[e]xcept as provided in section 765 and 766 of this title and in subsections (b), (c) and (d) of this section, the trustee, subject to the court's approval, may reject any executory contract or unexpired lease of the debtor." In its attempt to define "executory contracts" the Senate concluded, "[t]hrough there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides." S. REP. NO. 989, 95th Cong., 2d Sess. 58 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5844. See 2 COLLIER ON BANKRUPTCY ¶ 365.02 n.3 (1984).

8. Although 11 U.S.C. § 365(a) (1982) refers specifically to a trustee's right to reject executory contracts, section 1107(a) of the Bankruptcy Code extends this right to the debtor in possession. 11 U.S.C. § 1107(a) provides:

Subject to any limitations on a trustee under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter.

In creating and interpreting section 1107, Congress emphasized, "[t]his section places a debtor in possession in the shoes of a trustee in every way." H.R. REP. NO. 595, 95th Cong., 2d Sess. 404 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5902.

9. H.R. REP. NO. 595, 95th Cong., 2d Sess. 200 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6179.

of executory contract,<sup>10</sup> and thus, while it is protected by the NLRA, it is also subject to rejection under the Bankruptcy Code.

One of the most notable judicial responses to this conflict was rendered by the United States Supreme Court in *NLRB v. Bildisco & Bildisco*.<sup>11</sup> The *Bildisco* decision was followed, less than five months later, by the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAJA),<sup>12</sup> in part, a congressional effort to clarify the relationship between the debtor in possession and its unionized employees.

The purpose of this Note is to undertake a discussion of both the judicial and congressional responses to the statutory conflict and to suggest how future interpretation of the *Bildisco* decision may be affected by the Bankruptcy Amendments and Federal Judgeship Act.

## II. THE FOUNDATIONS FOR THE *BILDISCO* DECISION

Bildisco and Bildisco, a New Jersey general partnership engaged in the sale and distribution of building materials, filed a voluntary petition in bankruptcy for reorganization on April 14, 1980, pursuant to Chapter 11 of the Bankruptcy Code. After that date, Bildisco operated its business as a debtor in possession.<sup>13</sup>

In December 1980 Bildisco filed a motion with the bankruptcy court seeking an order authorizing the company to reject its collective bargaining agreement with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.<sup>14</sup> A hearing was held upon Bildisco's re-

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10. See Countryman, *Executory Contracts in Bankruptcy: Part II*, 58 MINN. L. REV. 479 (1974).

11. 104 S. Ct. 1188 (1984).

12. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333.

13. 11 U.S.C. § 1107 (1982). See *supra* note 8.

14. The collective bargaining agreement signed by Bildisco and Local 408 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America was effective from May 1, 1979 through April 30, 1982, and expressly provided that its terms were binding upon both parties in the event of bankruptcy. See *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188, 1192 (1984). The filing of this motion was pursuant to the Bankruptcy Code. See 11 U.S.C. § 365(a) (1982). See *also* note 7.

quest.<sup>15</sup> The bankruptcy court subsequently granted Bildisco permission to reject the collective bargaining agreement on January 15, 1981. The district court upheld the order, and the union appealed to the United States Court of Appeals for the Third Circuit.

Between January and April 14, 1980, Bildisco failed to meet certain obligations, in contravention of its collective bargaining agreement.<sup>16</sup> The union filed a claim with the National Labor Relations Board (NLRB). It charged that Bildisco had violated sections 8(a)(1) and (5) of the National Labor Relations Act<sup>17</sup> by unilaterally changing the terms of the collective bargaining agreement and thus not bargaining in good faith.<sup>18</sup> After notification of the bankruptcy court's order, the NLRB in turn issued an order on April 23, 1981. Bildisco was directed not only to abide by the terms of the collective bargaining agreement, but also to make all delinquent contributions and payments plus the accumulated interest and to post the appropriate notices.

The Third Circuit consolidated the NLRB's motion for enforcement of its order and the union's appeal from the district court's ruling. The Third Circuit concluded that section 365(a) authorized the bankruptcy court to permit the rejection

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15. At the hearing, Sal Valente, a general partner of Bildisco, testified that his firm could realize a savings of approximately \$100,000 in wages and fringe benefits in 1981 if it was granted permission to reject its collective bargaining agreement. See Joint Appendix in Brief for Petitioner Local Union Number 408, International Brotherhood of Teamsters at 59-61, *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188 (1984).

16. Bildisco ceased making pension and welfare payments to its union employees' trust funds in January 1980. Moreover, Bildisco failed to forward the union dues which were withheld from employee paychecks and subsequently failed to provide pay increases and vacation pay as required under the agreement. See Brief for Petitioner Local Union Number 408, International Brotherhood of Teamsters at 2-3, *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188 (1984).

17. 29 U.S.C. §§ 158(a)(1), (5) (1982).

18. "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." *Id.* § 158(a)(1). 29 U.S.C. § 157 provides in pertinent part: "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . ." For a discussion of the legislative policy underlying section 158(a)(1), see *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 682 (9th Cir. 1943) (quoting *International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 80 (1940)).

of collective bargaining agreements.<sup>19</sup> However, because of the unique nature of the collective bargaining agreement,<sup>20</sup> the Third Circuit fashioned a two-pronged test under which rejection of the agreement could be granted only when the bankruptcy court determines that its continuation would be burdensome to the estate of the debtor in possession and only after the court submits the case to a "thorough scrutiny, and a careful balancing of the equities on both sides."<sup>21</sup>

In addition, the Third Circuit refused to enforce the NLRB's order for summary judgment against Bildisco. It rejected the NLRB's premise that the debtor in possession was in fact an alter ego of the original debtor and thus a party to the collective bargaining agreement. Instead, it relied upon the two ground-breaking decisions of *NLRB v. Burns International Security Services, Inc.*<sup>22</sup> and *Local Union No. 455 v. Ke-*

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19. See *In re Bildisco*, 682 F.2d 72, 78 (3d Cir. 1982), *aff'd sub nom.* *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188 (1984). In reaching this conclusion, the Third Circuit relied heavily upon the fact that "Congress did provide detailed provisions for acceptance of executory contracts such as shopping centers, leases, § 365(b)(3), and transactions in commodities futures contracts, §§ 765, 766." *Id.* At the same time, the court singled out collective bargaining agreements subject to the Railway Labor Act, 45 U.S.C. § 156 (1982), in the provisions of 11 U.S.C. § 1167. According to the court:

The sheer complexity of the Bankruptcy Reform Act might preclude our use of § 1167 as definitive proof that every other collective bargaining agreement may be rejected, but the section permits an inference that, with this one exception, Congress did not intend to distinguish collective bargaining agreements from executory contracts in general.

682 F.2d at 78.

20. See *In re Bildisco*, 682 F.2d at 79 ("The impact of rejection of a collective bargaining agreement on the rights of workers and the favored status those rights have been accorded by Congress, however, require a more stringent examination of the evidence offered to justify rejection of such a contract.").

21. *Id.* at 79-80. In describing the "balance of equities" test, the court adopted the language of the United States Court of Appeals for the Second Circuit in *Shopmen's Local Union No. 455 v. Kevin Steel Prods., Inc.*, 519 F.2d 698, 704 (2d Cir. 1975).

22. 406 U.S. 272 (1972). In discussing the plight of the successor employer, the United States Supreme Court noted:

A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.

*Id.* at 287-88.

in *Steel Products, Inc.*,<sup>23</sup> both of which held that a debtor in possession was similar to a successor employer,<sup>24</sup> or a "new entity" which could not be bound by its predecessor's collective bargaining agreements. Therefore it was not subject to the determination restrictions of section 8(d) of the National Labor Relations Act as alleged by the union.<sup>25</sup>

Finally, the Third Circuit held that Bildisco's failure to comply with the terms of the collective bargaining agreement did not constitute an unfair labor practice.<sup>26</sup> The case was then remanded to the bankruptcy court for further consideration in light of the standards for rejection which it had established. The opinion of the Third Circuit held that if on remand the bankruptcy court permitted rejection of the collective bargaining agreement, the NLRB would be bound by such a determination.<sup>27</sup> The United States Supreme Court granted a writ of certiorari for the *Bildisco* case on January 17, 1983.

### III. THE *BILDISCO* DECISION

In an opinion delivered by Justice Rehnquist, the Supreme Court affirmed the decision reached by the Third Circuit.<sup>28</sup>

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23. 519 F.2d 698 (2d Cir. 1975). Kevin Steel Products, Inc., a New York steel fabricator and erector, and a debtor in possession under Chapter 11, was granted permission to reject its collective bargaining agreement with Shopmen's Local Union No. 455. This decision was reversed by the United States District Court for the Southern District of New York, which was, in turn, reversed by the Second Circuit. See *Shopmen's Local Union No. 455 v. Kevin Steel Prods., Inc.*, 381 F. Supp. 336, 338 (S.D.N.Y. 1974), *rev'd*, 519 F.2d 698 (2d Cir. 1975).

24. For a general discussion of successorship law, see Morris & Gaus, *Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns*, 59 VA. L. REV. 1359 (1973). See also *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 281-91 (1972) (while a "successor employer" had a duty to bargain pursuant to 29 U.S.C. § 158(a)(5), it was not required to observe the substantive terms of the collective bargaining agreement negotiated between the union and its corporate predecessors).

25. 29 U.S.C. § 158(d). See *supra* note 3.

26. This conclusion was based, in part, upon the premise, albeit a legal fiction, that the debtor in possession acquired the status of a "new entity" at the time it petitioned in bankruptcy. Thus, no agreements between the debtor in possession and other parties were in effect subsequent to the date the Chapter 11 petition was filed. For further discussion of the "new entity" theory, see *Truck Drivers Local Union No. 807 v. Bohack Corp.*, 541 F.2d 312 (2d Cir. 1976), *aff'd per curiam after remand*, 567 F.2d 237 (2d Cir. 1977), *cert. denied*, 439 U.S. 825 (1978).

27. See *In re Bildisco*, 682 F.2d at 84.

28. See *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188 (1984).

Noting that the language of section 365(a)<sup>29</sup> provides for the rejection of all executory contracts unless expressly exempted thereby,<sup>30</sup> the Court accepted the argument promulgated by *Bildisco*<sup>31</sup> and advanced by the Third Circuit.<sup>32</sup> Section 1167 of the Bankruptcy Code restricts a debtor in possession's power to reject a collective bargaining agreement.<sup>33</sup> Hence, the Court found that Congress' failure to expressly restrict this power of the debtor in possession gave rise to an inference that Congress had intended that such agreements should not be awarded deferential judicial treatment.<sup>34</sup>

The Court also affirmed the standard adopted by the Third Circuit for the rejection of *Bildisco*'s collective bargaining agreement. It stated that "[t]he Bankruptcy Court should permit rejection of a collective bargaining agreement under section 365(a) of the Bankruptcy Code if the debtor can show that the collective bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract."<sup>35</sup> However, the Court further added that before rejecting the collective bargaining agreement, the bankruptcy court must be persuaded that the debtor in possession had made reasonable efforts to negotiate a "voluntary modification" and that such efforts were unlikely to produce a "prompt and satisfactory solution."<sup>36</sup>

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29. 11 U.S.C. § 365(a) (1982).

30. See *Bildisco*, 104 S. Ct. at 1194.

31. See Brief for Respondents, *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188 (1984).

32. See *In re Bildisco*, 682 F.2d 72, 78 (3d Cir. 1982), *aff'd sub nom.* *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188 (1984).

33. See 11 U.S.C. § 1167 (1982).

34. See *Bildisco*, 104 S. Ct. at 1194. For a discussion of the judicial interpretation of congressional intent, see *infra* note 49 and accompanying text.

35. 104 S. Ct. at 1196. In elaborating upon the factors to be considered by the "balance of equities" test, the Court stated:

The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees. In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardship each may face.

*Id.* at 1197.

36. *Id.* at 1196.



### A. Rejecting the "New Entity" Theory

The Supreme Court evaluated the NLRB's claim that Bildisco committed an unfair labor practice by unilaterally rejecting or modifying the collective bargaining agreement. It rejected the arguments by both parties which attempted to classify the debtor in possession as either the "alter ego" of the debtor,<sup>37</sup> or as a "new entity."<sup>38</sup> It stated instead that the debtor in possession was in fact "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 done absent the bankruptcy filing."<sup>39</sup>

Finally, the Court held that a debtor in possession does not violate subsections 8(a)(5) and 8(d) of the National Labor Relations Act when it unilaterally changes the terms of its collective bargaining agreement after the petition in bankruptcy has been filed but before the bankruptcy court has authorized the rejection because the agreement is unenforceable under section 8(d).<sup>40</sup> To hold otherwise, stated the Court, "would largely, if not completely, undermine whatever benefit the debtor-in-possession otherwise obtains by its authority to request rejection of the agreement."<sup>41</sup> Furthermore, it maintained, such an enforcement of section 8(d) would run "directly counter" to congressional intent.<sup>42</sup>

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37. The Court used the term "alter ego" in reference to the petitioner's claim that the debtor in possession did not differ in any substantive way from the debtor: "In sum, there was no change in or replacement of the owners, managers, supervisors, employees, or the business and operations of Bildisco . . ." Brief for Petitioner Local Union No. 408, International Brotherhood of Teamsters at 24, *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188 (1984).

38. See Brief for Respondents at 27, *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188 (1984).

39. 104 S. Ct. at 1197.

40. See *id.* at 1198-1200.

41. *Id.* at 1198.

42. *Id.* at 1199. The Court stated that Congress intended, through the Bankruptcy Code, to afford the debtor in possession a greater degree of "flexibility and breathing space." *Id.* See H.R. REP. NO. 595, 95th Cong., 2d Sess. 340 (1977), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6296-97.

*B. Misinterpreting Congressional Intent*

In its decision, the Supreme Court arrived at the conclusion that Congress intended “[t]he provisions of Section 365(a)<sup>43</sup> [to] apply to all collective bargaining agreements covered by the National Labor Relations Act.”<sup>44</sup> To support this conclusion, the Court advanced the argument set forth in *Bildisco*’s brief: the fact that Congress had not singled out collective bargaining agreements for special treatment was particularly significant in light of the many detailed exceptions to and conditions on rejection which it placed upon other executory contracts.<sup>45</sup> Furthermore, Congress had expressly singled out labor agreements under the Railway Labor Act<sup>46</sup> and placed special limitations upon the right of the debtor in possession to reject such agreements.<sup>47</sup> Thus, Congress’ failure to place similar restrictions upon collective bargaining agreements subject to section 365(a) prompted the Court to conclude that Congress had not intended such agreements to be excluded.<sup>48</sup>

The folly of the Supreme Court’s interpretation of legislative intent is readily apparent from the congressional response to the *Bildisco* decision.<sup>49</sup> According to Representative Peter

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43. 11 U.S.C. § 365(a) (1982).

44. *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188, 1195 (1984).

45. See Brief for Respondents at 15-16, *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188 (1984).

46. 45 U.S.C. §§ 151-58 (1982).

47. 11 U.S.C. § 1167 (1982) provides:

Notwithstanding 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 (45 U.S.C. § 156).

48. See *Bildisco*, 104 S. Ct. at 1195 (“Obviously, Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to all collective-bargaining agreements covered by the NLRA.”).

49. Remarks made by Representative Daniel Glickman (D-Kan.) were typical of those made by many members of the House when it considered H.R. 5174 and the resulting Conference Report: “This package also responds to what I consider to have been a misinterpretation of congressional intent by the Supreme Court in its *Bildisco* decision with regard to the status of collective bargaining agreements in bankruptcies.” 130 CONG. REC. H7494 (daily ed. June 29, 1984) (statement of Rep. Glickman).

Rodino,<sup>50</sup> Congress intended its silence on the issue of collective bargaining agreements in 1978<sup>51</sup> to be construed by the courts as approval of the deferential treatment already accorded by the strict standard clearly set forth by the United States Court of Appeals for the Second Circuit in *Brotherhood of Railway and Airline Clerks v. REA Express, Inc.*<sup>52</sup> Representative Rodino stated that, "[t]he Congress was fully aware of the strict standard for rejection established in *REA Express* and believed it was simply continuing that standard when it enacted the 1978 law."<sup>53</sup> The United States House of Representatives subsequently passed H.R. 5174, legislation which contained language that would have expressly codified the standard for rejection enunciated by the Second Circuit.<sup>54</sup>

#### IV. THE CONGRESSIONAL RESPONSE

The congressional response to the Supreme Court's decision was quick and decisive.<sup>55</sup> The Bankruptcy Amendments and Federal Judgeship Act of 1984 is the conference version of H.R. 5174, an omnibus bankruptcy bill with four major

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50. Representative Rodino (D-NJ) was the Chairperson of the House Judiciary Committee and the primary mover of H.R. 5174, the Bankruptcy Amendments and Federal Judgeship Act of 1984.

51. Representative Rodino was referring to the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330 (1982).

52. 523 F.2d 164, 167-69 (2d Cir. 1975), *cert. denied*, 423 U.S. 1017 (1975). The United States Court of Appeals for the Second Circuit held that REA Express, Inc., could reject its collective bargaining agreement upon a showing to the district court that the agreement (1) was onerous and burdensome, and (2) would thwart efforts to save the failing carrier in bankruptcy from collapse.

53. 130 CONG. REC. H1723 (daily ed. Mar. 19, 1984) (statement of Rep. Rodino).

54. H.R. 5174 was the House version of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333. This bill provided in pertinent part: "(g) The court may not approve the rejection of a collective bargaining agreement under this title unless — (2) Absent rejection of such agreement, the jobs covered by such agreement will be lost and any financial reorganization of the debtor will fail." H.R. 5174, 98 Cong., 2d Sess. (1984).

55. Within less than two hours after *NLRB v. Bildisco & Bildisco* was decided by the Supreme Court, Representative Peter Rodino (D-NJ), Chairperson of the House Judiciary Committee, introduced H.R. 4908, which was intended to overturn the Supreme Court's decision. Republicans charged that the labor provisions were "railroaded" through Congress because neither the full Judiciary Committee nor the appropriate subcommittee held hearings on H.R. 4908 or similar provisions which were subsequently incorporated into H.R. 5174 and ultimately passed by both houses as the "Bankruptcy Amendments and Federal Judgeship Act of 1984." See 130 CONG. REC. H1771 (daily ed. Mar. 20, 1984) (statement of Rep. Gingrich).

provisions: (1) to facilitate a restructuring of the bankruptcy court system which had been established in 1978 and declared unconstitutional in *Northern Pipeline Construction Company v. Marathon Pipe Line Company*;<sup>56</sup> (2) to reform the consumer bankruptcy laws to allow a court to dismiss consumer bankruptcy cases filed under Chapter 7<sup>57</sup> if it determined that granting such relief would constitute a "substantial abuse" of the bankruptcy laws;<sup>58</sup> (3) to aid farmers affected by grain elevator bankruptcies;<sup>59</sup> and (4) to overturn the Supreme Court's decision in *NLRB v. Bildisco & Bildisco*<sup>60</sup> by substantially limiting the circumstances under which a collective bargaining agreement may be rejected by a debtor in possession in a bankruptcy case.<sup>61</sup> H.R. 5174 was signed into law by President Ronald Reagan on July 10, 1984.

Specifically, the BAJA would establish a set of provisions with which the trustee or debtor in possession<sup>62</sup> must comply before filing an application to reject or modify its collective bargaining agreement. The debtor in possession must first submit a proposal to the union outlining the modifications of the agreement which are necessary to facilitate reorganization and which contain assurances that all affected parties are

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56. 458 U.S. 50 (1982). In *Marathon* the United States Supreme Court held, in part, that because the bankruptcy court judges were not afforded the protections set forth for federal judges under article III of the Constitution of the United States — lifetime tenure during good behavior and salaries that cannot be reduced — the bankruptcy court system established by the Bankruptcy Reform Act of 1978 was unconstitutional. Titles I and II of the Bankruptcy Amendments and the Federal Judgeship Act of 1984 provided for the appointment of article III bankruptcy judges consistent with the standards enunciated by the Court in *Marathon*. See Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333.

57. 11 U.S.C. §§ 701-66 (1982).

58. See Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 352-58. The significant increase in the number of personal bankruptcies filed under Chapter 7 has given rise to charges that the bankruptcy system is subject to abuse from consumers with steady incomes who could eventually afford to repay their debts. Chapter 7 permits a debtor to permanently eliminate debts by liquidating all current assets rather than filing for bankruptcy under Chapter 13 and agreeing to spread payments to creditors over a period of time.

59. *Id.* at 358-61.

60. 104 S. Ct. 1188 (1984).

61. See Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 390-91 (to be codified at 11 U.S.C. § 1113).

62. *Id.* § 541(b)(1), 1984 U.S. CODE CONG. & AD. NEWS at 390-91 (to be codified at 11 U.S.C. § 1113(b)(1)). This section provides in pertinent part: "hereinafter in this section 'trustee' shall include a debtor in possession . . . ."

treated "fairly and equitably."<sup>63</sup> Furthermore, the debtor in possession must meet in "good faith" with representatives and present financial data relevant to evaluating the proposal.<sup>64</sup> Most importantly, the bankruptcy court shall approve the application to reject the collective bargaining agreement only after it finds that the debtor in possession has complied with the preceding provisions, that the authorized representative of the union has refused to accept such proposal without "good cause,"<sup>65</sup> and that "the balance of the equities clearly favors rejection of such agreement."<sup>66</sup> Finally, Congress included several safety provisions which would ensure that judicial action upon an application would proceed rapidly.

## V. INTERPRETING *BILDISCO*

Section 541(b)(1) and (b)(2) of the BAJA<sup>67</sup> should serve to allay one of organized labor's greatest fears in the wake of the *NLRB v. Bildisco & Bildisco*<sup>68</sup> decision — that an employer could exaggerate or even fabricate the need to file for reorganization under Chapter 11 of the Bankruptcy Code and subse-

63. Section 541(b)(1)(A) provides in pertinent part:

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession . . . shall (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees' benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably . . . .

64. Section 541(b)(1)(B) provides in pertinent part:

[The debtor in possession shall —] (B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal. (2) . . . [T]he trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreements.

65. *Id.* § 541(c)(2).

66. *Id.* § 541(c)(3). The language combined in the original H.R. 5174 provided for a much higher standard for rejection than that ultimately adopted by the Conference Committee. "The court may not approve the rejection of a collective bargaining agreement under this title unless — . . . (2) absent rejection of such agreement, the jobs covered by such agreement will be lost and any financial reorganization of the debtor will fail." H.R. 5174, 98th Cong., 2d Sess., 130 CONG. REC. H1842 (daily ed. Mar. 21, 1984).

67. Pub. L. No. 98-353, § 541, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 390-91 (to be codified at 11 U.S.C. § 1113).

68. 104 S. Ct. 1188 (1984).

quently abrogate its collective bargaining agreements. With the passage of the BAJA, the legitimacy of this concern may never be determined. Subsection b(1)(B) requires that a trustee seeking rejection provide the union's representative with "such relevant information as is necessary to evaluate the proposal . . . ." <sup>69</sup> Furthermore, the debtor in possession must "meet, at reasonable times, with the authorized representative to confer in good faith . . . ." <sup>70</sup> Together, these provisions lend assurance to a union that an employer will not be able to unilaterally abrogate its collective bargaining agreements in "bad faith." <sup>71</sup>

Another major difference between the Supreme Court's decision in *Bildisco* and the BAJA is their conceptual treatment of the time interval between the filing of a petition in bankruptcy pursuant to Chapter 11 and the bankruptcy court's authorization to reject the contract. The Court held that during this time interval, "the collective bargaining agreement is not an enforceable contract within the meaning of NLRA Section 8(d)." <sup>72</sup> The approval of an application for rejection relates back to the date upon which the petition was filed pursuant to Chapter 11. <sup>73</sup> Thus, according to the *Bildisco* Court, the NLRB was precluded from finding that the debtor in possession had committed unfair labor practices by unilaterally modifying the terms of the collective bargaining agreement, <sup>74</sup> conferring obvious benefits upon the debtor in possession.

The BAJA strips the debtor in possession of benefits conferred by the *Bildisco* decision. By prohibiting the unilateral

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69. Pub. L. No. 98-353, § 541(b)(1)(B).

70. *Id.* § 541(b)(2)(B).

71. The *Bildisco* Court preserved bargaining requirements:

Nevertheless, it is important to note that the debtor-in-possession is not relieved of all obligations under the NLRA simply by filing a petition for bankruptcy. A debtor-in-possession is an "employer" within the terms of the NLRA, 29 U.S.C. § 152(1) and (2), and is obligated to bargain collectively with the employees' certified representative over the terms of a new contract pending rejection of the existing contract following formal approval of rejection by the Bankruptcy Court.

*Bildisco*, 104 S. Ct. at 1201.

72. *Id.* at 1199.

73. 11 U.S.C. § 365(g)(i) (1982).

74. *See Bildisco*, 104 S. Ct. at 1199.

modification of the collective bargaining agreement prior to compliance with the notice, meeting, and court rejection provisions contained in subsection (b)(1), the BAJA provides that the collective bargaining agreement is not automatically unenforceable upon the filing of petitions.<sup>75</sup> Furthermore, since the BAJA prohibits unilateral modifications prior to rejection, such modifications would preclude the court from authorizing the application for rejection, and thus the "relation back" doctrine could not be triggered and its benefits realized.<sup>76</sup>

Specific language in the BAJA promises to become a source of considerable debate as bankruptcy courts across the nation interpret this legislation. One of the essential requirements for approving an application for the rejection of a collective bargaining agreement is that the bankruptcy court must find that the union representative refused to accept the required proposal without "good cause."<sup>77</sup> Clearly, Congress has charged the courts with the substantial responsibility of defining the scope of the "good cause" provision. Representative Dan Lungren, a member of the conference committee on H.R. 5174, acknowledged before the House that while the phrase "good cause" was undefined, "[t]he conferees clearly believed that it should be interpreted narrowly by a reviewing court; it certainly was not intended to permit virtually any refusal on the part of the labor representative."<sup>78</sup> On the other hand, determining whether a union's representative had "good cause" to refuse a proposal made by the debtor in possession would necessitate, in effect, a judicial "balancing of the equities" at a much earlier stage in the litigation process than Congress had intended.

## VI. CONCLUSION

The BAJA<sup>79</sup> is a welcome and overdue attempt by Congress to reconcile the conflict created by the often competing

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75. See Pub. L. No. 98-353, § 541(b)(1).

76. See *id.* § 541(f).

77. See *id.* § 541(c)(2).

78. 130 CONG. REC. H7495 (daily ed. June 29, 1984) (statement of Rep. Lungren (R-Cal.)).

79. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 390-91 (to be codified at 11 U.S.C. § 1113).

interests of labor and management and advanced through the language of the Bankruptcy Code<sup>80</sup> and the National Labor Relations Act.<sup>81</sup> It is curious to note that while the BAJA was initiated in response to *NLRB v. Bildisco & Bildisco*,<sup>82</sup> the two are not entirely incompatible.

Procedurally, the BAJA establishes a much stricter standard for the rejection of collective bargaining agreements than the standard posited by the Court in *Bildisco*. However, in the final analysis, the BAJA calls upon the court to “balance the equities” — presumably utilizing many of the same factors identified by the Court in *Bildisco*. It seems clear that Congress adopted this facet of the *Bildisco* standard in recognition of the fact that despite the statutory protections it affords either the debtor in possession or the union, a bankruptcy court is still in the best position to evaluate the equities unique to each case.

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80. 11 U.S.C. §§ 101-1330 (1982).

81. 29 U.S.C. §§ 151-169 (1982).

82. 104 S. Ct. 1188 (1984).