NOTES

REJECTION OF COLLECTIVE BARGAINING AGREEMENTS IN CHAPTER 11 AND THE PROBABILITY OF STRIKES: TIPPING THE BALANCE OF EQUITIES

I.
INTRODUCTION

For 50 years, the aim of national labor relations policy has been to encourage collective bargaining as the means of resolving labor disputes.[1] A critical mechanism for furthering this policy is section 8(d) of the National Labor Relations Act ("NLRA"), which prohibits an employer from altering a collective bargaining agreement without first complying with certain statutory requirements.[2] In 1978, however, Congress may have qualified its support of

1. *See* The National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-68 (1973). The preamble to the NLRA states: "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining. . . ." *Id.* at § 151. *See also* The Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-88 (1972).

2. NLRA § 8(d), 29 U.S.C. § 158(d) provides in relevant part:

collective bargaining when it amended the bankruptcy laws to enable corporations to enter and exit Chapter 11 more readily.[3] One provision of these amendments — section 365 — permits a debtor to "reject any executory contract."[4] The application of section 365 to executory labor contracts thus created the possibility that such contracts would be unilaterally rejected by debtor corporations, and placed the goals of federal bankruptcy law and those of federal labor law squarely at odds.

Bankruptcy judges after 1978 interpreted the language of section 365 as they had interpreted similar language in the old Bankruptcy Act,[5]—that is, to encompass labor agreements.[6] But in an effort to reconcile the conflict between these statutes on the one hand and the NLRA on the other, the courts developed stricter tests for rejecting collective bargaining agreements than the "burdensome" standard used for other executory contracts.[7] Federal courts of appeals upheld these tests, although until 1984 they disagreed over how strict the test should be. The Third and Eleventh Circuits adopted a "balance

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> [W]here there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —
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> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later . . .

The RLA counterparts to § 8(d) are 45 U.S.C. § 152, First, Seventh and 45 U.S.C. § 156. These provisions together with 45 U.S.C. § 155, First, and 45 U.S.C. § 160 — the so-called "status quo" provisions — prohibit an employer from making unilateral changes before a lengthy process of negotiation, mediation and arbitration is exhausted. *See* Detroit & Toledo S.L.R.R. v. United Transport Union, 396 U.S. 142 (1969).

3. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 1-1174 (1979)).

4. 11 U.S.C. § 365(a) (1979). The Bankruptcy Code imposes a limitation on a debtor's right to reject executory contracts in the case of a "collective bargaining agreement that is subject to the Railway Labor Act," requiring changes in wages or working conditions to be made "in accordance with section 6 of [the RLA]." 11 U.S.C. § 1167 (1979). Although § 1167 refers to all labor agreements under the RLA, § 103(g) further provides that this section "applies only in a case . . . concerning a railroad." 11 U.S.C. § 103(g).

5. The Bankruptcy Act of 1898 contained several provisions for rejecting executory contracts. *See infra* notes 68-69 and accompanying text.

6. *See infra* notes 70-72 and accompanying text.

7. The test for rejection of non-labor, executory contracts is whether they are "burdensome." *See* Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 318 U.S. 523, 549-50 (1943). *See also* 2 COLLIER ON BANKRUPTCY ¶ 365.03 (1986).

of the equities" standard,[8] while the Second Circuit endorsed a very rigorous test which required the debtor to show that the reorganization would fail without rejection.[9]

In the 1984 case of *NLRB v. Bildisco & Bildisco*,[10] the Supreme Court sought to resolve the conflict over when a debtor could reject its collective bargaining agreements. The Court's ruling was in two parts. First, it unanimously adopted the "balance of equities" test employed by the court below.[11] Although the Court gave little indication as to how this test should be applied, Justice Rehnquist's opinion did enumerate some factors to be considered: "[T]he 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 [such reduced value] would impose on them, and the impact of rejection on the employees."[12]

Second, the Court found that a debtor's unilateral termination of its collective bargaining agreement was not an unfair labor practice.[13] Justice Brennan, joined by three other Justices, dissented from the majority view on this issue. He felt that the Court had given short shrift to the objectives of federal labor law[14] and that the decision would foment labor strife.[15] He went on to state that "because labor unrest is inimicable to the prospects for successful reorganization, and because unilateral modifications of a collective-bargaining agreement will often lead to labor strife, such unilateral modification will more likely *decrease* the prospects for successful reorganization."[16] Thus, Justice Brennan saw unilateral rejection as contrary to the goal of the Bankruptcy Code as well as to the NLRA.

The second part of the Court's opinion was legislatively overruled by the 1984 amendments to the Bankruptcy Code.[17] The current law details a series of procedures — which includes securing the prior approval of the bankruptcy judge — that the debtor[18] is required to follow before it can reject the collec-

8. *See In re* Brada Miller Freight Systems, Inc., 702 F.2d 890 (11th Cir. 1983); *In re* Bildisco, 682 F.2d 72 (3d Cir. 1982).

9. Brotherhood of Railway Employees v. REA Express, Inc., 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975) (construing the Bankruptcy Act).

10. 465 U.S. 513 (1984).

11. *Id.* at 525-26.

12. *Id.* at 527.

13. *Id.* at 534. The National Labor Relations Board ("NLRB") took the position that by unilaterally rejecting its labor agreements Bildisco committed unfair labor practices in violation of § 8(d) and § 8(a)(5). *See* 29 U.S.C. §§ 158(a)(5), 158(d). *See also* NLRB v. Katz, 369 U.S. 736 (1962) (employer's unilateral changes in conditions of employment constitute *per se* violations of NLRA).

14. 465 U.S. at 535.

15. *Id.* at 548-49.

16. *Id.* at 551 (emphasis in original).

17. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333-92 (1984).

18. References to a "debtor" rejecting its collective bargaining agreements mean actions taken by the debtor-in-possession or the trustee, as the case may be.

tive bargaining agreement.[19] Yet, while the 1984 amendments incorporate the "balance of equities" test adopted in *Bildisco*,[20] it remains to be determined what factors should be weighed by this balance.

Bildisco provides some guidance. Before authorizing rejection courts should consider "not only the degree of hardship, but also any qualitative differences between the types of hardship each [creditor] may face."[21] This statement supports special consideration of employee interests because sacrifices by employees are qualitatively different from banks deferring receipt of payments. Employees stand to lose health insurance, retirement savings, and accumulated seniority,[22] in addition to the value of their rights under the NLRA.[23] Moreover, the Bankruptcy Code itself recognizes the special nature of employee sacrifices in assigning certain employee claims a priority status.[24]

However, from a bankruptcy judge's perspective, the more important reason why rejection requires particular attention to employees' interests is that employees can strike once their contract is rejected.[25] *Bildisco* endorses the Third Circuit's application of the "balance of equities" test,[26] which explicitly mentions strikes as a factor in the balance.[27] The case also implicitly supports consideration of the likelihood of a strike by including the "impact of rejection on employees"[28] as a factor in the equation and by declaring that the "[t]he Bankruptcy Court must focus on . . . how the equities relate to the success of the reorganization."[29] The impact of rejection on the employees thus encompasses the decision to strike, since a successful strike can threaten the debtor's reorganization.

This Note will attempt to define how much weight a court should give to the strike factor when evaluating a debtor's motion to reject its labor contracts. The Note proposes that the key criteria a court should consider are the probability that rejection will precipitate a strike and the likelihood that a strike will undermine the debtor's attempts to reorganize.

Part I examines the Chapter 11 filing of Wheeling-Pittsburgh Steel Cor-

19. The new law governing the rejection of executory labor contracts is codified at § 1113 of the Code, 11 U.S.C. § 1113 (West Supp. 1986). The text of § 1113 is reproduced *infra*, Appendix.

20. *Id.* at § 1113(c)(3).

21. 465 U.S. at 527.

22. Simon, B., *Paper Presented to American Bar Association On Judicial Involvement in Labor Relations Under Bankruptcy Code*, 152 DAILY LAB. REP. (BNA) E-1, E-4 (August 5, 1983).

23. *See* T. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 111 (1986) ("the value of the right provided employees by the National Labor Relations Act . . . is far greater than that of an unsecured creditor.").

24. 11 U.S.C. § 507(a)(3) (1979).

25. *In re* Bildisco, 682 F.2d at 80 (citing *In re* Ryan Co., 83 Lab. Cas. (CCH) ¶ 10,487 at 17,952 n.2 (D. Conn. 1978)).

26. 465 U.S. at 525-26.

27. *See* 682 F.2d at 80.

28. 465 U.S. at 527.

29. *Id.*

poration as a case in point of how rejection of a collective bargaining agreement can provoke a strike that nearly leads to liquidation of the company. Part II looks at labor contract rejections in the aggregate — the number of attempts to reject labor contracts, the percentage of cases where the bankruptcy judge allowed the debtor to reject such contracts and how often these rejections led to strikes. Part III analyzes selected court opinions where the judges either identified and evaluated the strike factor or failed to do so. Part IV assesses how courts should consider the likelihood and consequences of a strike following labor contract rejection. In conclusion, the Note inquires whether given their record and limited scope of expertise, bankruptcy courts are the proper forum for adjudicating labor contract rejections.

II.

IN RE WHEELING-PITTSBURGH STEEL CORPORATION

A. A Case in Point of the Need for Courts to Consider the Strike Factor

At one minute past midnight on July 21, 1985, more than 8,000 steelworkers struck the Wheeling-Pittsburgh Steel Corporation ("Wheeling-Pitt").[30] This action represented the first strike in the basic steel industry since 1959,[31] and it occurred within days of Bankruptcy Judge Warren Bentz's decision to permit rejection.[32] As late as September 1985, analysts were describing the company as "formidable competition if it settles the strike."[33] But as the strike dragged on for nearly 100 days, the company's very survival was put in doubt.[34] Whether the strike eventually would have forced Wheeling-Pitt into liquidation remains an unresolved question, since the company's major shareholder brought in a new management team that negotiated a strike settlement agreement.[35]

Wheeling-Pitt's successful motion to reject its labor contracts and the protracted strike that followed graphically illustrate the conflict between section 365 of the Bankruptcy Code and section 8(d) of the NLRA. On the one hand, rejection meant that Wheeling-Pitt was free to implement its previously

30. *Steelworkers Begin Strike at Wheeling-Pittsburgh*, N.Y. Times, July 21, 1985, at A19, col. 4. The striking steelworkers were represented by the United Steelworkers of America (hereinafter "USWA" or "the Union").

31. *Id.*

32. *See* 50 Bankr. 969 (Bankr. W.D. Pa.), *aff'd*, 52 Bankr. 997 (W.D. Pa. 1985), *rev'd*, 791 F.2d 1074 (3d Cir. 1986).

33. *Mixed Fortunes For Steelmakers*, N.Y. Times, Sept. 16, 1985, at D4, col. 4.

34. *Wheeling-Pittsburgh Nears An Accord With Steel Unions*, N.Y. Times, Oct. 16, 1985, at A20, col. 3 (quoting an unidentified banker: "It's doubtful the company has sufficient cash flow and asset basis to go forward as a viable operation.").

35. *Paulson Takes Control at Wheeling*, N.Y. Times, Sept. 21, 1985, at D1, col. 3. Allen Paulson, a major shareholder, secured CEO Dennis Carney's resignation. Wheeling-Pitt's new management team abandoned the confrontational labor relations policies adopted by their predecessors and successfully renegotiated collective bargaining agreements with the United Steelworkers union. In fact, the new agreement is something of a model for labor-management cooperation. *See Early Signs of Promise in Union Partnership at Steel Company*, N.Y. Times, Apr. 7, 1986, at A8, col. 1 [hereinafter *Early Signs of Promise*].

proposed wage cuts and thereby relieve some of the financial burdens on the company.[36] On the other hand, rejection meant that the company's employees were no longer constrained by the "no strike" provisions in their collective bargaining agreements.[37] Once this constraint was removed, the legal conflict between bankruptcy and labor law erupted into labor-management confrontation, as Justice Brennan in *Bildisco* had predicted it would.[38] If anything, Justice Brennan's warnings about the effect of unilateral rejection on the prospects for successful reorganization proved inadequate.

Wheeling-Pitt thus demonstrates that court-approved rejections, like unilateral rejections, may precipitate precisely the result — strikes — the NLRA was designed to avoid. Such rejections may also undermine the objective of Chapter 11 of the Bankruptcy Code — successful reorganization and a "fresh start."[39] That a strike proved capable of pushing this newly-modernized and efficient steelmaker[40] — a seemingly ideal candidate for Chapter 11 reorganization — toward the "brink of liquidation"[41] suggests that a successful strike has the potential to undermine almost any reorganization.

B. Failure of the Judge to Consider the Strike Factor

In authorizing Wheeling-Pitt to reject its labor contracts, Judge Bentz's opinion mentioned neither the likelihood of a strike following rejection, nor the impact of a strike on the debtor's reorganization. These omissions were especially surprising given that, at the time of the strike, it was public knowledge that the Union had $200 million in its strike fund,[42] Judge Bentz knew that the union had rejected the company's final pre-bankruptcy request for concessions[43] and he heard testimony stating that if the existing collective bargaining agreements were rejected and the company unilaterally instituted the $15.20 per hour wage rate it was proposing, the Union would respond by striking.[44] Despite this, Judge Bentz failed entirely to consider the strike factor, and erroneously predicted that rejection would have a "significant and

36. The company's proposal called for reducing wages from $21.40 to $15.20 per hour. *See infra* notes 50, 53.

37. Two collective bargaining agreements between Wheeling-Pitt and the USWA were in effect at the time the company entered Chapter 11. Both contained clauses forbidding steelworkers from striking while the agreement was in effect. *See* Mon Valley 1983 Agreement § 4, Marginal ¶ 4.6; Ohio Valley 1983 Agreement Art. 9, § 1, Marginal ¶ 9.1.

38. *See supra* notes 14-16 and accompanying text.

39. *See* Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393 (1985) ("discharge is viewed as granting the debtor a financial 'fresh start.' ").

40. *See supra* note 33.

41. *Early Signs of Promise*, *supra* note 35.

42. *See supra* note 30.

43. 50 Bankr. at 973-74.

44. *See* Joint Appendix Volume II at 126, *In re* Wheeling-Pittsburgh Steel Corporation, No. 85-3489 (3rd Cir. 1985) (quoting Andrew Palm, director of USWA District 15 and secretary of the Wheeling-Pittsburgh Negotiating Committee, as follows: "We will strike and shut down every facility in Wheeling-Pittsburgh Steel.").

positive effect on Wheeling-Pittsburgh's prospects for reorganization."[45]

This is not to say that the judge overlooked the importance of labor peace to Wheeling-Pitt's successful reorganization. He found that a five-year collective bargaining agreement would produce the stability needed to reorganize.[46] However, he incorrectly assumed that rejection of the current labor contract would inevitably yield a new five-year contract at the $15.20 hourly wage and benefit rate the company was demanding,[47] even though the Union had rejected a higher rate previously in pre-bankruptcy concession bargaining.[48]

At best, this assumption represents a leap of faith on Judge Bentz's part. At worst, it demonstrates several fundamental misconceptions by him of the collective bargaining process. First, he essentially ignored the significance of the pre-bankruptcy bargaining history. The $21.40 compensation package that Wheeling-Pitt's unionized employees were receiving immediately prior to the company's Chapter 11 petition[49] was itself the product of two rounds of concession bargaining.[50] Prior to accepting givebacks in 1982, those same employees were receiving roughly $25 per hour in wages and benefits.[51] Moreover, during both of the prior rounds of givebacks, the steelworkers had received something in exchange for their concessions: in one case stock, in the other profitsharing.[52] Under the terms of the company's final court-approved proposal, the Union contended that the workers would receive nothing for their sacrifices, even in the event of a dramatic upswing in the company's fortunes.[53] Judge Bentz thus presupposed that the Union would accept a radical

45. 50 Bankr. at 983. In this respect, Judge Bentz's omissions reflect a narrow view of the bankruptcy court's role, a view that is prevalent among bankruptcy judges. *See infra* note 146.

46. 50 Bankr. at 979.

47. *See id.*

48. *See* Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, 791 F.2d at 1077-78.

49. As Judge Bentz recognized, the $21.40 amount, like all other hourly labor cost figures for Wheeling-Pitt, represented a:

> gross figure encompassing total labor costs including numerous components other than wages . . . [A] portion of this figure represents the current cost of pensions and other benefits for retirees, money which is not part of the earnings of current employees. The figure is an average labor cost. Some workers have wages and benefits that exceed this figure; others have wages and benefits that fall below it.

Id. at 973 n.3.

50. Judge Bentz did take note of the Union's pre-bankruptcy concessions in his discussion of the "Background" of the proceeding. 50 Bankr. at 973. But in the section of his opinion entitled "Proposal Must Treat All Parties Fairly and Equitably," he found that these concessions were irrelevant, stating that "$15.20 is far from $21.40 and even farther from $25.00. But the evidence before the court relates to costs necessary to achieve a reorganization, not to whether such costs are 'standard' or 'sub-standard' as measured against some other scale." *Id.* at 980. While he found that the unionized employees' concessions were irrelevant, he nonetheless proceeded to discuss the salaried — i.e., management — employees' concessions, concluding that "[n]o further sacrifices in this sector are warranted." *Id.*

51. *Id.* at 973 n.3.

52. Wheeling-Pittsburgh Steel Corporation v. United Steelworkers of America, 791 F.2d 1074, 1077 (3d Cir. 1986).

53. *See* Brief for United Steelworkers of America at 44-45, *In re* Wheeling-Pittsburgh Steel Corporation, No. 85-1660 (W.D. Pa. 1985), which cites to the transcript of the hearings and

break from the prior course of negotiations.[54]

Secondly, the Judge reasoned that information supplied by Wheeling-Pitt to the Union in January 1985, in connection with an earlier round of concession negotiations, also served to fulfill the requirements of the Bankruptcy Code. Pursuant to section 1113, the debtor has a duty to make a pre-rejection proposal to the Union concerning necessary labor contract modifications, and to supply the information necessary to evaluate that proposal.[55] In determining that all information furnished to the Union since the first round of concession bargaining in 1982 counted toward fulfillment of this latter duty, Judge Bentz stated: "It should not matter that information which is relevant to evaluating the proposal was furnished prior to the debtor's filing of its Chapter 11 petition."[56] His reasoning on this point ignores the plain language of section 1113 in two respects. First, the statute requires that information supplied to facilitate evaluation of the debtor's proposal must be provided "[s]ubsequent to filing a petition."[57] The information that Wheeling-Pitt supplied four months prior to its bankruptcy petition was clearly not provided "subsequent" to its filing. Second, it must be "such relevant information as is necessary to evaluate th[at] proposal."[58] However, the information provided was inadequate to evaluate the company's post-petition proposal for contract modification, since none of its pre-petition proposals included a five-year contract term.[59] By thus allowing Wheeling-Pitt's provision of information under its NLRA obligations[60] to also satisfy its obligations under the Code, the Judge demonstrated an unawareness of not only the pre-rejection requirements of

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states that the absence of a "snap back" provision—that is, an upward adjustment in the wage rate pending an upturn in the company's financial status—"was a centerpiece of the union's contention to the bankruptcy court that the company's proposal was overreaching." Judge Bentz's opinion did not even address the Union's arguments concerning the absence of a "snap back" provision. However, he had found it "relevant to note that the proposal also does *not* provide for any downward adjustment below the $15.20 [rate proposed by the company]." 50 Bankr. at 980 (emphasis in original). The Third Circuit found Judge Bentz's failure to consider the "snap back" issue to be reversible error. *See* 791 F.2d at 1093.

54. In the non-bankruptcy context, an employer's insistence that the Union agree to a contract which "constituted such a radical departure from the previous contract . . . as to be predictably unacceptable to the Union" was held to violate the NLRA. NLRB v. Herman Sausage Co., 122 N.L.R.B. 168, 170 (1958), *enforced*, 275 F.2d 229 (5th Cir. 1960).

55. *See* 11 U.S.C. § 1113 (West Supp. 1986), *infra* Appendix.

56. 50 Bankr. at 981.

57. 11 U.S.C. § 1113(b)(1) (West Supp. 1986).

58. 11 U.S.C. § 1113(b)(1)(B).

59. Although the Third Circuit was not prepared to hold the court's findings regarding information supplied by the company to be "clearly erroneous," the court of appeals did direct the bankruptcy court to reconsider those findings on remand. *See Wheeling-Pitt*, 791 F.2d at 1094.

60. *See* NLRB v. Truitt Manufacturing Co., 351 U.S. 149 (1956) (employers have an obligation to furnish relevant information to substantiate their claim of inability to increase wages to union representatives during contract negotiations). *See also Concessions and Company-by-Company Steel Talks*, N.Y. Times, Apr. 10, 1986, at A20, col. 3 ("Lynn R. Williams, the union president, has adopted a strategy that only companies in dire' need can expect concessions, and *must open their financial records on request.*") (emphasis added).

section 1113, but also their meaning. Section 1113 requires that employers provide information specifically relevant to contract rejections during bankruptcy proceedings, information which may not be provided during collective bargaining negotiations.

A third misconception by Judge Bentz centered on the duration of the agreement he proposed. By allowing rejection of the steelworkers' contract and assuming the need for a five-year agreement to successfully reorganize, he ignored both the fact that five years is an unusually long term for collective bargaining agreements in general,[61] and the Union's "uncontradicted evidence . . . that a five-year contract was neither the practice of Wheeling-Pittsburgh nor that of the steel industry."[62] The Judge nonetheless allowed the company to reject its agreements, believing that the Union would accept a contract of longer duration than one it had already refused during pre-petition negotiations,[63] and of longer duration than the company could reasonably have expected to achieve in a non-bankruptcy setting.

In sum, Judge Bentz's opinion contains a number of erroneous assumptions, both factual and legal, regarding Wheeling-Pitt's labor-management relations. Given that bankruptcy judges are not expected to have particular expertise in labor relations or labor law, it is plausible that future bankruptcy court decisions will similarly misconstrue provisions of federal labor law and ignore facts such as those bearing on the probability of strikes. Such decisions can hardly be expected to inspire greater respect from employees than unilateral rejections by the debtors themselves. Indeed, it seems likely that such decisions will lead to repetitions of the *Wheeling-Pitt* scenario—that is, labor unrest and diminished prospects for successful reorganizations.

C. Epilogue

In October of 1985, the parties were once again before Judge Bentz on the issue of labor contract terms. This time, Wheeling-Pitt's new management joined with the Union in urging the Judge to approve a newly negotiated collective bargaining agreement.[64] The only opposition came from the company's lenders.[65] Judge Bentz re-evaluated his earlier findings and ratified a three-year accord which included a wage and benefit package worth $18.00 per hour.[66] This decision ended the steelworkers' walkout and put the reor-

61. Only four percent of collective bargaining agreements last longer than four years. Lab. Rel. Expediter 133 (1984). Moreover, a proposal for a five year contract has been considered by the NLRB as evidence of bad faith bargaining. *See e.g.*, NLRB v. Wonder State Mfg. Co., 344 F.2d 210, 216 (8th Cir. 1965) (enforcing in part, denying in part 147 N.L.R.B. 179 (1964)); Mooney Aircraft, Inc., 132 NLRB Dec. (CCH) ¶ 10,275 (1961), *enforced per curiam*, 310 F.2d 565 (5th Cir. 1962); Vanderbilt Prods., Inc., 129 N.L.R.B. 1323 (1961), *enforced per curiam*, 297 F.2d 833 (2d Cir. 1961).

62. *Wheeling-Pitt*, 791 F.2d at 1089.

63. *See id.* at 1077-78.

64. *See Wheeling Steel Banks Balking At Labor Pact*, Wall St. J., Oct. 25, 1985, at 4, col. 3.

65. *Id.*

66. *See* 209 Daily Lab. Rep. A-6 (BNA) (Oct. 29, 1985). Although this accord settled the

ganization effort back on track.[67] It also indicated that collective bargaining may provide a fruitful avenue to successful reorganization and labor peace. Wheeling-Pitt was fortunate to have had a second chance to explore this avenue; future bankrupt employers may not be so fortunate.

III.
BANKRUPTCY VERSUS LABOR CONTRACTS

The history of rejection of labor contracts in bankruptcy can be broken down into three periods: 1) cases decided under the old Bankruptcy Act; 2) cases decided after adoption of the Bankruptcy Reform Act of 1978 but before the 1984 Amendments; and 3) cases decided since the 1984 Amendments. Although these three periods involved distinct statutory provisions for authorizing rejection, the percentage of cases in which bankruptcy courts have authorized rejection has remained relatively constant. This suggests, perhaps, that bankruptcy judges have been less concerned with the particular language of these provisions than with the ultimate result. In the decided majority of cases, the result has been to permit rejection.

A. Court-Authorized Rejections

Prior to 1978, federal bankruptcy law contained several provisions for rejecting executory contracts. One such provision — section 313(1) — provided that: "the court may . . . permit the rejection of executory contracts of the debtor." [68] Similar provisions were included in section 70(b) and section 116(1).[69] Courts eventually interpreted these provisions to permit rejection of executory labor contracts, but there was no consensus as to what the legal

principle issues in controversy, it did not render the case moot. *See Wheeling-Pitt*, 791 F.2d at 1079-80.

67. *See Early Signs of Promise, supra* note 35 (company expected to announce a profit of $2 million for the first quarter of 1986). In fact, the company reported a $4 million profit for the first quarter of 1986. *See* Wheeling-Pittsburgh Steel Corporation 1986 Form 10-K Annual Report 32. Following its auspicious first quarter of 1986, however, Wheeling-Pittsburgh's recovery took a decided turn for the worse, and it ended the year with a net loss of $250 million. *Id.* at 11. But in the first quarter of 1987, the company was back in the black, reporting a profit of nearly $34 million for the quarter. *See* Wheeling-Pittsburgh Steel Corporation Form 10-Q Quarterly Report for Quarter Ended March 31, 1987. Wheeling-Pittsburgh continued to show profits in the second and third quarters of 1987, of $39 million and $25 million, respectively. *See* Wheeling-Pittsburgh Steel Corporation Form 10-Q Quarterly Reports for Quarters Ended June 30, 1987 and September 30, 1987.

68. Bankrupcty Act of 1898, § 313(l) (superseded at 11 U.S.C. § 365(a) (1979)).

69. Section 70b provided:

> The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract . . . not assumed or rejected within that time shall be deemed to be rejected.

Section 116 provided: "Upon the approval of a petition, the judge may . . . permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate."

standard for rejection should be.[70] Most courts adopted the "balance of the equities" standard,[71] while the Second Circuit eventually endorsed an even more stringent test: permitting rejection only if failure to do so would prevent successful reorganization.[72] This unsettled question regarding when debtors could reject their executory labor contracts under the Bankruptcy Act was never fully resolved. The Supreme Court passed up an opportunity to resolve the question when it denied *certiorari* in *Brotherhood of Railway and Airline Clerks v. REA Express.*[73] Moreover, the question of how labor agreements governed by the Railway Labor Act ("RLA")[74] should be considered in comparison with those under the NLRA compounded the uncertainty regarding the standard for labor contract rejection.[75] Six of eight bankrupt employers who sought rejection of their labor agreements during the period from 1935 through 1978 received permission to do so.[76]

With Congress' adoption of the new Bankruptcy Code in 1978, the statutory language regarding rejection of executory contracts was altered in two respects. First, debtors were permitted by section 365 to reject "any" execu-

70. *Cpmpare In re* Alan Wood Steel Co., 449 F. Supp. 165 (E.D. Pa. 1978) (balance of equities) *with* Brotherhood of Railway and Airline Clerks v. REA Express, Inc., 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975) (absent rejection the debtor will be forced into liquidation).

71. *See, e.g., In re* Alan Wood Steel Co., 449 F. Supp. 165 (E.D. Pa. 1978).

72. *See* Brotherhood of Railway and Airline Clerks v. REA Express, Inc., 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975). Before the adoption of this very stringent test, however, courts in the Second Circuit had generally applied the balance of equities standard, *see, e.g.*, Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975); *In re* Overseas National Airways, Inc., 238 F. Supp. 359 (E.D.N.Y. 1965), although one court applied a test resembling the standard for non-labor executory contracts. *See In re* Klaber Bros., Inc., 173 F. Supp. 83, 85 (S.D.N.Y. 1959) (affirming bankruptcy court's order permitting rejection because "contract is a burden on the estate").

73. 423 U.S. 1017 (1975).

74. 45 U.S.C. §§ 151-88 (1972).

75. The Bankruptcy Act contained express provisions regarding the rejection of collective bargaining agreements covering railroad employees. *See* Bankruptcy Act of 1898 § 77(n). In the first case to consider whether the provisions for rejecting labor contracts under the Bankruptcy Act applied with equal force to non-railroad employees under contracts governed by the RLA, the court held that it did. *Overseas National Airways*, 238 F. Supp. 359 (E.D.N.Y. 1965). The court found that such employees, even though not railroad employees, were entitled to require the debtor to conform with the "status quo" provisions of the RLA before it could reject the labor agreements. *Id.* at 360. That decision was implicitly overruled by *REA Express*, 523 F.2d 164, where the court ruled that a non-railroad debtor could reject its labor contracts without following the RLA's requirements since the language of the Bankruptcy Act regarding RLA labor contracts was limited to railroad reorganizations.

76. Reported cases permitting rejection: Truck Drivers Local 807 v. Bohack Corp., 541 F.2d 312 (2d Cir. 1976), *on remand*, 431 F. Supp. 646 (E.D.N.Y. 1977); *In re* Alan Wood Steel, 449 F. Supp. 165 (E.D. Pa. 1978) (affirming rejection); Garment Workers Local 30 v. Hers Apparel Industries, 76 Lab. Cas. (CCH) ¶ 13,940 (S.D.N.Y. 1973); Carpenters Local Union 2746 v. Turney Wood Products, Inc., 289 F. Supp. 143 (W.D. Ark. 1968); *In re* Klaber Bros., 173 F. Supp. 83, (S.D.N.Y. 1959); *In re* Public Ledger, Inc., 63 F. Supp. 1008 (E.D. Pa. 1945), *rev'd in part*, 161 F.2d 762 (3d Cir. 1947). Reported cases denying rejection: *In re* Overseas National Airways Inc., 238 F. Supp. 359 (E.D.N.Y. 1965); *In re* Mamie Conti Gowns, Inc., 12 F. Supp. 478 (S.D.N.Y. 1935) (possible abuse by financially healthy company where the judge said he was not "wholly satisfied" that the goal was reorganization).

tory contract, subject to court approval.[77] This alteration codified the case law interpretation of executory labor contracts as subject to rejection. Further, it reinforced the view that labor contract rejection involved a higher standard than other types of executory contracts[78] through the canon of statutory construction that presumes Congress is aware of prevailing judicial interpretations.[79] Second, under the Bankruptcy Code, it is the "trustee" rather than the court that is authorized to reject executory contracts, although the trustee's action is subject to court approval.[80] Thus, section 365 makes the trustee or debtor-in-possession[81] the operative party, rather than the court.

While the incorporation of section 365 in the Bankruptcy Code did not represent a dramatic change in the statutory language,[82] a significant increase in efforts to reject labor contracts followed its adoption. As compared to the handful of cases prior to 1978, more than five times as many debtors sought court authorization to reject their collective bargaining agreements in the period between the adoption of the Code in 1978 and the 1984 Amendments.[83] In sixty-two percent of the cases where rejection was sought (22 of 35), the petitioner-employers succeeded in obtaining rejections.[84] While the courts in-

77. 11 U.S.C. § 365(a) (1979).

78. *See supra* note 7 and accompanying text.

79. *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 524 (1984).

80. 11 U.S.C. § 365(a) (1979).

81. Section 1107 provides a debtor-in-possession with essentially the same rights as the trustee. *See* 11 U.S.C. § 1107 (1979). *See also Bildisco,* 465 U.S. at 517 n. 2.

82. There may have been little difference between the prior language and § 365 in the case where the debtor sought bankruptcy court approval before rejecting its collectively bargained contractual obligations. However, the new language arguably recognized a debtor's right to reject first and seek approval later. Although theoretically a debtor could have been found to be retroactively liable to its employees for a unilateral rejection that the bankruptcy court found unwarranted, every unilateral rejection between the adoption of the Code and the 1984 Amendments was validated. *See, e.g., Bildisco,* 465 U.S. at 513; *In re* Continental Airlines, No. 83-04019-H2-5, slip op. (Bankr. S.D. Tex. Aug. 17, 1984).

83. This figure does not include those cases where the debtor unilaterally rejected its labor contracts without first obtaining court sanction. However, it does include two instances where clearly solvent companies sought to take advantage of § 365 to evade their collective bargaining agreements. *See In re* C. & W. Mining Co., 3 Bankr. L. Rep. (CCH) ¶ 69,792 (Bankr. N.D. Ohio 1984); *In re* Louis F. Sammarco Electric Co., 109 L.R.R.M. (BNA) 3288 (Bankr. W.D. Tenn. 1982).

84. Reported decisions permitting rejection: Briggs Transportation Co. v. Teamsters, 739 F.2d 341 (8th Cir.), *cert. denied,* 469 U.S. 917 (1984); Borman's, Inc. v. Allied Supermarkets, Inc., 706 F.2d 187 (6th Cir. 1983); *In re* Tuscon Yellow Cab Co., 27 Bankr. 621 (Bankr. 9th Cir. 1983); Local Joint Executive Board v. Hotel Circle, Inc., 613 F.2d 210 (9th Cir. 1980); *In re* Midwest Emery Freight System, Inc., 48 Bankr. 566 (Bankr. N.D. Ill. 1985); *In re* Bloss Glass Co., Inc., 39 Bankr. 694 (Bankr. M.D. Pa. 1984); *In re* Rath Packing Co., 36 Bankr. 979 (Bankr. N.D. Iowa 1984); *In re* Gray Truck Line Co., 34 Bankr. 174 (Bankr. M.D. Fla. 1983); *In re* Blue Ribbon Transport Co., Inc., 30 Bankr. 783 (Bankr. D.R.I. 1983); *In re* Concrete Pipe Machine Co., Inc., 28 Bankr. 837 (Bankr. N.D. Iowa 1983); *In re* Commercial Motor Freight, Inc., 27 Bankr. 293 (Bankr. S.D. Ind. 1980); *In re* J.R. Elkins, Inc., 27 Bankr. 862 (Bankr. E.D.N.Y. 1983); *In re* Braniff Airways, Inc., 25 Bankr. 216 (Bankr. N.D. Tex. 1982), *aff'd,* 700 F.2d 214 (5th Cir. 1983); *In re* U.S. Truck Co., 24 Bankr. 853 (Bankr. E.D. Mich. 1982); *In re* Southern Electric Co., 23 Bankr. 348 (Bankr. E.D. Tenn. 1982); *In re* Hoyt, 27 Bankr. 13 (Bankr. D. Or. 1982); *In re* Yellow Limousine Service, 22 Bankr. 807 (Bankr. E.D. Pa. 1982); *In re* Reserve Roofing of Florida, Inc., 21 Bankr. 96 (Bankr. M.D. Fla. 1982); *In re* Price

terpreting the Code were not always clear about the tests that they were applying, the balance of the equities standard appears to be the one that they predominantly used.

The Bankruptcy Amendments and Federal Judgeship Act of 1984 included a new statutory provision governing rejection of labor agreements. The 1984 Amendments expressly eliminated unilateral rejection[85] and specified the procedures for debtors to follow before the bankruptcy court would permit rejection.[86] The courts have since undertaken to clarify this provision and its effect, if any, on *Bildisco*'s "balance of equities" standard. This effort has led to the development of a nine point test, which includes "balancing the equities" as one of its points.[87] However, since the adoption of the 1984 Amendments, bankruptcy judges have generally viewed the "balance of equities" as the substantive standard for rejection, and have approved fifty-four percent of motions to reject (6 of 11).[88]

Chopper Supermarkets, Inc., 19 Bankr. 462 (Bankr. S.D. Cal. 1982); *In re* Aetco Equipment, Inc., 18 Bankr. 915 (Bankr. W.D. Pa. 1982); *In re* Allied Technology, 8 Bankr. 366 (Bankr. S.D. Ohio 1980); *In re* Handy Andy, 109 L.R.R.M. (BNA) 3299 (W.D. Tex. 1982).

Reported decisions denying rejection: *In re* Kirkpatrick, 34 Bankr. 767 (Bankr. 9th Cir. 1983); *In re* Crozier Bros., Inc., 52 Bankr. 402 (Bankr. S.D.N.Y. 1985); *In re* Fitzgerel, 44 Bankr. 949 (Bankr. W.D.Mo. 1984); *In re* Pesce Baking Co., 43 Bankr. 949 (Bankr. N.D. Ohio 1984); *In re* Total Transport Service, 37 Bankr. 904 (Bankr. S.D. Ohio 1984); *In re* Maverick Mining Corp., 36 Bankr. 837 (Bankr. W.D. Va. 1984); *In re* Tinti Construction Co., 29 Bankr. 971 (Bankr. E.D. Wis. 1983); *In re* St. Croix Hotel Corp., 18 Bankr. 375 (Bankr. D. V.I. 1982); *In re* David A. Roslow, Inc., 9 Bankr. 190 (Bankr. D. Conn. 1981); *In re* Connecticut Celery Co., 90 Lab. Cas. (CCH) ¶ 12,515 (Bankr. D. Conn. 1980); *In re* Studio Eight Lighting, 91 L.R.R.M. (BNA) 2429 (E.D.N.Y. 1976); *In re* C. & W. Mining Co., 3 Bankr. L. Rep. (CCH) ¶ 69,792 (Bankr. N.D. Ohio 1984) (solvent company's petition denied); *In re* Louis F. Sammarco Electric Co., 109 L.R.R.M. (BNA) 3288 (Bankr. W.D Tenn. 1982) (same).

See also International Brotherhood of Teamsters v. IML Freight, Inc., 789 F.2d 1460 (10th Cir. 1986) (remanding order permitting rejection); *In re* Figure Flattery, 88 Lab. Cas. (CCH) ¶ 11,850 (S.D.N.Y. 1980) (same); *In re* Brada Miller Freight Systems, 8 Bankr. 62 (Bankr. N.D. Ala. 1980) (permitting rejection), *vacated and remanded*, 702 F.2d 890 (11th Cir. 1983).

85. *See* 11 U.S.C. § 1113(f) (West Supp. 1986), *infra*, Appendix.

86. *Id.* at § 1113(b).

87. The test was developed in *In re* American Provision Co., 44 Bankr. 907 (Bankr. D. Minn. 1984). It has been followed in *In re* Kentucky Truck Sales, Inc., 52 Bankr. 797 (Bankr. W.D. Ky. 1985); *In re* Cook United, Inc., 50 Bankr. 561 (Bankr. N.D. Ohio 1985); *In re* K&B Mounting, Inc., 50 Bankr. 460 (Bankr. N.D. Ind. 1985); *In re* Salt Creek Freightways, 47 Bankr. 835 (Bankr. D. Wyo. 1985).

88. Reported decisions permitting rejection: *In re* Royal Composing Room, Inc., 62 Bankr. 403 (Bankr. S.D.N.Y. 1986); *In re* Kentucky Truck Sales, Inc., 52 Bankr. 797 (Bankr. W.D. Ky. 1985); *In re* K&B Mounting, Inc., 50 Bankr. 460 (Bankr. N.D. Ind. 1985); *In re* Salt Creek Freightways, 47 Bankr. 835 (Bankr. D. Wyo. 1985); *In re* Allied Delivery System Co., 49 Bankr. 700 (Bankr. N.D. Ohio 1985); *In re* Carey Transportation, 50 Bankr. 203 (Bankr. S.D.N.Y. 1985), *aff'd*, 816 F.2d 82 (2d. Cir. 1987). Reported decisions denying rejection: *In re* Sullivan Motor Delivery, Inc., 56 Bankr. 28 (Bankr. E.D. Wis. 1985); *In re* Cook United, Inc., 50 Bankr. 561 (Bankr. N.D. Ohio 1985); *In re* Fiber Glass Industries, Inc., 49 Bankr. 202 (Bankr. N.D.N.Y. 1985); *In re* American Provision Co., 44 Bankr. 907 (Bankr. D. Minn. 1984); *In re* Wright Airlines, No. B84-2493 (Bankr. E.D. Ohio 1984).

See also In re Century Brass Products, Inc., No. 2-85-00197, slip op. (Bankr. D. Conn. July 26, 1985), *aff'd*, 55 Bankr. 712 (D. Conn. 1985), *rev'd*, 795 F.2d 265 (2d Cir. 1986) (debtor failed to satisfy procedural requirements of § 1113 because union's conflict of interest precluded

However, in *Wheeling-Pittsburgh Steel Corporation v. United Steelworkers of America*,[89] the Third Circuit called into question the prevailing view among bankruptcy judges that the standard for rejection embodied in the 1984 Amendments was the "balance of equities." In its opinion, the court of appeals determined that the 1984 Amendments had effected a "substantial modification in the standard for rejection."[90] The court quoted extensively from section 1113's legislative history to show that the statute was intended to make it more difficult for debtors to reject their collective bargaining agreements. Specifically, it found that the floor debates that preceded the enactment of section 1113 reflected the "pervasive understanding that the substantive standard of *Bildisco* had been overturned and that the *REA Express* standard, or something close to it had been reinstated."[91]

The court essentially derived its "necessity" test from the language of section 1113 itself, specifically from the interaction of section 1113(b) and (c). Section 1113(b) requires that a debtor which seeks to reject its labor contracts first make to its employees' representative a proposal that contains those changes "necessary to permit reorganization of the debtor."[92] Section 1113(c) mandates that the court ensure compliance with section 1113(b) before it can authorize rejection.[93] Reading these sections collectively, the court of appeals concluded that "when the bankruptcy court considers whether a specific proposal of modification is 'necessary' under the substantive standard set forth in section 1113, it will have to decide if the debtor has shown that any modifications are necessary."[94] In other words, the bankruptcy court should apply a "necessity" test as a prerequisite to rejection.[95] As conceived by the Third Circuit, this standard would be considerably more stringent than *Bildisco*'s

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it from serving as both active employees' and retirees' "representative"), *cert. denied*, 107 S. Ct. 433 (1986).

89. 791 F.2d 1074 (3d Cir. 1986).

90. *Id.* at 1090-91.

91. *Id.* at 1088. *See infra* note 95 and accompanying text.

92. For the full text of § 1113(b), *see infra*, Appendix.

93. For the full text of § 1113(c), *see infra*, Appendix.

94. 791 F.2d at 1085.

95. While the Third Circuit may have been justified in deriving the substantive test of "necessity" from the language of § 1113, the existence of this test does not obviate the need for the bankruptcy court to "balance the equities" (and hence to consider the strike factor), as well. Section 1113(c) not only imposes as a condition precedent to rejection the requirement that the debtor make a proposal containing modifications "necessary" for reorganization, but it also expressly requires that the court find that "the balance of the equities clearly favors rejection." 11 U.S.C. § 1113(c)(3). Since the various provisions of § 1113(c) are conjunctive, both the "balance of the equities" and the "necessity" tests must be satisfied, assuming that the Third Circuit's analysis was correct. Thus, the Third Circuit's reference to the *Bildisco* standard being "overturned," 791 F.2d at 1088, cannot be read as eliminating the need to apply the "balance of equities" test since to do so would render § 1113(c)(3) inoperative in contravention of established principles of statutory construction. *See* 2A N. SINGER, STATUTORY CONSTRUCTION ¶ 46.06 (4th ed. 1984). Instead, one should interpret the opinion as having identified an additional test of "necessity" that should be applied in conjunction with the "balance of equities" standard. *Cf.* Truck Drivers Local 807 v. Carey Transportation, Inc., 816 F.2d 82, 88 (2d Cir. 1987) (listing both the necessity and the balance of equities tests as two of the "substantive

"balance of equities" test, and thus should lead to fewer rejections.[96]

B. Unilateral Rejections

Unlike court-approved rejections of labor contracts, which occurred during all three periods in the history of labor contract rejection, unilateral rejections were almost exclusively a phenomenon of the 1978 - 1984 period. Prior to 1978, only one debtor — W.T. Grant — attempted to reject its labor contract unilaterally.[97] This effort proved unsuccessful since the bankruptcy court refused to ratify the rejection.[98] Both the district court and the court of appeals affirmed, and the Supreme Court denied certiorari.[99]

Only three years after denying certiorari in *W.T. Grant*, the Supreme Court's affirmance of the bankruptcy court's action in *Bildisco*[100] made clear that debtors could refuse to honor commitments arising from their collective bargaining agreements before the rejection was authorized. The *Bildisco* Court empowered the debtor to reject first and seek court approval later. Moreover, the debtor would face adverse consequences only in the unlikely event that the bankruptcy judge subsequently refused to validate the rejection.[101] If the gamble paid off, the debtor could begin to reap the benefits of rejection immediately.

Once *Bildisco* cleared the way, much larger enterprises followed its example, or went a step further. Wilson Foods not only made a unilateral declaration of its intention to forego provisions in its executory labor contracts, but it also unilaterally implemented new wage rates and working conditions.[102] The new wages were forty to fifty percent lower than the rates before bank-

showings" required for rejecting labor contracts and noting a third such requirement—"that the union has rejected [the debtor's] proposal without good cause").

96. If the other circuits follow the Third Circuit's interpretation of § 1113, then the problem of rejection-induced strikes might largely be mitigated by the more stringent rejection standard. However, if another circuit took the position that § 1113 was intended to perpetuate the "balance of equities" standard, then the status of the substantive test for rejection would become just as unsettled as when the Supreme Court granted *certiorari* in *Bildisco*. The Second Circuit has already muddied the waters somewhat by declining to follow the Third Circuit's interpretation of § 1113's requirements. Although it held that the substantive test for rejection included a necessity component, the Second Circuit called the *Wheeling-Pittsburgh* court's view of what constitutes necessity "troubling." *Carey Transportation*, 816 F.2d at 89.

97. *In re* W.T. Grant Co., 474 F. Supp. 788 (S.D.N.Y. 1979), *aff'd* 620 F.2d 319 (2d Cir. 1980), *cert. denied sub. nom.* Rodman v. Rinier, 446 U.S. 983 (1980).

98. 474 F. Supp. at 791.

99. *See supra* note 97.

100. NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984). *Bildisco* was among the first proceedings under the Code where the debtor sought after-the-fact approval of a prior unilateral rejection. Bildisco had failed to honor several of its contractual obligations to its employees beginning in the spring of 1980, but did not seek formal rejection until December of that year. On January 15, 1981, the bankruptcy court granted Bildisco's motion to reject. *See id.* at 518.

101. If the contract was not deemed rejected, " '[a]ny compensation earned by and payable to the employee under the contract' after the petition is filed is a first priority administrative expense." *Id.* at 545 (Brennan, J., dissenting) (citing Countryman, *Executory Contracts in Bankruptcy: Part II*, 58 MINN. L. REV. 479, 484 (1974)).

102. *See In re* Wilson Foods Corporation, 31 Bankr. 269, 270 (Bankr. W.D. Okla. 1983).

ruptcy.[103] Continental Airlines,[104] following Wilson Food's example, unilaterally reduced wages by forty-five to fifty percent and instituted new work rules.[105] Both companies' actions provoked strikes.

In the wake of *Bildisco*, Congress began to consider legislation both to prevent future unilateral rejections and to make the test for rejection of labor agreements more stringent.[106] Due to the constitutional crisis surrounding the status of bankruptcy judges,[107] bankruptcy legislation was already a priority item on the congressional docket. Organized labor successfully lobbied to join the issue of unilateral rejection of labor agreements with legislation that addressed the need to conform the Bankruptcy Code to the requirements of Article III of the Constitution. Ultimately, unilateral rejections were proscribed, but only prospectively.[108] Thus, while Congress closed the back door that *Bildisco* had left open, it left undisturbed those companies that had exploited bankruptcy in this way.[109]

C. *Strikes Against Chapter 11 Companies*

Rejections or breaches of collective bargaining agreements by companies in bankruptcy have resulted in a number of strikes by their employees. As will be discussed below, the unilateral rejection of labor contracts by Wilson Foods, Continental Airlines, and Bohack sparked walkouts at their job sites. In the cases of Wilson Foods and Continental Airlines, the companies, operating as debtors-in-possession, coupled the rejections with drastic wage reductions and made major alterations in working conditions. Court-sanctioned rejections precipitated strikes at Wheeling-Pitt, Briggs Transportation, and IML Freight. And in several other instances, debtor companies' breach of their labor contracts led to strikes.

In the case of *In re Wilson Foods Corp.*, the debtor reduced wages by forty to fifty percent within days of its Chapter 11 filing.[110] The company's unilat-

103. *See* 465 U.S. at 549 n.16 (Brennan, J., dissenting) (citing N.Y. Times, May 3, 1983, at D2).

104. *See In re* Continental Airlines Corporation, 38 Bankr. 67 (Bankr. S.D. Tex. 1984).

105. *See* 465 U.S. at 549 n.16 (Brennan, J., dissenting) (citing N.Y. Times, Sept. 28, 1983, at D6).

106. *See The Bildisco Case And The Congressional Response*, 30 WAYNE L. REV.1169, 1190-92 (1984). Even before *Bildisco* was decided, Congress had held hearings on the subject of labor contract rejections. *See Wheeling-Pitt*, 791 F.2d at 1082.

107. *See* Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1981), where the Supreme Court struck down the statute defining the jurisdiction of the bankruptcy courts, ruling that it violated Article III of the U.S. Constitution.

108. *See* 11 U.S.C. § 1113(f) (West Supp. 1986).

109. More recently, this door was reopened, if only slightly, by the NLRB. In Edward Cooper Painting, Inc., 273 N.L.R.B. 1870 (1985), the Board held that filing for bankruptcy ends an employer's liability for unfair labor practices. Here again, a debtor's unilateral action, in this case filing its petition, enables it to escape legal obligations to its employees. The Board saw this result as a necessary consequence of *Bildisco*, but did not consider what effect the 1984 Amendments might have in curtailing *Bildisco*'s reach.

110. *See supra* note 103.

eral wage cut prompted a walkout by 5,000 workers at seven plants[111] that forced the company to return to the bargaining table. The parties eventually agreed to a new collective bargaining agreement that provided for a wage rate of $8.00 per hour.[112] This was roughly halfway between the company's pre-petition rate of $10.69, and the $6.50 rate it unilaterally imposed after the petition.[113]

Six months after Wilson Foods' unilateral rejection, the scenario was repeated at Continental Airlines.[114] Following its bankruptcy filing, the company rejected its collective bargaining agreements and unilaterally changed wages and work rules. The various employee unions responded immediately by striking.[115] At Continental, however, the strikes failed to force the airline to renegotiate its labor agreements. Instead, the strikes eventually were settled on terms favorable to the debtor.[116]

The case of *Bohack Corp.*[117] arguably falls within the unilateral rejection category, as well. First, Bohack breached its labor agreements by subcontracting work to drivers outside the bargaining unit, and by laying off members of the Teamsters union who had previously performed identical functions.[118] Despite this action, the union did not strike until the company committed its second breach when it announced plans to terminate the remaining drivers.[119] On the same day that it terminated the drivers, the company also moved to reject its labor contracts.[120] Thus, Bohack unilaterally implemented changes in violation of its labor agreements without first receiving court authorization to reject those agreements.

In the context of court-approved rejections, the events that took place at Wheeling-Pitt following Judge Bentz's decision to permit rejection were strikingly similar to those that occurred earlier at Wilson Foods. The employees of both companies struck without regard to whether the rejection occurred unilaterally or after court approval. Strike activity in both cases led to re-negotiated labor agreements and subsequent strike settlements, although the

111. *Wilson Foods Fights Back*, N.Y. Times, Dec. 3, 1983, at 31, col. 1.

112. *Id.*

113. *Id.*

114. *See* N.Y. Times, Oct. 3, 1983, at B13, col. 4.

115. *Id.* Members of the Machinists Union were already on strike prior to Continental's bankruptcy filing. *See* 188 Daily Lab. Rep. (BNA) A-11 (Sept. 27, 1983).

116. After prolonged picketing that lasted more than two years, ALPA, the Air Line Pilots Association, was the last union to concede defeat. ALPA agreed to be bound by the bankruptcy court's resolution of all its claims against Continental and to end all outstanding litigation against the airline. *See Continental, ALPA Agree On Terms To End Strike*, 213 Daily Lab. Rep. (BNA) A-8 (Nov. 4, 1985). *See also* 76 Daily Lab. Rep. (BNA) 1 (April 19, 1985) (Machinists and Flight Attendants Unions announced they were unconditionally ending their strikes.).

117. Truck Drivers Local 807 v. Bohack Corp., 541 F.2d 312 (2d Cir. 1976).

118. *Id.* at 314-15.

119. *Id.* at 315.

120. *Id.*

Wheeling-Pitt strike lasted for a much longer period of time.[121]

Yet another variation of the rejection/strike scenario was described in *Briggs Transportation Company v. International Brotherhood of Teamsters.*[122] Briggs sought and received bankruptcy court approval to reject its collective bargaining agreements.[123] The company immediately announced a unilateral reduction in wages and benefits. Within a week, members of the Teamsters union, which represented 300 of the company's employees, went on strike.[124] The strike ended two days later, when the employer agreed to rescind the changes. Thus, *Briggs* can be seen as a precursor to *Wheeling-Pitt* on a much smaller scale, and on an accelerated timetable.

If *Briggs* represents the *Wheeling-Pitt* scenario in an abbreviated form, then the events described in *International Brotherhood of Teamsters v. IML Freight, Inc.*[125] can be viewed as *Wheeling-Pitt* extended to its ultimate conclusion. *IML Freight* initially involved a petition for voluntary reorganization under Chapter 11. On the same day that it sought bankruptcy court protection, IML Freight filed a motion to reject thirty-three collective bargaining agreements it had with sixty-six local unions.[126] The bankruptcy court granted the debtor's petition and "[s]ometime thereafter the employees went on strike, and IML went into Chapter 7."[127] The district court affirmed the bankruptcy court's decision to permit rejection of IML Freight's labor contracts.[128] In reversing, the Tenth Circuit held that "the bankruptcy judge and district court failed to make the required findings of fact to support the conclusion that the labor agreements should be rejected."[129] The court of appeals specifically criticized the two lower courts for their failure to give serious consideration to the strike factor:

> [T]here is little discussion of the effect on employees from rejection. While there is an indication that both the bankruptcy judge and district judge were aware that the employees would probably strike after rejection, the reality of the unions' strongly stated opposition was dismissed with an expression of hope that the debtor would reach an accommodation with its employees. Such optimism would scarcely seem warranted in view of the pre-bankruptcy history, including unfair labor practice charges following unilateral wage cuts.[130]

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121. The Wheeling-Pitt strike lasted 98 days. *See Court Limits Bankrupt's Altering of Labor Pacts*, N.Y. Times, June 8, 1986, at 34, col. 1. The Wilson Foods strike lasted less than a month. *See Strikers Vote to Accept Meat Packer's Offer*, N.Y. Times, June 27, 1983, at A10, col. 6.

122. 739 F.2d 341 (8th Cir.), *cert. denied*, 469 U.S. 917 (1984).

123. *See In re* Briggs Transport. Co., 39 Bankr. 343 (Bankr. D. Minn. 1984).

124. 739 F.2d at 342.

125. 789 F.2d 1460 (10th Cir. 1986).

126. *Id.* at 1462.

127. *Id.* Chapter 7 is the liquidation provision of the Bankruptcy Code.

128. *Id.*

129. *Id.* at 1464.

130. *Id.* at 1463. The Tenth Circuit not only criticized the bankruptcy and district courts

Thus, *IML Freight* stands for the proposition that a bankruptcy judge's failure to balance the equities properly — and in particular to include the strike factor in the balance — can constitute reversible error. It also demonstrates that court-ordered rejection of labor contracts can precipitate a strike that results in liquidation of the debtor, thereby fulfilling Justice Brennan's *Bildisco* prophesy.[131] Although the Tenth Circuit did not identify the bankruptcy judge's failure to consider the strike factor as the proximate cause of IML Freight's demise, the sequence of events clearly indicates that this omission contributed to the ultimate outcome.

The remaining instances of strikes by employees of bankrupt companies involved breaches of labor contracts without formal rejection. For the purpose of analyzing the strike factor, a breach of contract can be treated like a rejection.[132] In the former scenario, the employer violates the agreement by a unilateral action that fails to honor the contract terms; in the latter, the employer unilaterally announces her intention to repudiate the contract. In both cases, the non-breaching party is no longer bound by the contract's terms. Furthermore, under general contract principles, the rejection of a contract is deemed to be a breach as of the time of a bankruptcy filing.[133] Finally, it is settled that a debtor cannot reject only part of a contract.[134]

In three of these breach of contract strikes against bankrupt employers, the breaches actually occurred pre-petition. All three cases involved an employer's failure to make scheduled contributions to various employee benefit funds. In one of these cases, *In the Matter of Crowe & Associates, Inc.*,[135] the employer was $36,000 in arrears on payments into its pension fund prior to filing for bankruptcy. The employees went on strike to compel payment of this money. Similarly, in *In re Petrusch*,[136] the employees went on strike to

for their failure to consider the prior bargaining history of the parties in the case at bar, but also faulted the bankruptcy court for its general ignorance of national labor relations policy. The court observed that "the bankruptcy judge . . . concluded that rejection would cause negotiation leading to a new contract. That approach is inconsistent with the history of judicial intervention in labor disputes since the formation of labor organizations in the United States." *Id.* at 1464. The court of appeals found the bankruptcy judge's reasoning regarding the result of labor contract rejection "inconsistent with the court's duty to balance the equities." *Id.*

131. *Supra* note 16 and accompanying text.

132. There is no functional difference between the effect of a breach of contract and that of a unilateral rejection on the right to strike, unless the breach involves an arbitral issue. Where an employer rejects its labor contracts, the employees can respond by striking. *See In re* Bildisco, 682 F.2d 72, 80 (1986). Similarly, in the case of an employer's breach, the employees are prohibited from striking only when the collective bargaining agreement contains an arbitration provision and the dispute involves an arbitral issue. *See* Boys Market, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1969).

133. 11 U.S.C § 365(g)(1) provides that "the rejection of an executory contract . . . constitutes a breach of such contract . . . immediately before the date of the filing of the petition."

134. *See* 11 U.S.C. § 365(g); 2 COLLIER ON BANKRUPTCY ¶ 365.01 (1986); Hughes, *"Wavering Between the Profit and the Loss": Operating a Business During Reorganization Under Chapter 11 of the New Bankruptcy Code*, 54 AM. BANK. L.J. 45, 84 ("debtor may not . . . reject only part of an executory labor contract").

135. 713 F.2d 211 (6th Cir. 1983).

136. *In re* Petrusch v. Teamsters Local 1317, 667 F.2d 297 (2d Cir. 1981).

collect the employer's pre-petition debt to two benefit funds — the Health and Hospital Fund and the Pension and Retirement Fund. And in the third such case, *In re Tom Powell & Son, Inc.*,[137] the employees struck over the company's pre-petition debt to certain fringe benefit funds.

Although the employer breach in these cases occurred pre-petition, this should not affect their characterization as bankruptcy-induced strikes since the employees, in all three cases, did not strike until after the companies filed their petitions. These cases suggest that while employees may be willing to excuse a breach by a non-bankrupt employer, they are less likely to accept this breach once bankruptcy is declared since, post-petition, a strike may be the only way for employees to protest the debtor's actions.[138]

A similar instance of employee intolerance toward a bankrupt employer's breach occurred in *In re Catamount Dyers, Inc.*[139] When the employer failed to pay a scheduled wage increase of thirty-five cents per hour that came due after the employer filed its bankruptcy petition, the employees refused to continue working at the old contract rate. Thus, similar employee action was precipitated by a breach after the petition.

In sum, whether the debtor formally rejects its labor contract or simply fails to perform its contractual obligations while enjoying the protection of the bankruptcy court, the union is likely to respond by striking. Neither the fact that the debtor has obtained court approval for rejection nor whether it breached its obligations before or after seeking court protection appears to preclude the possibility that the union will strike. In all, strikes precipitated by rejections or breaches of contracts have occurred in ten cases,[140] and in one of these cases the strike resulted in liquidation of the debtor.[141] When compared to the thirty-five reported instances when bankrupt employers successfully rejected their labor agreements, either unilaterally or after obtaining court approval,[142] the likelihood of rejection or breach-induced strikes looms large enough for judicial notice.[143]

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137. 22 Bankr. 657 (Bankr. W.D. Mo. 1982).

138. *See infra* note 180.

139. 24 Bankr. 59 (Bankr. D. Vt. 1982).

140. Other strikes against bankrupt employers did not directly result from rejection or breach. These include: *In re* Third Ave. Transit Corp., 192 F.2d 971 (2d Cir. 1951) (bankrupt employer's refusal to discuss union's demand for changes in oral collective bargaining agreement prompted one-day strike by part of 3,600 member workforce); *In re* Liberal Mkt., 11 Bankr. 742 (Bankr. S.D. Ohio 1981) (collective bargaining agreement expired two weeks prior to Chapter 11 filing and "bitter strike" was already in progress by the time of the filing); *In re* Rath Packing, Co., 36 Bankr. 979 (Bankr. N.D. Iowa 1984) (following bankruptcy filing, 300 employees engaged in work stoppage to protest discharge of co-worker. *See* Daily Lab. Rep. (BNA) A-13 (May 9, 1984)).

141. International Bhd. of Teamsters v. IML Freight, Inc., 789 F.2d 1460 (10th Cir. 1986).

142. *See supra* notes 76, 84, 88, and 102-105.

143. Breaches of contract, unlike rejections, do not always involve court proceedings. Thus, it is not possible to produce a figure for the total number of breaches of contract to compare to the number of strikes. While the percentage of strikes occuring in rejection or breach situations may not be precisely calculable, there clearly exists some relationship between

IV.
How Bankruptcy Judges Have Examined the Strike Factor

Despite the frequency of strikes against Chapter 11 employers, bankruptcy judges have almost invariably failed to consider either the likelihood or the consequences of a strike by a debtor's employees. This troubling approach can be seen in decisions both before[144] and after *Bildisco*.[145] In those few cases where bankruptcy judges have discussed the strike factor, they have tended to minimize its importance. As a practical matter, therefore, it has played no role in the outcome of bankruptcy judges' decisions.[146]

A. Disregarding the Strike Factor

The failure of a bankruptcy judge to consider the strike factor was dramatically present in *In re Continental Airlines*.[147] Striking employees were a factor in the company's reorganization from its inception on September 24, 1983.[148] Despite this, Judge R.F. Wheless did not hear testimony regarding the propriety of rejection until four months after the airline unilaterally repudiated its agreements with the pilots and flight attendants unions. According to Judge Wheless, "this was the earliest that the court's calendar would permit it to undertake this lengthy hearing."[149] The hearing continued into April 1984, and Judge Wheless issued his opinion on August 17, 1984,[150] nearly 11 months after Continental's bankruptcy filing. The proceeding took place at this leisurely rate even though Continental and its unions were locked in "one of the most bitter labor disputes in airline history."[151] Given these circumstances, the fact that the hearing did not begin earlier or proceed more expeditiously suggests that the goals of the RLA were not paramount considerations for Judge Wheless.

More significantly, Judge Wheless discussed neither how the strike affected the balance of equities, nor what impact it might have on Continental's

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rejection or breach by bankrupt employers and the likelihood of strikes. Moreover, this correlation seems significant enough that a bankruptcy judge charged with balancing the equities with one eye toward successful reorganization, *see supra* note 27 and accompanying text, should at least give the strike factor a hard look and, depending on the facts of the case, attempt to quantify its importance.

144. *See, e.g., In re* Handy Andy Inc., 109 L.R.R.M. (BNA) 3298 (W.D. Tex. 1982); *In re* Figure Flattery Inc., 88 Lab. Cas. (CCH) ¶ 11,850 (S.D.N.Y. 1980).

145. *See, e.g., In re* Carey Transp., 50 Bankr. 203 (S.D.N.Y. 1985); *In re* Allied Delivery Systems, Co., 49 Bankr. 700 (N.D. Ohio 1985). Both courts allowed debtors to reject collective bargaining agreements in order to reorganize.

146. Gibson, *The New Law on Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. § 1113*, 58 Am. Bankr. L.J. 325, 346 (1984). *But see infra* notes 160-166 and accompanying text.

147. No. 83-04019-H2-5, slip op. (Bankr. S.D. Tex. Aug. 17, 1984).

148. *See supra* note 115.

149. *Continental*, No. 83-04019-H2-5, slip op. at 1 (Bankr. S.D. Tex. Aug. 17, 1984).

150. *Id.*

151. 213 Daily Lab. Rep. (BNA) A-8 (Nov. 4, 1985).

reorganization. When one considers that Judge Wheless expressly found that "[the Air Line Pilots union's] primary aim [was] to shut down Continental's operations,"[152] the latter omission is especially disturbing. Since Judge Wheless found that at least one union was committed to undermining the debtor's reorganization, he should have considered the likelihood of the effort's success.

The general tendency of bankruptcy judges to disregard obvious consequences of their decisions which can affect the outcome of a reorganization is difficult to understand, given that two circuits have expressly included the strike factor in their discussions of the balance of equities.[153] The Supreme Court upheld the Third Circuit's holding in *Bildisco* without any statement that strikes should not be considered in the balance. Since no other circuit has explicitly held otherwise, the authorities indicate that bankruptcy judges should assess the strike factor. Yet even if bankruptcy judges nationwide are not compelled to consider the strike factor, the *Bildisco* decision seems to mandate that bankruptcy judges in the Third Circuit do so. Nevertheless, Judge Bentz, who is bound by the Third Circuit's analysis of the balance of equities, did not even mention the possibility of a strike in deciding that "[t]he balance of the equities clearly favors rejection."[154]

B. The Strike Factor in the Balance of Equities

Three decisions stand in stark contrast to the consistent disregard of the strike factor that bankruptcy judges have demonstrated. The first of these rulings, *In re Parrot Packing Co., Inc.*,[155] was heard as an initial matter by a district judge, Judge William Lee, who viewed as remote the likelihood of a strike by the debtor's employees. He therefore concluded that the "mere possibility" of a strike could not carry much weight compared to the "real probability" of liquidation absent rejection.[156]

Similarly, the ruling by a bankruptcy judge, Judge William Thinnes, in *In re Rath Packing*,[157] explicitly considered the strike factor. *Rath Packing* involved the rejection of a labor contract in the peculiar circumstances of a company's acquisition by its employees. At the time Rath entered Chapter 11 proceedings, its workers had acquired 60 percent of the stock through an employee stock ownership plan (ESOP).[158] Rath's motion to reject its collective bargaining agreements thus raised an additional factor bearing on the equities of the proceedings. Judge Thinnes' well-reasoned opinion acknowledged not only the strike factor, but this additional issue, as well. He determined that

152. *Continental*, No. 83-04019-H2-5, slip op. at 17 (Bankr. S.D. Tex. Aug. 17, 1984).

153. *See* the Third Circuit decision in *Bildisco*, 682 F. 2d at 80, and the Eleventh Circuit's in *Brada Miller*, 702 F.2d at 899.

154. *Wheeling-Pitt*, 50 Bankr. at 983.

155. 99 Lab. Cas. (CCH) ¶ 10,550 (N.D. Ind. 1983).

156. *Id.* at 19,683.

157. 36 Bankr. 979 (N.D. Iowa 1984).

158. *Id.* at 981 n.1.

because the employees held the majority ownership of the company through the ESOP a strike was unlikely, given that it "would . . . be economic pressure by the employees against their own assets."[159] Although Bankruptcy Judge Thinnes, like District Judge Lee, ultimately concluded that the strike factor did not weigh heavily in the balance of equities, he was at least willing to consider the factor in his analysis.

Finally, in *In re Pesce Baking Co., Inc.*,[160] the bankruptcy court both considered the strike factor and gave it decisive weight. *Pesce Baking* involved a debtor's petition to reject three collective bargaining agreements. Bankruptcy Judge White concluded that one of the three agreements expired before he could conduct a hearing on the issue of rejection and, because the agreement was no longer executory, held that the debtor's application to reject it was moot.[161] He further held that "the court cannot find that the [other two] agreements burden the estate. Even if the agreements did burden the estate, the court has found that the equities balance in favor of the unions and against the debtor."[162]

In discussing the strike factor with regard to the "two-prong test" mandated by *Bildisco,*[163] Judge White concluded that Pesce Baking had failed to satisfy either prong. First, in considering the "burdensome" prong, he noted that "the debtor [could] save approximately $35,000.00 by the elimination of the pension plans" and thus could "realize some savings by rejecting the collective bargaining agreements."[164] But he found that this savings was not in and of itself decisive. "Considering the importance which the union members attach to their pension benefits, there is no guarantee that they would accept the elimination of these benefits. *A strike against the debtor is a distinct possibility.* The Bankruptcy Code does not prohibit the union members from waging a strike against the debtor."[165]

Judge White thus recognized that rejection is a two-edged sword: it not only relieves the debtor from the burdens of its collective bargaining agreements, but also frees the employees to respond by striking. He concluded that given the limited amount of potential savings from rejecting the agreements and the fact that a strike could mean no savings at all, "the debtor has failed to show that the collective bargaining agreements burden the estate."[166]

Second, in discussing the "balance of equities" prong, Judge White noted that *Bildisco* required consideration of a number of factors, including "the impact of rejection on the employees."[167] He stated that "[f]rom the employ-

159. *Id.* at 993.
160. 43 Bankr. 949 (Bankr. N.D. Ohio 1984).
161. *Id.* at 957.
162. *Id.* at 962.
163. *See id.* at 957.
164. *Id.* at 959.
165. *Id.* (emphasis added).
166. *Id.*
167. *Id.* at 960 (quoting *Bildisco*, 465 U.S. at 527). For Justice Rehnquist's complete list of factors, *see supra* note 12 and accompanying text.

ees' standpoint, a reorganization in which they lost their health and welfare and pension benefits would hardly be considered successful. . . . [I]n such circumstances, the possibility of a strike cannot be discounted. Even without a strike the employees' disappointment could result in decreased productivity."[168] He then compared the possibility of a strike or slowdown to any projected savings from rejection and concluded that "[c]onsidering the risk of strike or decreased productivity, this projected savings is highly speculative."[169]

Finally, Judge White considered the possibility of liquidation absent rejection. He reasoned that "employees would suffer the most from liquidation"[170] and that "rejection is more likely to lead to liquidation by destroying employee morale."[171] Here, Judge White's reasoning followed *Bildisco* precisely, assessing not only how the equities favored the employees, but also how they related to a successful reorganization. At the same time, by incorporating the strike factor into his assessment of the balance of equities, Judge White mirrored Justice Brennan's analysis of the impact of unilateral rejection where the bankruptcy court was in the position to permit or deny rejection. Judge White concluded that "[t]he equities clearly balance in favor of denying the debtor's application to reject the collective bargaining agreements."[172]

C. Bankruptcy Court Injunctions Against Strikes

Bankruptcy judges have not only failed to consider the likelihood of strikes resulting from labor contract rejection, they have also ignored the clear statutory language of the Norris-LaGuardia Act when faced with actual strikes against bankrupt employers. Despite Norris-LaGuardia's strictures against federal courts issuing injunctions against strikes,[173] a number of bankruptcy judges have attempted to use the automatic stay provisions in section 362 of the Bankruptcy Code[174] to enjoin strikes by employees of bankrupt companies.[175] While section 362 does provide a bankruptcy court with broad powers to protect the debtor's assets,[176] all circuit courts which have considered the question have refused to allow the automatic stay to reach peaceful labor picketing.[177]

168. 43 Bankr. at 961.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 959.
173. *See* 29 U.S.C. §§ 101-15 (1973). One exception to Norris-LaGuardia's prohibition against federal courts enjoining strikes was recognized by the Supreme Court in Boys Market, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1969), where the Court determined that federal courts can enjoin strikes over arbitrable issues.
174. 11 U.S.C. § 362 (1979).
175. *See infra* notes 181-85 and accompanying text.
176. *See* 11 U.S.C. § 362(a)(1-7).
177. *In re* Petrusch, 667 F.2d 297 (2d Cir. 1981); Briggs Transportation Co. v. International Bhd. of Teamsters, 739 F.2d 341 (8th Cir.), *cert. denied*, 469 U.S. 917 (1984); *In re* Crowe & Associates, 713 F.2d 211 (6th Cir. 1983).

Bankruptcy judges' misinterpretation of the reach of the bankruptcy laws vis-a-vis the Norris-LaGuardia Act did not originate with the adoption of the Bankruptcy Reform Act of 1978. In pre-Code cases, appellate courts, when petitioned to dissolve bankruptcy courts' injunctions against strikes, consistently held that the injunctive provisions of the Bankruptcy Act did not supersede Norris-LaGuardia.[178] Although courts have permitted limited injunctions in cases involving strike activity,[179] these precedents have been confined to their special facts. No precedent exists under the Bankruptcy Act, or for that matter the Bankruptcy Code, for barring peaceful labor picketing.

Since adoption of the Code, circuit courts have consistently rejected any suggestion that the automatic stay empowered bankruptcy judges to enjoin strike activity,[180] regardless of the consequences for the debtor. In *In re Petrusch*,[181] the Second Circuit affirmed a district court's decision that bankruptcy courts have no subject-matter jurisdiction to enjoin strikes, finding that Congress never intended the automatic stay provision to supersede Norris-LaGuardia. Similarly, in *Briggs Transportation*, the Eighth Circuit upheld a district court's refusal to grant an injunction against present and future picketing.[182] The court of appeals, in reaching its holding, cited with approval District Judge Magnuson's statement that *Bildisco* "does not prohibit the employees from complaining."[183] In *Matter of Crowe & Associates*,[184] the Sixth Circuit went the furthest in prohibiting bankruptcy courts from enjoining strikes. The court upheld the district court's ruling dissolving the bankruptcy court's injunction against striking employees, and declaring that even if its consequence is the company's liquidation, "[t]he labor laws recognize that a strike may drive an employer out of business."[185]

In all these cases, courts of appeals overturned bankruptcy court deci-

178. International Bhd. of Teamsters v. Quick Change, Inc., 168 F.2d 513 (10th Cir. 1948); *In re* Third Avenue Transit Corp., 192 F.2d 971 (2d Cir. 1951); Truck Drivers Local 807 v. Bohack Corp., 541 F.2d 312 (2d Cir. 1976).

179. *See, e.g., In re* Cleveland & Sandusky Brewing Co., 11 F. Supp. 198 (N.D. Ohio 1935) (holding bankruptcy court has power to enjoin strikers from interfering with removal of beer and bottling equipment for purpose of bottling beer so as to preserve debtor's assets).

180. *See supra* note 177. *See also* NLRB v. Brada Miller Freight Systems, 109 L.R.R.M. (BNA) 2533 (N.D. Ala. 1981), where the district court dissolved the bankruptcy court's injunction against "interfering with" the debtor's business. On the other hand, bankruptcy courts may be able to enjoin or preempt NLRB proceedings despite Norris-LaGuardia. *Compare* NLRB v. Superior Forwarding, Inc., 762 F.2d 695 (8th Cir. 1985) (permitting bankruptcy court stay of unfair labor practice proceedings when those proceedings "threaten the assets of the debtor") *with In re* Shipper's Estate, 618 F.2d 9 (7th Cir. 1980) (automatic stay does not apply to NLRB proceedings where assets of the estate are not threatened) *and In re* Tuscon Yellow Cab Co., 27 Bankr. 621 (Bankr. 9th Cir. 1983) (bankruptcy court abused its discretion by permanently enjoining NLRB proceeding that did not threaten debtor's assets). Since strikes can never be enjoined but in certain cases NLRB proceedings can, the upshot is that a strike may be the employees' only means of protesting rejection.

181. 667 F.2d at 297.

182. 739 F.2d at 341, *aff'g*, 40 Bankr. 972 (D. Minn. 1984).

183. *Id.* at 343 (quoting 40 Bankr. at 975).

184. 713 F.2d at 211.

185. *Id.* at 216.

sions enjoining strikes. Bankruptcy judges have repeatedly given an erroneous interpretation to the reach of the automatic stay vis-a-vis strikers, which indicates that they are favoring bankruptcy concerns in conflicts between the Bankruptcy Code and provisions of federal labor law,[186] such as the anti-injunction provisions of the Norris-LaGuardia Act.[187] This record of misinterpretation supports the inference that bankruptcy court may not be the forum best suited to adjudicate proceedings involving Code provisions which implicate important policies of federal labor law.

V.
How Judges Should Consider the Strike Factor

Not all employees will respond to rejection of their collective bargaining agreements by striking. A court thus must first determine in which cases the strike factor should enter into the balance. To paraphrase one district judge who considered the question:[188] can the mere possibility of a strike weigh against the strong probability that, absent rejection, the debtor will be forced to liquidate? When the question is thus posed, the answer is most likely "no." But as the likelihood of a strike increases the answer becomes less clear. In some instances, this likelihood may be great enough to tip the balance of equities, as it was in *Pesce Baking*.[189]

In contrast to the prevailing practices of bankruptcy judges, I propose that the strike factor be an important component in the balance of equities, at least in certain cases. But assuming that the court considering labor contract rejection incorporates a strike factor in its decision, how should this factor affect its decision to permit or deny rejection? I further suggest that the court analyzing this factor focus on two key considerations: 1) the probability of a strike occurring after rejection; and 2) the likelihood that such a strike would impair reorganization. In those cases like *Wheeling-Pitt*[190] where a strike seems likely both to occur and to impair reorganization, the court should deny rejection.

A. Probability of Strikes

Courts can find guidance in determining the probability of a strike by analyzing the responses of employees of other companies in the same industry that rejected their labor agreements. But what if a case is one of first impression and no company in that industry has rejected its labor contracts? And of

186. Bankruptcy judges' apparent bias against labor law in this instance has not constrained their efforts to encroach in other areas. For example, one bankruptcy court decided the merits of unfair labor practice charges filed by the union, a function entrusted to the NLRB. *See In re* Handy Andy, Inc., 109 L.R.R.M. (BNA) 3298, 3302-03 (W.D. Tex. 1982).

187. 29 U.S.C. §§ 101-15 (1973).

188. *In re* Parrot Packing Co., Inc., 99 Lab. Cas. (CCH) ¶ 10,550 (N.D. Ind. 1983).

189. *In re* Pesce Baking Co., Inc., 43 Bankr. 949 (Bankr. N.D. Ohio 1984).

190. *In re* Wheeling-Pittsburgh Steel Corp., 50 Bankr. 969 (Bankr. W.D. Pa.), *aff'd*, 52 Bankr. 997 (W.D. Pa. 1985), *rev'd*, 791 F.2d 1074 (3d Cir. 1986).

what relevance is the frequency of strikes against non-bankrupt employers? An analysis of past strikes against bankrupt employers suggests a few answers. First, *Wheeling-Pitt* makes clear that a court should consider the presence of a no-strike clause in deciding whether to authorize rejection of labor agreements, since rejection of the contract's wage and benefit provisions also rejects any no-strike clause therein.[191] The case further suggests that the presence of a no-strike clause in the rejected agreement should be of even more importance than the fact that there have been no strikes in the industry for twenty years.[192]

Second, Wheeling-Pitt, Wilson Foods and Continental Airlines were among the largest companies to seek Chapter 11 protection. Of the bankrupt companies with 5,000 or more employees that have sought to reject their labor agreements, three out of four have been hit by strikes.[193] This suggests that the number of people employed by the debtor corporation should be considered by a court: the larger the company, the more likely a strike following a Chapter 11 filing and rejection. Moreover, the impact of a strike on interstate commerce will be more significant where the firm is large. Hence, the concerns underlying federal labor laws will be more strongly implicated.

Third, analysis reveals that rejection-induced strikes have occurred most often in the transport and trucking industries. Six of the firms to experience strikes during bankruptcy were common or private carriers: one airline; two surface transport companies; and three trucking firms.[194] The industries to which these firms belong are among those which underwent deregulation in the past ten years. Since deregulation has generally had a destabilizing effect on the established pattern of labor relations in these industries,[195] a court should consider whether the company seeking rejection is in a recently deregulated industry.

B. The Likelihood of a Strike Impairing Reorganization

Forecasting winners and losers once a strike occurs is even more speculative than assessing the probability of a rejection-induced strike.[196] For one

191. *See supra* note 134.

192. *See supra* note 30.

193. The four companies with 5,000 or more employees that sought to reject their labor agreements in bankruptcy were: Wheeling-Pittsburgh, *see* 50 Bankr. at 973; Continental Airlines, *see In re* Continental Airlines Corp., 38 Bankr. 67, 71 (Bankr. S.D. Tex. 1984); Wilson Foods, *see Wilson Foods Fights Back*, N.Y. Times, Dec. 3, 1983, at 31, col. 1; and Braniff Airways, *see In re* Braniff Airways, Inc., 25 Bankr. 216, 219 (Bankr. N.D. Tex. 1982).

194. *See Continental Airlines*, 38 Bankr. at 67; *Briggs Transportation*, 739 F.2d at 341 (common carrier); *Third Avenue Transit*, 192 F.2d at 971 (common carrier); *IML Freight*, 789 F.2d at 1460 (trucking); *Petrusch*, 667 F.2d at 297 (trucking) and *Bohack*, 541 F.2d at 312 (trucking).

195. *See* 238 Daily Lab. Rep. (BNA) A-12,(Dec. 9, 1983) ("For most unions . . . deregulation has been disastrous.").

196. The Supreme Court, in *Bildisco*, recognized the speculative nature of the bankruptcy court's task. *See* 465 U.S. at 527. It did not, however, deem this speculativeness a bar to courts' consideration of a strike's impact on reorganization.

thing, the outcome of the strike may depend, in large part, on how determined the parties are to hold out against the other side. Other factors may be beyond either party's control, such as the economic climate. Nevertheless, I suggest that two objective factors can be isolated and should be considered by courts presiding over bankruptcy rejections: 1) the financial resources that the union can commit to maintaining a strike; and 2) the ability of an employer to recruit and retain qualified strike replacements.

The *Wheeling-Pitt* case indicates that the availability of a Union's strike fund is one criteria for the court to consider. At the time the Wheeling-Pitt strike began, the United Steel Workers Union had $200 million in its strike fund.[197] This financial resource, combined with the eligibility of striking Wheeling-Pitt employees to receive unemployment benefits under state law,[198] enabled the workers to hold out long enough to force the company to negotiate a new contract.

On the other hand, the unsuccessful strike by Continental Airlines employees suggests that this factor alone is not dispositive. All three unions — pilots, flight attendants, and machinists — made major financial commitments to the strike. For example, the pilots had strong worker solidarity and strike benefits that matched the salaries Continental paid its pilots after the Airline's petition was filed.[199] Yet, unlike Wheeling-Pitt's employees, the pilots failed to force the company to renegotiate employment terms after it rejected the labor contracts.

One distinguishing factor in the two strikes was the availability of replacements for strikers. Continental was able to find strikebreakers who could perform the strikers work,[200] and who were apparently willing to do so at lower wage rates. Consequently, the strike at Continental did not threaten the reorganization to the point where the employees could force the company to renegotiate wages and working conditions.

In conclusion, proper consideration of the strike factor requires a court to make two determinations: first, whether rejection will result in a strike; and second, what impact a strike will have on reorganization. To make these determinations, a court must interpret no-strike provisions, analyze labor relations in the particular industry, assess the union's strike resources, and predict the company's ability to recruit qualified replacements for strikers. Bankruptcy judges must therefore familiarize themselves with these aspects of labor relations and labor law if they are to give adequate consideration to the strike factor.

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197. *See supra* note 30.

198. Wheeling-Pitt tried to use the automatic stay to enjoin payment of unemployment benefits to strikers in Ohio, Pennsylvania, and West Virginia. The district court denied the company's request for a temporary injunction. *See* 178 Daily Lab. Rep. (BNA) A-8, A-9 (Sept. 3, 1985).

199. *See supra* note 114.

200. White, J., *The Bildisco Case and the Congressional Response*, 30 WAYNE L. REV. 1169, 1189 (1984).

VI.
CONCLUSION

In his dissent in *Bildisco*,[201] Justice Brennan made two assertions regarding the relationship between unilateral rejection of collective bargaining agreements and strikes: (1) rejection "will often lead to labor strife"; and (2) it "will more likely decrease the prospects for reorganization."[202] Justice Brennan was referring to unilateral rejection, but the *Wheeling-Pitt* scenario indicates that his statement applies with equal force to court-approved rejections. Clearly, there have been proportionately more cases of strikes following unilateral rejections of labor agreements than following court-approved rejections. But the failure of bankruptcy judges to consider the likelihood and consequences of strikes suggests that this may be merely a fortuitous result. Moreover, the fact that unilateral rejection was prohibited by the 1984 Amendments may mean that cases that previously would have arisen as unilateral rejections will now be decided by the courts in the first instance and, consequently, that employees will respond to court rejection as they would have responded to unilateral rejection, by striking. If this should prove to be the case, the *Wheeling-Pitt* scenario may become more the norm than the exception.

Regardless of the frequency with which the *Wheeling-Pitt* scenario recurs, bankruptcy judges' persistent refusal to give sufficient weight to the strike factor in the past suggests that they will continue to underestimate its significance in the future. One commentator has suggested that the way for a union to force a bankruptcy judge to take the threat of a strike seriously is to adopt a binding resolution to strike before the rejection hearing.[203] The threat of liquidation, he argues, has been the only factor that has swayed bankruptcy courts in practice.[204] If bankruptcy judges must be faced with an imminent strike that threatens to lead to liquidation before they will consider it a real factor, then this suggests that they are unwilling to make the sort of detailed analysis proposed in Part V above. It also suggests that employee interests will receive short shrift in less extreme situations.

Bankruptcy judges' tendencies to minimize the likelihood of strikes following rejection is an indication of their general lack of awareness of principles of labor relations and labor law. Several bankruptcy judges have displayed their lack of awareness by trying to enjoin strikes, despite the prohibitions against such action in the Norris-LaGuardia Act. Moreover, the judges themselves have acknowledged their lack of experience in the field of labor-management relations.[205] Justice Rehnquist twice made similar obser-

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

202. *See supra* notes 15-16 and accompanying text.

203. Gibson, *supra* note 146, at 346-47.

204. *Id.* at 347.

205. *See, e.g., In re* Rath Packing, 36 Bankr. at 979; *Continental*, No. 83-04019-H2-5, slip op. at 10 (Bankr. S.D. Tex. Aug. 17, 1984).

vations in writing for the majority in *Bildisco*.[206]

If bankruptcy judges are unwilling or unable to assess the dynamics of labor relations, then the obvious question is: why should they hear petitions to reject collective bargaining agreements? It certainly makes little sense from the standpoint of federal labor policies; presumably, it was intended to further the goals of the Bankruptcy Code. If so, one important consequence of the Bankruptcy Reform Act of 1978 was that bankruptcy courts were empowered to make a policy determination that collectively bargained labor contracts may be sacrificed when the Bankruptcy Code requires it, even if this policy has the collateral effect of precipitating strikes. This policy probably was not what Congress intended to promote when it adopted the Code in 1978, and probably was what the 1984 Amendments were intended to rectify. Yet, bankruptcy courts continue to abide by such a policy, which indicates the need for additional legislation to properly accommodate the clashing purposes of the Code and the NLRA.

Putting aside the questions of labor relations policy, there remains Justice Brennan's premise that rejecting labor contracts may also be contrary to the goal of successful reorganization. Already, Justice Brennan's view has been borne out in *IML Freight*,[207] where a rejection-induced strike drove the debtor into Chapter 7.[208] Moreover, in *Wheeling-Pitt*, the company was pushed to the brink of liquidation before bankruptcy court approval of a collective bargaining agreement between the Union and the company's new management ended the strike.[209] A similar strike settlement agreement at Wilson Foods may have averted that company's demise.[210] Given that the consequences of a bankruptcy judge's miscalculations concerning the likelihood of a strike and its probable outcome may be precisely what the Bankruptcy Code seeks to avoid, it does not make much sense for judges with little apparent understanding of labor relations to decide issues that have been shown to provoke labor strife especially in light of the consequent impact on the reorganization effort.

What then is to be done? Congressional action seems unlikely at this time, since the Bankruptcy Code was amended only a few years ago, motivated by the then-pressing need to resolve the bankruptcy system's constitutional crisis.[211] Two options remain. First, employees can attempt to persuade bankruptcy judges to place greater weight on the strike factor. One way to accomplish this would be for the Union to hold a binding, pre-rejection strike vote.[212] Such a vote should persuade any bankruptcy judge that the

206. 465 U.S. at 526-27, 534. *See also supra* note 130.

207. International Bhd. of Teamsters v. IML Freight, Inc., 789 F.2d 1460 (10th Cir. 1986).

208. *See supra* note 127 and accompanying text.

209. *See supra* note 35.

210. *See supra* note 111.

211. *See supra* note 107 and accompanying text. Recall that those 1984 amendments included the prohibition against unilateral rejection of labor contracts.

212. *See supra* note 203 and accompanying text.

likelihood of a strike cannot be dismissed as a mere possibility. If this strike vote is accompanied by a similarly binding pledge by the union to commit funds to the strike effort, the bankruptcy judge would be even more strongly compelled to consider the strike factor in the balance of equities. Another, less dramatic means to this end would be to point out to the court similarities between the situation at hand and past, rejection-induced strikes.

Second, district courts should more frequently exercise their power to withdraw from the bankruptcy court's jurisdiction any case or proceeding involving consideration of a statute affecting commerce,[213] including especially labor laws. As suggested earlier, it is nearly impossible for a bankruptcy judge to give proper consideration to the strike factor without examining the law governing federal labor contracts generally and no-strike clauses in particular. Federal law arguably mandates that district courts withdraw rejections from the bankruptcy courts' jurisdiction. Moreover, even if section 1113 makes it unnecessary to consider federal labor statutes in deciding whether to allow rejection, the district judge "may" still withdraw a motion to reject for "cause shown."[214] Employees might be able to persuade district judges to exercise their discretion to withdraw motions to reject in those cases where the strike factor looms large. One district judge did utilize his withdrawal powers to hear a motion to reject collective bargaining agreements.[215] Similarly, district judges have in the past reached down to hear cases involving certification of an employee representative for collective bargaining,[216] as well as other important public policy issues.[217] When the rejected labor agreements cover thousands of employees, as in the case of *Wheeling-Pitt*, the public policy ramifications of a strike are significant. In these instances at least, bankruptcy proceedings may be too important to leave to the bankruptcy judges.

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213. 28 U.S.C. § 157(d) (1986). Section 157(d) provides:
The district court may withdraw, in whole or in part, any case or proceeding referred under [title 11 of the U.S. Code], on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting commerce.

214. *Id.*

215. The one district court judge to withdraw a motion to reject labor contracts also expressly considered the strike factor. *In re* Parrot Packing Co., 99 Lab. Cas. (CCH) ¶ 10,550 (N.D. Ind. 1983).

216. *See, e.g., In re* Continental Airlines Corp., 50 Bankr. 342, 359-60 (S.D. Tex. 1985).

217. *See In re* ESM Government Securities, Inc., 52 Bankr. 372 (S.D. Fla. 1985) (district court exercised withdrawal power to protect customers of securities broker dealer); *In re* A.H. Robins Co., Inc., 59 Bankr. 99, 102 (Bankr. E.D. Va. 1986) (district court retained jurisdiction over issues involving dismissal of the case as well as claims concerning liability arising out of the Dalkon Shield).

APPENDIX

Section 1113, which was enacted as part of the 1984 Amendments, 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.
>
> (b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall —
>
> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
>
> (B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.
>
> (2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.
>
> (c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that —
>
> (1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);
>
> (2) the authorized representative of the employees has refused to accept such proposal without good cause; and
>
> (3) the balance of equities clearly favors rejection of such agreement.
>
> (d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circum-

stances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

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

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

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

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

11 U.S.C. § 1113 (West Supp. 1986).