

1985

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## Repository Citation

George, B. Glenn, "Collective Bargaining in Chapter 11 and Beyond" (1985). *Faculty Publications*. 854.  
<https://scholarship.law.wm.edu/facpubs/854>

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# Collective Bargaining in Chapter 11 and Beyond

B. Glenn George†

Union relations may be the least of the difficulties facing an employer confronted with bankruptcy. Another employer may consider union wage and benefit demands one of the primary problems behind the company's failure.<sup>1</sup> In either situation, management is likely to be more concerned about the survival of the business than about any legal restrictions on its ability to implement wage cuts required to accomplish the rehabilitation.<sup>2</sup> Undoubtedly this same concern about the continued viability of the company has recently prompted a number of unions to compromise employee benefits in order to assist financially-troubled employers.<sup>3</sup> When the employer refuses to consult with the union about changes in employment terms, however, the union has no opportunity to participate in those decisions affecting the employees. The potentially conflicting goals of the Bankruptcy Code and the National Labor Relations Act in such circumstances confuse both the existence and extent of the employer's legal duty to bargain with the union.

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1. After filing for reorganization under the Bankruptcy Code and cutting wages 45 to 50%, the President of Continental Airlines commented, "Our sole problem was labor." Wall St. J., Sept. 26, 1983, at 1, col. 6. See also N.Y. Times, Sept. 28, 1983, at D6, col. 2 (discussing connection between Continental's financial and labor problems).

2. Business filings under Chapter 11 have increased dramatically in recent years. In the nine-month period following October 1, 1979, the effective date of the current Bankruptcy Code, only 4,002 filings were recorded. 1980 AD. OFF. U.S. CTS. ANN. REP. DIRECTOR, Table F3BC. That number grew over 300% by 1984. During the twelve-month period ending June 30, 1984, 17,213 filings were reported. 1984 AD. OFF. U.S. CTS. ANN. REP. DIRECTOR, Table F-2. See also 1983 AD. OFF. U.S. CTS. ANN. REP. DIRECTOR 420, Table F-3A (18,306 business filings under Chapter 11); 1982 AD. OFF. U.S. CTS. ANN. REP. DIRECTOR 400, Table F-3A (12,385 business filings under Chapter 11); 1981 AD. OFF. U.S. CTS. ANN. REP. DIRECTOR 552, Table F-3A (7,230 business filings under Chapter 11).

3. See, e.g., *Wage Concessions at Eastern Air*, 118 LAB. REL. REP. (BNA) 132 (Feb. 18, 1985) (extension of wage concessions by Eastern Airlines' three unions); *Wage Concessions During First Nine Months*, 117 LAB. REL. REP. (BNA) 181 (Nov. 5, 1984) (reporting wage freezes or reductions in almost one-third of contract settlements negotiated during first three quarters of 1984); *Wage Cuts for UPI Employees*, 117 LAB. REL. REP. (BNA) 61 (Sept. 24, 1984) (Wire Service Guild agrees to 8% wage cut to assist United Press International); *Teamsters Approval of Pay Cut, Stock Plan*, 115 LAB. REL. REP. (BNA) 50 (Jan. 16, 1984) (in exchange for stock, Teamsters approve five-year, 15% wage cut to assist trucking company). For other examples of union concessions to financially-troubled businesses, see *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 n.19 (1981); Note, *Collective Bargaining Over Plant Relocation Decisions: Let's Make a Deal*, 18 NEW ENG. L. REV. 715, 744-45 n.213 (1983).

## The Duty to Bargain

In *NLRB v. Bildisco & Bildisco*,<sup>4</sup> the Supreme Court made two fundamental mistakes in its resolution of this basic tension between the Bankruptcy Code<sup>5</sup> and the National Labor Relations Act.<sup>6</sup> First, the Court failed to identify fully and to address the nature of the NLRA violations involved in the case. Second, with more serious implications, the Court misconceived the entire thrust of the nation's labor policy. This Article examines these errors and attempts a better reconciliation of the conflict between the two statutes.

By filing a petition for reorganization under Chapter 11 of the Bankruptcy Code, a company places itself under the bankruptcy court's jurisdiction to arrange a payment plan for creditors while allowing the enterprise to get back on its feet.<sup>7</sup> As part of the rehabilitation process, the debtor often wants to reduce employee wages and benefits. When a collective bargaining agreement governs the terms of employment, the debtor faces a two-part problem. She must first be allowed to avoid her contractual obligations. Once the agreement has been removed as an obstacle, she must then be permitted to reduce wages and benefits. Although both steps often occur simultaneously, each implicates different statutory rights and duties under the Labor Act and the Bankruptcy Code.

The right to reject burdensome contracts represents one of the most significant privileges granted a debtor under Chapter 11. The rejection of a collective bargaining agreement, however, conflicts with section 8(d) of the NLRA which prohibits mid-term contract modifications.<sup>8</sup> In facing this tension, the lower courts uniformly had agreed that, under some circumstances, the exigencies of bankruptcy must override the Labor Act's protection of collective bargaining agreements, but the courts had differed over the standard appropriate to allow such rejection.<sup>9</sup> The Supreme Court's long-awaited decision in *Bildisco*<sup>10</sup> resolved this much discussed<sup>11</sup>

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4. 104 S. Ct. 1188 (1984), *aff'g* 682 F.2d 72 (3d Cir. 1982), *denying enforcement of* 255 N.L.R.B. 1203 (1981).

5. 11 U.S.C.A. §§ 1-151326 (West 1979 & Supp. 1984-1985) ["the Code"].

6. 29 U.S.C.A. §§ 151-69 (West 1973 & Supp. 1985) ["the NLRA," "the Labor Act," or "the Act"].

7. See 11 U.S.C.A. §§ 1101-74.

8. See 29 U.S.C.A. § 158(d).

9. See *infra* notes 62-63 and accompanying text.

10. 104 S. Ct. 1188.

11. See, e.g., Bordewieck & Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J. 293 (1983); Countryman, *Executory Contracts in Bankruptcy: Part II*, 58 MINN. L. REV. 479, 492-98 (1974); Pulliam, *The Rejection of Collective Bargaining Agreements Under Section 365 of the Bankruptcy Code*, 58 AM. BANKR. L.J. 1 (1984); Note, *The Bankruptcy Law's Effect on Collective Bargaining Agreements*, 81 COLUM. L. REV. 391 (1981) [hereinafter cited as Note, *Bankruptcy Law's Effect*]; Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, 80 MICH. L. REV. 134 (1981) [hereinafter cited as Note, *Labor-Bankruptcy Conflict*]; Note, *Bankruptcy Law—Labor Law—Rejection of Collective Bargaining Agreements as Executory Contracts in Bankruptcy*, 22 WAYNE L. REV. 165 (1975) [hereinafter cited as Note, *Rejection of Collective Bargaining Agreements*]; Comment, *The*

and litigated<sup>12</sup> issue. The Court's test permitted rejection of the labor contract if the bankruptcy court found the agreement burdensome to the debtor, and if, after "careful scrutiny," the equities balanced in favor of disaffirmance.<sup>13</sup> The section 8(d) violation that otherwise would occur under the NLRA was excused.<sup>14</sup>

The second step sought by the debtor, the reduction of wages and benefits, presents a separate problem. The duty to bargain in section 8(a)(5)<sup>15</sup> is the cornerstone of the Labor Act; the encouragement of the collective bargaining process is the ultimate goal of the legislation. This obligation requires the employer to bargain with her employees' representative about any changes in employment terms, whether or not an enforceable labor contract exists. By unilaterally decreasing wage rates, the debtor thus commits a *second* violation of the Act, even if the mid-term modification of the collective bargaining agreement is permitted by the court's approval of rejection. In considering the debtor's duty to bargain about wage and benefit reductions in *Bildisco*, the Supreme Court failed to acknowledge the existence of this distinct Labor Act violation which is unrelated to the rejection issue. The Court authorized *Bildisco* to change employment terms without mandatory bargaining from the time it filed for reorganization under Chapter 11, even prior to the rejection approval by the bankruptcy court.

The decision prompted almost immediate legislative response.<sup>16</sup> Congress amended the Bankruptcy Code to provide a standard procedure for the rejection of a collective bargaining agreement.<sup>17</sup> Before seeking rejection, the debtor must propose to the union contract modifications "necessary to permit the reorganization," and she subsequently must "confer in good faith" to discuss the suggested changes.<sup>18</sup> The alteration of employment terms before rejection approval, allowed by the *Bildisco* Court, is now unlawful.<sup>19</sup>

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*Collective Bargaining Agreement in Bankruptcy: Rejection and Its Consequences*, 36 ARK. L. REV. 469 (1983); Comment, *Collective Bargaining Agreements and the Bankruptcy Reform Act: What Test Should the Bankruptcy Court Use in Deciding Whether to Allow a Debtor to Reject a Collective Bargaining Agreement?*, 51 U. CIN. L. REV. 862 (1982) [hereinafter cited as Comment, *What Test Should the Bankruptcy Court Use*].

12. See cases cited *infra* notes 62-63.

13. *Bildisco*, 104 S. Ct. at 1196.

14. *Id.* at 1199-200.

15. 29 U.S.C. § 158(a)(5) (1982).

16. See *infra* notes 97-99 and accompanying text.

17. 11 U.S.C.A. § 1113 (West Supp. 1985). A bankruptcy court in Pittsburgh recently approved the first rejection of a collective bargaining agreement under the new legislation. See *In re Wheeling-Pittsburgh Steel Corp.*, 119 L.R.R.M. (BNA) 3277, 3288 (Bankr. W.D. Pa.), *aff'd*, 120 L.R.R.M. (BNA) 2198 (W.D. Pa. 1985).

18. 11 U.S.C.A. § 1113(b). See *infra* notes 100-01 and accompanying text.

19. 11 U.S.C.A. § 1113(f). See *infra* note 103 and accompanying text.

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Legislation now controls this much debated<sup>20</sup> issue of collective bargaining agreement rejection. The second step that occurs after rejection—the reduction of employee wages and benefits—remains an open question, however. Both *Bildisco* and the legislation left unresolved the extent and nature of the debtor's duty to bargain after contract rejection or where no agreement is in effect when the Chapter 11 petition is filed. The superficial answer found in *Bildisco*, consistent with prior authority, suggests that the bargaining requirement remains intact and is unaffected by the bankruptcy proceedings. In the absence of a labor contract, the debtor must negotiate about alterations in employment terms until either agreement or impasse is reached. Yet the *Bildisco* Court also allowed an employer bound by a labor contract to change employment conditions without prior bargaining, a *per se* unfair labor practice in any other context.<sup>21</sup> The two positions illogically permit the Chapter 11 employer with a collective bargaining agreement more flexibility than the Chapter 11 employer who is not a party to a contract.

Rationally defining the Chapter 11 employer's duty to bargain within the *Bildisco* framework proves impossible. Because the Court failed to address the existence of two independent Labor Act violations in *Bildisco*'s modification of its collective bargaining agreement and its reduction of wages and benefits, the Court also failed to acknowledge the significance of the duty to bargain as a separate issue unconnected to the contract. Determining the appropriate standard for the bargaining obligation in a Chapter 11 context requires a reevaluation of *Bildisco* in light of this oversight. Upon reconsideration, this Article concludes that *Bildisco* should have been required to bargain to impasse before implementing employee benefit cuts.

On a more fundamental level, *Bildisco* signals a subtle yet disturbing erosion of national labor policy. As a reflection of the Supreme Court's attitude toward the collective bargaining process, *Bildisco* envisions the labor-management relationship as one of distrust or, at best, toleration. Where collective bargaining threatens to "interfere" with the operation of the business, the Court excused the employer's obligation. Far from encouraging the cooperative and productive process contemplated by Congress, the *Bildisco* Court viewed the bargaining relationship as one of obstruction and irreconcilable differences. By fostering such divisiveness, the Court threatens to undermine the goals of our labor laws.

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20. For two of the more extreme positions on this issue, see Pulliam, *supra* note 11 (arguing collective bargaining agreements should be treated same as other executory contracts, subject to rejection under "business judgment" test; see *infra* notes 48–53 and accompanying text) and Bordewieck and Countryman, *supra* note 11 (arguing rejection of labor contracts should be approved only where reorganization will fail absent rejection).

21. See *NLRB v. Katz*, 369 U.S. 736, 742–43, 747 (1962).

Following analysis of the duty to bargain under the NLRA and of the special rights and obligations of a Chapter 11 employer, this Article briefly reviews the *Bildisco* decision and the legislation it prompted. The Article then considers the possible alternatives for defining the duty to bargain within the bankruptcy context. Because all options presented are inherently inconsistent with the *Bildisco* opinion, *Bildisco* is reevaluated and a standard that better accommodates the conflicting goals of the Labor Act and the Bankruptcy Code is proposed. Finally, the Article examines some of the more far-reaching implications for national labor policy of the Supreme Court's approach in *Bildisco*.

## I. THE STATUTORY TENSIONS AND ATTEMPTED RESOLUTIONS

### A. *The Duty to Bargain Under the NLRA*

The duty to bargain lies at the heart of the National Labor Relations Act. The Supreme Court repeatedly has recognized collective bargaining as the key to the industrial peace that the Act was created to promote.<sup>22</sup> The drafters of the NLRA considered the bargaining obligation such an inherent part of the Act's scheme that they thought it unnecessary to include an explicit bargaining provision in the legislation originally submitted to Congress in 1935.<sup>23</sup> Section 8(5), the predecessor of the current section 8(a)(5),<sup>24</sup> was added during deliberations to clarify the intent of Congress and to emphasize the necessary correlation between the employer's duty to recognize the employees' representative and the employer's obligation to negotiate with that representative.<sup>25</sup> Without the duty to bargain, the employer's required recognition of the employees' representative is meaningless—a "mere delusion."<sup>26</sup>

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22. *E.g.*, *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 401-02 (1952) ("The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers.") (footnote omitted); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937) ("Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife.").

23. *Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 43 (1935) (statement of Sen. Wagner), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1373, 1419 (1949) [hereinafter cited as NLRA HISTORY] ("[W]hile the bill does not state specifically the duty of an employer to recognize and bargain collectively with the representatives of his employees, because of the difficulty of setting forth this matter precisely in statutory language, such a duty is clearly implicit in the bill."); see *NLRB v. American National Ins. Co.*, 343 U.S. 395, 402-03 (1952).

24. Wagner Act, ch. 372, § 8(5), 49 Stat. 449, 453 (1935) (current version at 29 U.S.C. § 158(a)(5) (1982)).

25. See S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935), reprinted in 2 NLRA HISTORY, *supra* note 23, at 2300, 2312.

26. *Id.* See *NLRB v. Insurance Agents' Int'l*, 361 U.S. 477, 484-85 (1960) (The "purpose [of § 8(a)(5)] is the making effective of the duty of management to extend recognition to the union; the duty

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Under section 8(a)(5), the employer commits an unfair labor practice by refusing to “bargain collectively” with her employees’ chosen agent.<sup>27</sup> Section 8(d), added to the NLRA in 1947, defines the requirement to “bargain collectively” as the obligation to “confer in good faith with respect to wages, hours, and other terms and conditions of employment.”<sup>28</sup> Any unilateral alteration of a term of employment—a change made by the employer without negotiating with the union—clearly violates this bargaining obligation and constitutes an unfair labor practice under section 8(a)(5).<sup>29</sup>

The Act recognizes, however, that there may be cases in which the parties have negotiated in good faith but are unable to reach a mutually-acceptable compromise. Having thus bargained to impasse, the employer is free to change employment conditions consistent with her last offer to

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of management to bargain in good faith is essentially a corollary of its duty to recognize the union.”); see also 29 U.S.C. § 151 (1982) (“Experience has proved that protection by law of the right of employees to organize and bargain collectively . . . promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by *encouraging practices fundamental to the friendly adjustment of industrial disputes* arising out of differences as to wages, hours, or other working conditions, and by *restoring equality of bargaining power between employers and employees.*”) (emphasis added).

27. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982). A corresponding duty for labor organizations appears in § 8(b)(3) of the Act, 29 U.S.C. § 158(b)(3).

28. NLRA § 8(d), 29 U.S.C. § 158(d). Section 8(d) states in relevant part:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where 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—

(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

(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 provision was added in its original form in 1947 (and was amended to the above-quoted form in 1974) in response to concerns that the Board had been improperly regulating bargaining behavior under § 8(a)(5). H.R. REP. NO. 245, 80th Cong., 1st Sess. 19–24 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 292, 310–12 (1948) [hereinafter cited as LMRA HISTORY].

29. The Supreme Court characterized such action as a refusal to negotiate “in fact,” which “frustrates the objectives of § 8(a)(5) much as does a flat refusal.” NLRB v. Katz, 369 U.S. 736, 743 (1962).

the union.<sup>30</sup> The employer's "hands are tied" by the Act only until negotiations have reached a stalemate.<sup>31</sup>

Section 8(d) imposes additional requirements on the employer where a collective bargaining agreement is in effect. During the term of the agreement, either party may lawfully refuse to negotiate or even to discuss the alteration of any term covered by the contract.<sup>32</sup> Absent voluntary agreement, modifications can be made only after the contract's expiration.<sup>33</sup> In particular, an employer who desires to terminate or modify a collective bargaining agreement must serve sixty days written notice of such intent and offer to discuss the proposed changes.<sup>34</sup> Unilateral mid-term contract

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30. See *id.* at 745. While the Act imposes a duty to *bargain* over any subject considered a term or condition of employment, the statute is equally clear that this requirement includes no duty to *agree*. "[S]uch obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." NLRA § 8(d), 29 U.S.C. § 158(d). Factors considered by the Board in determining the existence of a lawful impasse include the parties' bargaining history, the parties' good faith, the length of negotiations, the significance of the issues about which the parties are unable to agree, and the understanding of each party as to the status of the negotiations. *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967). See generally Comment, *Impasse in Collective Bargaining*, 44 TEX. L. REV. 769, 776-82 (1966) (exploring significance of impasse and factors considered in determining whether impasse reached).

31. Absent a collective bargaining agreement, an employer may also alter an employment term without bargaining if a union waives its right to negotiate by failing to request bargaining after being notified of the intended change. See *United States Lingerie Corp.*, 170 N.L.R.B. 750 (1968).

32. See *Dunham-Bush, Inc.*, 264 N.L.R.B. 1347, 1348 (1982); *California Blowpipe & Steel Co.*, 218 N.L.R.B. 736, 748 (1975) ("The Union . . . was not obligated to agree or even to discuss the Company's proposal which constituted a midterm modification of the collective-bargaining agreement . . . ."); *Oak Cliff-Golman Baking Co.*, 207 N.L.R.B. 1063, 1064 (1973), *enforced*, 505 F.2d 1302 (5th Cir. 1974), *cert. denied*, 423 U.S. 826 (1975); *C & S Indus., Inc.*, 158 N.L.R.B. 454, 457 (1966). A union, faced with an employer's demands for wage concessions to assist a failing business, may lawfully refuse even to meet with the employer if protected by a valid contract. See cases cited *supra*; *infra* note 65. The union may, of course, voluntarily agree to negotiations or contract modifications at any time. In recent years, such voluntary wage reductions have become common as unions have attempted to assist financially-troubled employers. See *supra* note 3.

33. NLRA § 8(d)(4), 29 U.S.C. § 158(d)(4); *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185 (1971).

Not every breach of a collective bargaining agreement constitutes an unfair labor practice under § 8(d), however. See *Mine Workers v. NLRB*, 257 F.2d 211, 214-15 (D.C. Cir. 1958); *Independent Petroleum Workers v. Esso Standard Oil Co.*, 235 F.2d 401, 405 (3d Cir. 1956). In considering amendments to the NLRA, Congress rejected provisions that would have made the violation of a collective bargaining agreement an unfair labor practice in and of itself. See S. 1126, 80th Cong., 1st Sess. § 8(a)(5) (1947), *reprinted in* 1 LMRA HISTORY, *supra* note 28, at 109-11. Section 8(d) is applicable only where the contractual breach constitutes a "modification" or "termination" of the contract. The types of alterations generally at issue during Chapter 11 proceedings, i.e., wage and benefit reductions, unquestionably qualify as "modifications." "[T]here can be little [sic] doubt that where an employer unilaterally effects a change which has a continuing impact on a basic term or condition of employment, wages for example, more is involved than just a simple default in a contractual obligation. Such a change manifestly constitutes a 'modification' within the meaning of Section 8(d)." *C & S Indus.*, 158 N.L.R.B. 454, 458 (1966).

The duty to bargain during the term of a contract may continue, however, with respect to any mandatory subjects not covered in the collective bargaining agreement or discussed in prior negotiations. See *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 684 (2d Cir. 1952); *GTE Automatic Elec., Inc.*, 240 N.L.R.B. 297, 298 (1979).

34. NLRA § 8(d), 29 U.S.C. § 158(d). The employer is also required to notify appropriate federal and state mediation authorities of the dispute within thirty days. *Id.*



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modifications are prohibited by the requirement that all terms of the existing agreement continue in effect until the contract expires or the sixty day notice period has run, whichever is later. Given the significance of collective bargaining in the NLRA's underlying policies and goals,<sup>35</sup> the additional restrictions and protection afforded any resulting agreement are both reasonable and appropriate.

Thus, for a failing business, the avoidance of a collective bargaining agreement and a change in employment conditions without negotiation will result in two *separate* violations of section 8(a)(5). The first unfair labor practice is the modification of a term or condition of employment contained in a labor contract without compliance with section 8(d).<sup>36</sup> The second violation, the unilateral change in a mandatory bargaining subject, constitutes an unfair labor practice regardless of the existence of the collective bargaining agreement.<sup>37</sup>

### B. The Chapter 11 Employer

By filing a petition for reorganization under Chapter 11 of the Bankruptcy Code, an employer, in exchange for protection from her creditors, places her business under the supervision of the bankruptcy court.<sup>38</sup> The Chapter 11 proceeding allows the company an opportunity to restructure its debts and reorganize its business to become a profitable enterprise.<sup>39</sup> The business generally remains in operation under the direction of the bankruptcy court.<sup>40</sup> Although the court may appoint an independent agent

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35. See *Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 34-43 (1935) (statement of Sen. Wagner giving overview of bill), *reprinted in* 1 *NLRA HISTORY*, *supra* note 23, at 1410-19; see also the preamble of the Act, NLRA § 1, 29 U.S.C. § 151 (1982).

36. See, e.g., *Dunham-Bush, Inc.*, 264 N.L.R.B. 1347, 1348 (1982) (employer unilaterally changed contractual work rules); *Foodway*, 235 N.L.R.B. 1479, 1488 (1978) (employer refused to comply with enforceable labor contract); *Airport Limousine Serv.*, 231 N.L.R.B. 932, 933 (1977) (refusal to guarantee overtime and pay wage increase as required by labor contract); *Fairfield Nursing Home*, 228 N.L.R.B. 1208, 1210-11 (1977) (employer failed to pay contractual wage increase); *California Blowpipe & Steel Co.*, 218 N.L.R.B. 736, 748 (1975) (failure to comply with union security clause); *Oak Cliff-Golman Baking Co.*, 207 N.L.R.B. 1063, 1064 (1973), *enforced*, 505 F.2d 1302 (5th Cir. 1974), *cert. denied*, 423 U.S. 826 (1975). When the contractual dispute is subject to grievance/arbitration procedures contained in the agreement, the Board will defer to the arbitration process where certain safeguards have been met to ensure that the unfair labor practice issue has been considered by the arbitrator. See *Olin Corp.*, 268 N.L.R.B. 573 (1984) (deferral to the parties' arbitration process before the arbitration has occurred); *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971) (same); *United Technologies Corp.*, 268 N.L.R.B. 557 (1984) (deferral where an arbitration award has already been rendered); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955) (same).

37. See *NLRB v. Katz*, 369 U.S. 736, 742-43, 747 (1962).

38. 11 U.S.C.A. §§ 1101-74 (West 1979 & Supp. 1985).

39. See H.R. REP. NO. 595, 95th Cong., 1st Sess. 220 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6179 ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders.").

40. *Id.* See H.R. REP. NO. 595, 95th Cong., 1st Sess. 404 (1977), *reprinted in* 1978 U.S. CODE

as the trustee of the debtor-employer,<sup>41</sup> the debtor herself usually continues to manage the business as the "debtor-in-possession."<sup>42</sup>

The Bankruptcy Code offers the debtor a variety of special protections and privileges designed to provide the business with a "breathing space" and a chance for rehabilitation. From the moment the petition is filed, the Code's automatic stay provision prohibits collection efforts by creditors,<sup>43</sup> thus avoiding piecemeal liquidation of company assets which could irreparably cripple the enterprise. The creditors, and the judicial system, also benefit from the assurance that the division of those assets will not be determined by a race to the courthouse, rewarding those creditors who litigate their claims first.<sup>44</sup>

In conjunction with the automatic stay, the Code encourages creditors to continue dealing with the debtor in order to make possible the maintenance of business operations. Any costs incurred in the ordinary course of business during reorganization are considered administrative expenses entitled to first priority in the payment of claims against the debtor.<sup>45</sup> By extending further credit to the debtor, the creditor can assist the rehabilitation effort with the security that these additional debts must be paid before other priority claims or the claims of unsecured creditors.<sup>46</sup> The Bankruptcy Code also affords special protection to employees, who are uniquely dependent on the debtor. Wages earned during the reorganization also must be paid as first priority administrative expenses.<sup>47</sup>

In addition to the problems of meeting the payroll and obtaining new

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CONG. & AD. NEWS 5963, 6360.

41. See 11 U.S.C. §§ 1104, 1108.

42. See 11 U.S.C. §§ 1101(1), 1107. Except under certain specified circumstances, § 1107(a) grants to the debtor-in-possession the same rights, duties, and functions as a trustee. The terms "debtor-in-possession" and "trustee" will therefore be used interchangeably in this Article.

43. 11 U.S.C.A. § 362(a) (West 1979 & Supp. 1984). Relief from the automatic stay is available under certain circumstances described in 11 U.S.C.A. § 362(d).

44. See H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6296-97.

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors.

45. 11 U.S.C. § 507(a)(1) (1982).

46. Should this incentive prove inadequate, the bankruptcy court may authorize even more attractive alternatives under the statute to secure the extension of additional credit during the reorganization period. See 11 U.S.C. § 364 (1982).

47. 11 U.S.C. §§ 503(b)(1)(A), 507(a)(1) (1982). Unpaid wages, vacation pay, sick pay, and severance pay earned up to 90 days before the petition was filed are third priority claims. 11 U.S.C.A. § 507(a)(3) (West 1979 & Supp. 1985). A maximum of \$2,000.00 per employee is allowed. Benefits earned before the 90 day period are unsecured claims. Employee benefit plan contributions accrued within 180 days of filing are given fourth priority. 11 U.S.C.A. § 507(a)(4).

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and extended credit, the debtor is often plagued by difficulties in meeting her obligations under ongoing contracts. The legislative history of the Code describes these "executory contracts" as agreements where "performance remains due to some extent on both sides;"<sup>48</sup> they include leases, continuing supply contracts and purchase agreements, and individual employment contracts.<sup>49</sup> Under section 365(a) of the Code, the trustee or debtor-in-possession has the right to reject any executory contract with the approval of the bankruptcy court.<sup>50</sup> The standard for rejection, generally referred to as the "business judgment" test, requires only that the debtor-in-possession establish that the contract is burdensome to the company and the reorganization efforts.<sup>51</sup> If the court approves the request for rejection, the contract is considered breached as of the time the petition was filed.<sup>52</sup> The other party to the contract is reduced to the status of any other unsecured creditor and may then file a claim for contractual damages.<sup>53</sup> This provision on executory contracts, as much as any other part of the Code, allows for the "breathing space" needed for a company to re-establish itself.

### C. Tensions and Responses

The ability to reject burdensome or unprofitable contracts is obviously one of the most significant privileges granted the debtor by the Bankruptcy Code. That power, however, conflicts with the provisions of the NLRA prohibiting mid-term modifications of collective bargaining agreements. A labor contract certainly fits within the broad definition of an executory contract. While under a collective bargaining agreement, both the union and the employer have continuing obligations to the other party.

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48. H.R. REP. NO. 595, 95th Cong., 1st Sess. 347 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6303; S. REP. NO. 989, 95th Cong., 2d Sess. 58 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5844; *see* Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973) (defining executory contract as "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."); *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1348 (10th Cir. 1983) (quoting Countryman, *supra*); *In re Select-A-Seat Corp.*, 625 F.2d 290, 292 (9th Cir. 1980) (same); *Jenson v. Continental Financial Corp.*, 591 F.2d 477, 481 (8th Cir. 1979) (same).

49. *See generally* Countryman, *supra* note 48, at 450-60 (1973) (citing cases finding various contracts to be executory).

50. 11 U.S.C. § 365(a) (1982).

51. *See* Group of Institutional Investors v. Chicago, Milw., St. Paul & Pac. R.R., 318 U.S. 523, 552-55 (1943) (considering whether rejection equitable to debtor); *Borman's, Inc. v. Allied Supermarkets, Inc.*, 706 F.2d 187, 191 (6th Cir. 1983) (describing the business judgment test as considering "only . . . whether rejection would be advantageous to the debtor"), *cert. denied*, 104 S. Ct. 263 (1983); 2 COLLIER ON BANKRUPTCY § 365.03 (15th ed. 1985).

52. *See Bildisco*, 104 S. Ct. at 1198; *Truck Drivers Local Union No. 807 v. Bohack Corp.*, 541 F.2d 312, 321 n.15 (2d Cir. 1976); 11 U.S.C. § 365(g)(1).

53. *See Bildisco*, 104 S. Ct. at 1198-99 (interpreting 11 U.S.C.A. §§ 502(g), 507 (West 1979 & Supp. 1985)).

The Code contains nothing to suggest that collective bargaining agreements under the NLRA should be treated any differently than other executory contracts.<sup>54</sup>

Courts presented with the issue have unanimously held that collective bargaining agreements are "executory contracts" within the meaning of the Code.<sup>55</sup> Yet because of the special status of labor agreements under the Labor Act, the courts have been unwilling to accept the business judgment test as the appropriate standard for rejection. Every appellate court that has considered the question, and ultimately the Supreme Court, have agreed that a labor contract "is not an ordinary contract"<sup>56</sup> to be treated in an ordinary way.<sup>57</sup> A collective bargaining agreement applies to a unique relationship of interdependence between employees and the company that employs them. The agreement creates a blueprint that guides the day-to-day dealings of the parties. This contractual "law of the shop," as described by the Supreme Court,<sup>58</sup> is critical to maintaining industrial peace in an ongoing relationship that is both constant and fluid. When most executory contracts are rejected, the relationship itself can be terminated. Goods can be bought and sold through other more profitable arrangements. When a collective bargaining agreement is rejected, however, the parties' underlying relationship remains unchanged. The employees continue as employees, the union continues as their representative, and the employer remains obligated to deal with that agent; only the contractual structure of the relationship has been removed.

While a debtor's other executory contracts may be protected by the common law of contracts, a federal statute protects collective bargaining agreements. Treating a labor contract like any other contract ignores NLRA policies established by Congress, the same body that created the Bankruptcy Code. The Code does not permit the debtor to avoid its Labor

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54. Cf. 11 U.S.C. § 365 (1982) (executory contracts).

55. See cases cited *infra* notes 62-63.

56. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550 (1964).

57. See *infra* notes 62-63; see also cases cited in Comment, *What Test Should the Bankruptcy Court Use*, *supra* note 11, at 866 n.29. But see *In re Ateco Equipment, Inc.*, 18 Bankr. 915 (Bankr. W.D. Pa. 1982) (holding standard of rejection for labor agreements should be same as for nonlabor executory contracts); *In re Concrete Pipe Mach. Co.*, 28 Bankr. 837 (Bankr. N.D. Iowa 1983) (applying business judgment rule). Cf. *In re Rath Packing Co.*, 36 Bankr. 979 (Bankr. N.D. Iowa 1984) (describing as "very persuasive" arguments that business judgment test should be applicable to labor contracts but finding rejection appropriate under any of various standards applied).

The Code does exempt from rejection labor agreements under the Railway Labor Act, 45 U.S.C. §§ 151-88 (1982). See 11 U.S.C. § 1167 (1982). Employers, and at least one commentator, have argued that the omission of a similar provision for contracts under the NLRA must be interpreted as a rejection by Congress of any special treatment for NLRA agreements. See *Shopmen's Local Union 455 v. Kevin Steel Prods.*, 519 F.2d 698, 702 (2d Cir. 1975); Pulliam, *supra* note 11, at 38; see also *Bildisco*, 104 S. Ct. at 1194-95 (suggesting omission signifies not all collective bargaining agreements immune from rejection).

58. See *Bildisco*, 104 S. Ct. at 1195; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960).

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Act obligations "any more than it can ignore those imposed by the Internal Revenue Code."<sup>59</sup> Where a direct conflict occurs, as between section 365 of the Code allowing contract rejection and sections 8(a)(5) and 8(d) of the NLRA prohibiting mid-term modification of a labor agreement, some accommodation must be made acknowledging the policies underlying both federal laws.<sup>60</sup>

The appellate courts considering the rejection of collective bargaining agreements prior to *Bildisco* agreed that a standard somewhat stricter than the business judgment test was appropriate.<sup>61</sup> Disagreement arose, however, over the nature of that standard, prompting the Supreme Court to consider the problem. One line of cases required the debtor-in-possession to establish that the reorganization would fail absent rejection.<sup>62</sup> An opposing, less stringent viewpoint involved a careful balancing of the equities weighing for and against rejection.<sup>63</sup> The *Bildisco* Court eventually adopted the latter approach.<sup>64</sup>

The rejection of a collective bargaining agreement, however, unlike the rejection of other types of executory contracts, cannot be viewed as an end in itself. The goal of the debtor-in-possession is not only to avoid the labor contract, but also to change the terms of employment for her workforce. The point is not to terminate her employees, but to have them continue working for reduced wages and benefits. The rejection of the labor contract thus accomplishes only the first step of the employer's goal. Given the employer's duty under the NLRA to bargain about any change in employment conditions, the second step of actually making such changes raises a new issue and poses an obstacle independent of the contract rejection itself. This second problem is one traditionally handled by the National Labor Relations Board.

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59. *Shopmen's Local Union 455 v. Kevin Steel Prods.*, 519 F.2d 698, 706 (2d Cir. 1975).

60. See *Bildisco*, 104 S. Ct. at 1197; *In re Brada Miller Freight Sys.*, 702 F.2d 890, 897-99 (11th Cir. 1983); *Shopmen's Local Union 455 v. Kevin Steel Prods.*, 519 F.2d 698, 706 (2d Cir. 1975).

61. See appellate cases cited *infra* notes 62-63.

62. *Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, Inc.*, 523 F.2d 164, 169 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975); *In re Connecticut Celery Co.*, 106 L.R.R.M. (BNA) 2847, 2851-53 (Bankr. D. Conn. 1980); *In re Wood Steel Co.*, 449 F. Supp. 165, 169 (E.D. Pa. 1978); *In re Studio Eight Lighting, Inc.*, 91 L.R.R.M. (BNA) 2429, 2430 (E.D.N.Y. 1976); see *Bildisco*, 104 S. Ct. at 1195; see also *Bohack Corp. v. Truck Drivers Local 807 (Bohack II)*, 431 F. Supp. 646 (E.D.N.Y.), *aff'd per curiam*, 567 F.2d 237 (2d Cir. 1977), *cert. denied*, 439 U.S. 825 (1978) (permitting rejection where alternative was collapse of the business).

63. *In re Brada Miller Freight Sys.*, 702 F.2d 890, 898-99 (11th Cir. 1983); *In re Bildisco*, 682 F.2d 72, 79-80 (3d Cir. 1982), *aff'd*, 104 S. Ct. 1188 (1984). An earlier Second Circuit case, *Shopmen's Local Union 455 v. Kevin Steel Prods.*, 519 F.2d 698 (2d Cir. 1975), also adopted the balancing approach. Only a few months later, however, the Second Circuit "interpreted" *Kevin Steel* as requiring that rejection be necessary to the success of the reorganization. See *Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, Inc.*, 523 F.2d 164, 169 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975). For a discussion of this apparent discrepancy, see *In re Brada Miller*, 702 F.2d at 898-99; *In re Bildisco*, 682 F.2d at 79-80.

64. *Bildisco*, 104 S. Ct. at 1196.

In spite of the special circumstances of a Chapter 11 employer under bankruptcy court control, the Board generally has held the trustee or the debtor-in-possession to the same Labor Act obligations as any other employer.<sup>65</sup> As the "alter ego" of the debtor-employer, the trustee or debtor-in-possession is considered the same entity as the debtor-employer and therefore is treated as such under the NLRA.<sup>66</sup> Under this theory, the trustee or debtor-in-possession assumes all bargaining obligations of the debtor-employer and is bound by any labor contract in effect.<sup>67</sup> If the bankruptcy court approved the rejection of a labor contract, the Board held the trustee or debtor-in-possession to a continuing duty to bargain.<sup>68</sup> After rejection the Board required the Chapter 11 employer to fulfill the same collective bargaining obligations as any employer whose employees are represented by a union but not covered by an agreement. Changes in employment terms were permitted only by union agreement or bargaining to impasse.

The federal courts have consistently agreed with the Board, recognizing the duty to bargain after rejection under both the current<sup>69</sup> Bankruptcy

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65. The Board has consistently rejected financial difficulties as a defense to a section 8(a)(5) charge based on the employer's unilateral change in a mandatory bargaining issue. *Airport Limousine Serv.*, 231 N.L.R.B. 932, 934 (1977); *Phoenix Air Conditioning*, 231 N.L.R.B. 341, 342 (1977), *enforced*, 580 F.2d 1053 (9th Cir. 1978); *Oak Cliff-Golman Banking Co.*, 207 N.L.R.B. 1063, 1064 (1973), *enforced*, 505 F.2d 1302 (5th Cir. 1974), *cert. denied*, 423 U.S. 826 (1975); *C & S Indus.*, 158 N.L.R.B. 454, 460 (1966).

66. *See, e.g.*, *Burmeyer Bros.*, 254 N.L.R.B. 1027, 1028 (1981); *Oxford Structures, Ltd.*, 245 N.L.R.B. 1180, 1181 (1979); *Jersey Juniors, Inc.*, 230 N.L.R.B. 329, 331-32 (1977); *Cagle's, Inc.*, 218 N.L.R.B. 603, 604 (1975); *Stateside Shipyard & Marina, Inc.*, 178 N.L.R.B. 516, 518 (1969). Factors considered by the Board in concluding that an entity represents the alter ego of the employer include "'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership." *Crawford Door Sales Co.*, 226 N.L.R.B. 1144, 1144 (1976). *But see* *Blazer Indus.*, 236 N.L.R.B. 103, 109-10 (1978) (trustee was not bound by collective bargaining agreement because of drastic changes in operation).

67. *See* cases cited *supra* note 66. A unilateral change in employment terms would thus constitute a § 8(a)(5) violation even for the Chapter 11 employer. If the change also altered the provisions of a collective bargaining agreement, the employer would be guilty of an additional unfair labor practice under § 8(a)(5) by the violation of the provisions of § 8(d)(4). NLRA § 8(d), 29 U.S.C.A. § 158(d) (West 1979 & Supp. 1985). *See* cases cited *supra* note 33.

68. *Oxford Structures, Ltd.*, 245 N.L.R.B. 1180, 1183 (1979) ("Although under some authorities a bankruptcy court may, after weighing all policy considerations, disaffirm an existing collective-bargaining agreement, there is no authority for the proposition that the underlying bargaining obligation of an employer may be vitiated. Indeed, the opposite is true. A debtor-in-possession remains obligated to bargain if it continues to operate the same 'employing enterprise.'"); *M&M Transp. Co.*, 239 N.L.R.B. 73, 75 (1978) ("[A]s a general proposition of law, a debtor-in-possession, like any other employer, is obligated to bargain in good faith with the representative of his employees."); *U.S. Lingerie Corp.*, 170 N.L.R.B. 750, 763 (1968) ("[I]nstitution of bankruptcy proceedings does not extinguish preexisting bargaining obligations.").

69. 11 U.S.C. §§ 101-1330 (1982). *See, e.g.*, *In re Brada Miller Freight*, 702 F.2d 890, 899 (11th Cir. 1983) ("[A] debtor-in-possession, even after rejection, is compelled to bargain with an established bargaining unit in an attempt to execute a new collective bargaining agreement. . . ."); *Bildisco*, 682 F.2d at 80 ("[T]he debtor-in-possession who rejects a collective bargaining agreement remains an employer and is still required by the NLRA to bargain with the representatives of its employees . . . ."); *Local Joint Exec. Bd. v. Hotel Circle, Inc.*, 613 F.2d 210, 215 (9th Cir. 1980)

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Code and its predecessor.<sup>70</sup> It is this duty to bargain after rejection, an issue which seemingly had been settled, that *Bildisco* unnecessarily muddled. Although the *Bildisco* Court acknowledged the existence of some type of continuing bargaining obligation in Chapter 11 situations, the requirement of bargaining to impasse is no longer clear.

### 1. NLRB v. Bildisco & Bildisco

Bildisco and Bildisco, a New Jersey partnership, was in the business of distributing building supplies. Its warehousemen and drivers, represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, were covered by a collective bargaining agreement effective from May 1, 1979 to April 30, 1982.<sup>71</sup> In January 1980, without prior bargaining with the Teamsters, Bildisco breached the labor contract by failing to make pension, health, and welfare contributions, by failing to remit to the union dues withheld from employee paychecks, and by failing to pay vacation benefits.<sup>72</sup> Three months later, on April 14, 1980, the company filed a petition for reorganization under Chapter 11 of the Bankruptcy Code.<sup>73</sup> Bildisco continued operations as debtor-in-possession.<sup>74</sup> Subsequent to the petition filing on May 1, 1980, Bildisco again violated the collective bargaining agreement and unilaterally altered employment terms by failing to pay a contractual wage increase.<sup>75</sup>

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("[W]e agree that a receiver has the general duty to bargain and otherwise comply with the NLRA . . .").

The discussion of the duty to bargain in these cases is generally limited to one sentence. No explanation of the nature or extent of the bargaining obligation is provided. Nonetheless, the courts almost certainly were referring to the duty to bargain to impasse; "duty to bargain" is a "term of art" in labor law and is understood to include the concept of "impasse" unless explicitly qualified. *See* NLRB v. Katz, 369 U.S. 736 (1962); NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952). The courts' failure to elaborate more fully on the debtor-in-possession's continuing duty to bargain is not surprising; the issue was peripheral to the more immediate question before the courts—the rejection of the collective bargaining agreement. Apart from the consideration of rejection, the debtor-in-possession's failure to bargain was generally resolved through unfair labor practice proceedings before the Board. *See infra* note 187.

70. *Truck Drivers Local Union No. 807 v. Bohack Corp.*, 541 F.2d 312, 320 (2d Cir. 1976), *aff'd per curiam after remand*, 567 F.2d 237 (2d Cir. 1977), *cert. denied*, 439 U.S. 825 (1978); *Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, Inc.*, 523 F.2d 164, 170 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975); *Shopmen's Local Union 455 v. Kevin Steel Prods.*, 519 F.2d 698, 704 (2d Cir. 1975). Again, the courts simply refer to the continuing duty to bargain without discussion, and it must be assumed that "impasse" bargaining was intended. *See supra* note 69.

The Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101–1330 (1982), replaced the Bankruptcy Act of 1898, as amended, 11 U.S.C. §§ 1–1200 (1976) (repealed 1978). Although a number of alterations were made, the basic structure and procedures remained unchanged.

71. *Bildisco & Bildisco*, 255 N.L.R.B. 1203, 1204 (1981).

72. *Id.* at 1204–05.

73. *Bildisco*, 104 S. Ct. at 1192.

74. *Bildisco*, 255 N.L.R.B. at 1204.

75. *Id.* at 1205.

The Teamsters filed unfair labor practice charges against Bildisco in the summer of 1980. The Board issued an amended complaint on October 8, 1980, charging violations of sections 8(a)(5) and 8(a)(1) of the NLRA. Following Bildisco's failure to file a timely answer to the complaint, the Board granted the General Counsel's motion for summary judgment on April 23, 1981.<sup>76</sup> On January 15, 1981, after the issuance of the complaint but before the grant of summary judgment, Bildisco successfully requested rejection of the Teamster contract in the bankruptcy court.<sup>77</sup> The union's appeal from the order allowing rejection was consolidated by the Court of Appeals for the Third Circuit with the Board's petition for enforcement of its order.<sup>78</sup>

The Third Circuit first considered Bildisco's request to reject its collective bargaining agreement with the Teamsters. Adopting the approach of a Second Circuit decision, the court concluded that the competing policies of the Bankruptcy Code and the NLRA could best be accommodated by a "thorough scrutiny, and a careful balancing of the equities on both sides."<sup>79</sup> The Third Circuit then turned to the Board's findings of unfair labor practices. Because the court considered the debtor-in-possession to be a "new entity," it was not a "party" to the collective bargaining agreement and thus could not have breached the contract.<sup>80</sup> Although the court noted that the duty to bargain continued, the decision offered no further discussion of the nature or extent of this obligation.<sup>81</sup> The court denied the Board's application for enforcement of its order.

In considering Bildisco's failure to make pension contributions and pay a contractually-required wage increase, the Third Circuit neglected to recognize the existence of two separate unfair labor practices. The first unfair labor practice, the mid-term modification of the parties' collective bargaining agreement, was rejected because Bildisco was not a "party" to the contract as the debtor-in-possession.<sup>82</sup> The second unfair labor practice, overlooked by the Third Circuit, was Bildisco's alteration of employment terms without bargaining with the union, regardless of the collective bargaining agreement. Even though the court acknowledged that the duty to

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76. *Id.* at 1203-04.

77. *In re Bildisco*, 682 F.2d 72, 75 (3d Cir. 1982).

78. *Id.* at 76.

79. *Id.* at 79 (quoting *Shopmen's Local Union No. 455 v. Kevin Steel Prods.*, 519 F.2d 698, 707 (2d Cir. 1975), which in turn quotes *In re Overseas Nat'l Airways*, 238 F. Supp. 359, 361 (E.D.N.Y. 1965)). The Third Circuit rejected, however, the subsequent "interpretation" of *Kevin Steel* by the Second Circuit in *Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, Inc.*, 523 F.2d 164, 169 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975). *Bildisco*, 682 F.2d at 79. See *supra* notes 61-64 and accompanying text.

80. *Bildisco*, 682 F.2d at 82-83.

81. *Id.* at 83.

82. *Id.*



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bargain continued, it failed to explain how, consistent with this duty, Bildisco could unilaterally change the terms of employment.<sup>83</sup> In other words, the Third Circuit resolved only the section 8(a)(5) violation based on the collective bargaining agreement. The second violation of section 8(a)(5), altering conditions of employment without first bargaining to impasse, was independent of the contract and ignored by the Court.

The Supreme Court, in upholding the conclusions of the Third Circuit, repeated the mistake of the lower court by failing to distinguish between Bildisco's two separate section 8(a)(5) violations. The Court quickly dismissed the argument that collective bargaining agreements are not subject to rejection under Chapter 11 and proceeded to discuss the appropriate standard for permitting such rejection.<sup>84</sup> The Court agreed with the Third Circuit that the stricter standard used by some courts placed too high a burden on the struggling debtor. Adopting a slightly modified version of the Third Circuit's test, the Court held that rejection should be permitted if the labor contract burdens the company and if careful scrutiny reveals that the equities balance in favor of rejection.<sup>85</sup>

Having resolved the rejection issue, the Court went on to address the Board's findings of unfair labor practices based on Bildisco's unilateral modifications of the contract.<sup>86</sup> The Court wisely avoided the "new entity" theory used by the Third Circuit and acknowledged that the debtor-in-possession is more reasonably viewed as the same "entity" that existed before filing.<sup>87</sup> Nonetheless, the Court reached the same result by a different route. Instead of excusing Bildisco from the section 8(d) requirements as a new entity, the Court focused on the status of a labor contract after a bankruptcy petition is filed. Because the agreement is subject to rejection, the Court reasoned, it cannot be considered an "enforceable contract" under section 8(d) until assumed by the debtor-in-possession.<sup>88</sup> Therefore, Bildisco's unilateral breach of the agreement did not constitute an unfair labor practice under the language of the NLRA.<sup>89</sup>

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83. *Id.*

84. *Bildisco*, 104 S. Ct. at 1194-95. The Court agreed with the Third Circuit that the "business judgment" rule, usually applied to executory contracts, *see supra* notes 50-51 and accompanying text, was inappropriate for labor contracts. *Id.* at 1195.

85. *Bildisco*, 104 S. Ct. at 1196.

86. *Id.* at 1197.

87. *Id.* The "new entity" approach, first introduced by the Second Circuit in *Shopmen's Local Union 455 v. Kevin Steel Prods.*, 519 F.2d 698 (2d Cir. 1975), had been the subject of substantial criticism. *See infra* note 141.

88. *Bildisco*, 104 S. Ct. at 1198-99.

89. *Id.* at 1199-1201. In discussing the appropriate standard for rejection of a labor contract in Part II of the opinion, the Court had stated that "reasonable efforts to negotiate a voluntary modification" should be required by the bankruptcy court before approving rejection. *Id.* at 1196. Part III of the opinion, concerning the right of the debtor-in-possession to alter employment terms unilaterally, mentions no parallel bargaining requirement as a precondition of making these changes. The Court's "impasse" discussion in Part III, addressing the union's argument that the debtor-in-possession must

The *Bildisco* Court conceded that the filing for bankruptcy did not entirely remove the bargaining obligation. Before rejection, the debtor-in-possession must make "reasonable efforts" to negotiate voluntary contract modifications.<sup>90</sup> Furthermore, the debtor-in-possession remains under a duty to bargain for a new contract, pending rejection of the old agreement or following rejection approval by the bankruptcy court.<sup>91</sup> The nature and extent of this duty to bargain, however, was left unresolved.

Although the Court was unanimous in approving a balancing test for the rejection of collective bargaining agreements,<sup>92</sup> it split over the debtor-in-possession's obligation to comply with section 8(d) before rejection. Four Justices dissented from the majority's conclusion that *Bildisco* acted lawfully in unilaterally altering contract terms prior to rejection.<sup>93</sup> Justice Brennan's dissenting opinion charged the majority with failing to accommodate the policies of the conflicting statutes, and with focusing instead on the Bankruptcy Code alone.<sup>94</sup> Justice Brennan disputed the Court's holding that a collective bargaining agreement is not an "enforceable contract" under section 8(d) after a Chapter 11 petition is filed. The dissent argued that even though the contract is "suspended" before affirmance or rejection, it retains characteristics of a contract still "in effect."<sup>95</sup> Justice Brennan pointed out that, under traditional bankruptcy law, an executory contract is deemed enforceable from the commencement of the bankruptcy proceedings once it has been assumed by the debtor-in-possession. Even if rejected, Justice Brennan noted, the agreement is the basis under the Code for damage claims resulting from the breach.<sup>96</sup>

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bargain to impasse before seeking rejection, more reasonably belongs in Part II of the decision.

90. *Id.* at 1196.

91. *Id.* at 1201.

92. *Id.* at 1201 (Brennan, J., concurring in part).

93. *Id.* at 1201 (Brennan, J., dissenting in part) (Justice Brennan's partial dissent was joined by Justice Blackmun, Justice Marshall, and Justice White.).

94. *Id.* at 1204 (Brennan, J., dissenting in part).

95. Since the term "enforceable contract" cannot be found in § 8(d), Justice Brennan assumed the majority was referring to the "in effect" language of that provision. *Id.* at 1206 (Brennan, J., dissenting in part).

96. *Id.* The dissent also noted that the contract rate is often used as a measure when determining the reasonable value of employee services rendered between the filing and a ruling on the contract's rejection. *Id.* at 1207. Furthermore, Justice Brennan noted the debtor-in-possession is an "employer" as defined in the NLRA, 29 U.S.C. § 152 (1982). *Id.* at 1207 & n.15.

The dissenters found additional support for the applicability of § 8(d) by examining the NLRA's underlying policies. The notice and cooling-off provisions of the statute were aimed at preventing the industrial strife that can result from unilateral mid-term contract modification. *Id.* at 1207-08 (Brennan, J., dissenting in part). Instead of assisting the debtor in reorganization, the labor unrest resulting from the unilateral breach of the collective bargaining agreement could actually hinder the debtor's efforts. If the agreement is so burdensome as to require immediate modification, reasoned Justice Brennan, the debtor-in-possession is free to request quick relief from the bankruptcy court. *Id.* at 1209 (Brennan, J., dissenting in part).

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### 2. The Bildisco Legislation

At the time of the Supreme Court's decision in *Bildisco*, Congress was considering amendments to the Bankruptcy Code to resolve the constitutional status of bankruptcy judges.<sup>97</sup> In response to immediate and intensive union lobbying,<sup>98</sup> Congress amended the Bankruptcy Amendments and Federal Judgeship Act of 1984 to include a procedure for the rejection of collective bargaining agreements.<sup>99</sup> Under the Code provisions as amended, a trustee or debtor-in-possession may not seek contract rejection unless she has: 1) proposed modifications to the union "necessary" to permit a successful reorganization; and 2) provided the union with information needed to evaluate those modifications.<sup>100</sup> Until the hearing on rejection, the trustee must "confer in good faith" with the union in an effort to reach agreement.<sup>101</sup> Absent a voluntary compromise, rejection will be ap-

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97. In 1982, the Supreme Court held the Bankruptcy Code unconstitutional on the grounds that bankruptcy judges exercised judicial power without the protection of life tenure and the prohibition of salary diminution required by Article III of the Constitution. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The Court stayed the ruling in order to allow Congress an opportunity to correct the problem without the confusion that would result from declaring the Code invalid. *Id.* at 88. The *Bildisco* legislation is part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 1113, 98 Stat. 333, 390, intended to resolve the status of the bankruptcy judges. There is some speculation, however, that the amendments failed to resolve the constitutional problem addressed in *Marathon Pipe Line*, making the amended Code vulnerable to being declared unconstitutional for a second time. See Dahl, *New Bankruptcy Law Causes Confusion Amid Claims It Is Unconstitutional*, Wall St. J., July 13, 1984, at 3, col. 4.

98. The immediate response of unions to *Bildisco* was undoubtedly responsible in part for the rapid enactment of legislation to alter its result. See, e.g., Serrin, *Labor Leaders Voice Concern*, N.Y. Times, Feb. 23, 1984, at D25, col. 4; Aparcar, *Unions Press Congress to Reverse Decision by High Court on Bankrupt Firms' Pacts*, Wall St. J., Mar. 21, 1984, at 35, col. 4. The first legislation to reverse *Bildisco* was introduced by Representative Peter Rodino on the same day the decision was handed down. See H.R. 4908, 98th Cong., 2d Sess. § 3 (1984).

99. 11 U.S.C.A. § 1113 (West Supp. 1985); see H.R. REP. NO. 882, 98th Cong., 2d Sess. 61-63 (1984) (discussing reasons for amended provision).

100.

Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee . . . 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.

11 U.S.C.A. § 1113(b)(1).

The duty to supply information is not a new concept in labor relations. The employer's bargaining obligation under § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1982), has been interpreted as including a duty to supply relevant information to unions to permit them to bargain knowledgeably about terms and conditions of employment. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-54 (1956). See generally R. GORMAN, *BASIC TEXT ON LABOR LAW* 409-15 (1976) (discussing duty to furnish information); 1 *THE DEVELOPING LABOR LAW* 606-29 (C. Morris 2d ed. 1983) (same).

101.

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

proved if the union has failed to accept the debtor's proposal "without good cause" and if the equities "clearly" balance in favor of rejection.<sup>102</sup>

In contrast with the *Bildisco* decision, the new statute does not permit the debtor-in-possession to alter any contract term unilaterally before complying with the specific procedures for rejection and before obtaining approval of the rejection from the bankruptcy court.<sup>103</sup> In recognition of the employer's possible need for immediate relief, however, the legislation requires a hearing within fourteen days after application for rejection<sup>104</sup> and permits interim changes prior to rejection if approved by the court.<sup>105</sup>

Despite the fact that the legislation partially addressed the duty to bargain before contract rejection, a number of questions remain. The newly revised Code requires the trustee to "confer in good faith"<sup>106</sup>—language identical to that found in section 8(d)'s definition of the duty to bargain under the NLRA.<sup>107</sup> Is Congress implying that the same duty to bargain to impasse under section 8(a)(5) and 8(d) of the Act is applicable to the trustee prior to rejection under the Code? The answer is almost certainly no, though it is unfortunate that Congress did not select alternative language. Although the legislative history is not entirely clear on the point, Congress apparently shared the concern of the *Bildisco* Court that the bankruptcy judges not be burdened by traditional Board determina-

attempting to reach mutually satisfactory modifications of such agreement.

11 U.S.C.A. § 1113(b)(2). The term "trustee" as used in the legislation includes a debtor-in-possession. See 11 U.S.C.A. § 1113(b)(1).

102.

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 [of "necessary" modifications];
- (2) the authorized representative of the employees has refused to accept such proposal without good cause; and
- (3) the balance of the equities clearly favors rejection of such agreement.

11 U.S.C.A. § 1113(c).

103. 11 U.S.C.A. § 1113(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."). Unilateral changes in the contract are permitted pending the court's ruling on rejection, however, if the judge fails to rule on the application for rejection within thirty days. 11 U.S.C.A. § 1113(d)(2).

104. 11 U.S.C.A. § 1113(d)(1).

105.

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.

11 U.S.C.A. § 1113(e).

106. 11 U.S.C.A. § 1113(b)(2).

107. NLRA § 8(d), 29 U.S.C. § 158(d) (1982).

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tions.<sup>108</sup> More significantly, the legislation fails to address the existence and extent of the debtor-in-possession's bargaining obligation after contract rejection or contract expiration. In order to consider these issues, *Bildisco* must be reexamined.

### II. COLLECTIVE BARGAINING IN CHAPTER 11

The *Bildisco* Court, purportedly recognizing the importance of collective bargaining in national labor policy, held that bargaining was required both before and after contract rejection. Prior to seeking rejection, the Court stated, the debtor-in-possession must make "reasonable efforts to negotiate a voluntary modification."<sup>109</sup> Even if such efforts fail, the debtor-in-possession remains obligated to bargain about a new contract

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108. See *Bildisco*, 104 S. Ct. at 1200. Senator Hatch, a member of the Senate Committee on the Judiciary and a Senate conferee on the *Bildisco* legislation, stated that the good faith obligation imposed by the statute was "a requirement articulated by the Supreme Court in the *Bildisco* case. . . . [T]he good faith nature of these negotiations will require that the employees' union representative be given an opportunity to review and accept or reject the business proposal." 130 CONG. REC. S8892 (daily ed. June 29, 1984) (statement of Sen. Hatch), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 590, 593. If intended as a reflection of the Supreme Court's position, impasse was not contemplated. See *In re Wheeling-Pittsburgh Steel Corp.*, 119 L.R.R.M. (BNA) 3277, 3281-82 (Bankr. W.D. Pa.), *aff'd*, 120 L.R.R.M. (BNA) 2198, 2204 (W.D. Pa. 1985); cf. 130 CONG. REC. S8888 (daily ed. June 29, 1984) (statement of Sen. Thurmond), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 581, 583 ("The requirement that the union refusal to accept the proposal be 'without good cause' is obviously not intended to import traditional labor law concepts into a bankruptcy forum or turn the bankruptcy courts into a version of the National Labor Relations Board."). But see 130 CONG. REC. S8898, 8900 (daily ed. June 29, 1984) (statement of Sen. Moynihan) ("[T]he legislation . . . embodies the principles of the NLRA by requiring the company to bargain in good faith.").

The legislation presents other obvious problems of interpretation as well. Section 1113(b)(1)(A), for example, requires the trustee to propose contract modifications "necessary" for the reorganization. 11 U.S.C.A. § 1113(b)(1)(A). Strictly interpreted, this provision could demand a demonstration by the trustee that the reorganization would fail without the requested changes in employment terms. Another interpretation might require only that the revisions contribute to a successful reorganization. See *In re Wheeling-Pittsburgh Steel Corp.*, 120 L.R.R.M. (BNA) 2198, 2202 (W.D. Pa. 1985) ("[T]he 'necessary' standard of § 1113 does not mean 'absolutely essential;' . . . a 'necessary' standard [is] satisfied by considerations of feasibility for reorganization.").

Similarly, § 1113(c) includes as a precondition for rejection the union's refusal of the trustee's proposed modifications "without good cause." 11 U.S.C.A. § 1113(c)(2). "Good cause" may be subject to a number of possible definitions, depending on whether the provision is viewed as one for the protection of the trustee or the union. See 130 CONG. REC. S8891 (daily ed. June 29, 1984) (statement of Sen. Hatch), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 590, 591 ("[t]he union can only reject such a good faith offer for cause good enough to justify the risk of the business' collapse").

The legislative history suggests that the statute be interpreted liberally with concern for the debtor's financial well-being. See 130 CONG. REC. S8888 (daily ed. June 29, 1984) (statement of Sen. Thurmond), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 581, 583 (commenting that provisions of 11 U.S.C. § 1113(b) should be interpreted "in the most practical and workable manner possible"); 130 CONG. REC. S8892 (daily ed. June 29, 1984) (statement of Sen. Hatch), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 590, 592-94 ("all . . . provisions in this labor part of the bill must be read in the context of the needs of the reorganization process"). The first bankruptcy court decision approving the rejection of a collective bargaining agreement under the new legislation indicates that the debtor's predicament will remain the primary concern under the statute. See *In re Wheeling-Pittsburgh Steel Corp.*, 119 L.R.R.M. (BNA) 3277 (Bankr. W.D. Pa. 1985), *aff'd*, 120 L.R.R.M. (BNA) 2198 (W.D. Pa. 1985).

109. *Bildisco*, 104 S. Ct. at 1196.

"pending rejection of the existing contract or following formal approval of rejection by the Bankruptcy Court."<sup>110</sup> The Court was equally explicit, however, in rejecting any duty to bargain to impasse as a condition of seeking rejection.<sup>111</sup> Furthermore, the Court permitted the Chapter 11 employer to make unilateral changes in employment terms prior to rejection without violating section 8(a)(5).<sup>112</sup>

The question left unanswered is the extent of the bargaining obligation where no contract is in effect. Even though the *Bildisco* Court stated that the duty continues after rejection, it did not elaborate on the nature of that duty. Several theories are suggested by the *Bildisco* framework; none is satisfactory. The approach most likely to be accepted by the bankruptcy courts and the Board, consistent with past authority, reinstates the duty to bargain to impasse immediately after rejection of the labor contract by the bankruptcy court. Alternatively, the duty to bargain after rejection may be the same as the bargaining obligation before rejection, that is, a duty to bargain in good faith but not to impasse. As a third option, an analogy to successorship principles would suggest that the debtor-in-possession could lawfully make initial unilateral alterations in employment terms but thereafter would be required to bargain about any additional changes. Yet, because *Bildisco* is inherently inconsistent, each of these analyses fails: By permitting *Bildisco* to alter employment terms unilaterally before rejection of the collective bargaining agreement, but requiring bargaining after rejection, the Court illogically allowed the debtor-in-possession *with* a labor contract more freedom than the Chapter 11 employer *without* an agreement. After examining these different approaches, this Article concludes that the traditional concept of a duty to bargain to impasse must be imposed. This result can be reached, however, only by reevaluating and ultimately rejecting that aspect of the *Bildisco* decision.

#### A. *Bargaining to Impasse*

A superficial reading of the *Bildisco* majority opinion suggests that the "usual" section 8(a)(5) obligations take effect as soon as the bankruptcy court approves rejection of the labor contract. In other words, although the duty to bargain to impasse is excused prior to or as a condition of rejection, that duty remains with respect to any changes in employment terms made after rejection. Such changes would be permitted only if the union agreed or if the parties reached a lawful impasse. This approach, consistent with prior Board and appellate court decisions addressing the

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110. *Id.* at 1201.

111. *Id.* at 1200.

112. *Id.* at 1198-1201.

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issue,<sup>113</sup> seems a reasonable interpretation of the Court's statement that the debtor-in-possession remains "obligated to bargain . . . over the terms and conditions of a possible new contract."<sup>114</sup>

The difficulty with such a theory is that it puts the debtor-in-possession in a better posture, vis-a-vis her obligations under the NLRA, *before* rejection than *after* rejection. Prior to rejection, the debtor-in-possession apparently can make whatever employment changes she desires without consulting the union.<sup>115</sup> After rejection, she is restricted by a duty to bargain. National labor policy, as well as common sense, would dictate the reverse. A debtor-in-possession who is contractually bound to a union should be under greater restrictions, even under Chapter 11, than the debtor-in-possession whose contractual obligations have been removed. The policies of the NLRA, reflected in the increased protection afforded a union with a collective bargaining agreement,<sup>116</sup> have been more than "subordinated to the exigencies of bankruptcy"<sup>117</sup>—they have been completely subverted.

The inconsistency created by this interpretation is further highlighted by considering the debtor-in-possession's duty to bargain when there is no collective bargaining agreement involved. The *Bildisco* Court,<sup>118</sup> as well as other courts presented with the issue,<sup>119</sup> stated that the duty to bargain remains after rejection of a collective bargaining agreement. Presumably, that same duty is in effect when there is no agreement, whether because one expired before the Chapter 11 filing or because the workers had never unionized before reorganization.<sup>120</sup> No court has suggested otherwise, nor did the *Bildisco* legislation address this question. In the absence of a contract, the debtor-in-possession would be allowed to alter employment terms, but only after bargaining to impasse.<sup>121</sup> In contrast, according to the Supreme Court's reasoning, the debtor-in-possession subject to a collective bargaining agreement could make unilateral contract changes prior to rejection without running afoul of section 8(a)(5).<sup>122</sup> Again, contrary to sensible expectations, the Chapter 11 employer subject to a labor contract

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113. See *supra* notes 68–70 and accompanying text.

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

115. See *id.* at 1198–99. Although the Court required some bargaining as a condition of allowing contract rejection, *id.* at 1196, the Court made no reference to any bargaining obligation as a necessary prerequisite of *Bildisco*'s right to make unilateral changes in employment terms, *id.* at 1197–99. Furthermore, the facts contain no indication that *Bildisco* discussed with the union its action in ceasing pension contributions and failing to pay a contractual wage increase. See *id.* at 1192–93.

116. The greater protection accorded labor contracts under the NLRA is evident in the § 8(d) restrictions. 29 U.S.C.A. § 158(d) (West 1973 & Supp. 1985). See *supra* notes 33–35 and accompanying text.

117. *Bildisco*, 104 S.Ct. at 1200.

118. *Id.* at 1201.

119. See cases cited *supra* notes 68–70.

120. See *supra* notes 68–70 and accompanying text.

121. See *supra* notes 27–35 and accompanying text.

122. *Bildisco*, 104 S. Ct. at 1198–99.

has *greater* flexibility in altering employment terms than the Chapter 11 employer without such an agreement. Although there is unquestionably a conflict to be resolved here between the Bankruptcy Code and the Labor Act,<sup>123</sup> it is impossible to justify the Court's subordination and reversal of NLRA policy in considering the bargaining obligation.

### B. *Bargaining in Good Faith Without Impasse*

An attempt at consistency in evaluating the Court's opinion suggests that the duty to bargain after rejection may require a "good faith" effort on the part of the debtor-in-possession but no obligation to reach "impasse" before changing employment terms. This bargaining obligation would be the equivalent of the duty to bargain before rejection described in *Bildisco*.<sup>124</sup> In other words, the debtor-in-possession would be required to bargain, but not to impasse, both before and after the contract's disaffirmance. Again, recognizing the special protection afforded collective bargaining agreements under the NLRA<sup>125</sup> and by *Bildisco* itself,<sup>126</sup> the Chapter 11 employer logically should be permitted no less flexibility after rejection than before. The "breathing space" needed by the debtor-in-possession, a factor which motivated the *Bildisco* Court,<sup>127</sup> would presumably be a continuing concern both before and after contract repudiation. Thus, after rejection the Chapter 11 employer would continue to bargain in good faith but could alter employment terms as needed without the necessity of reaching agreement or impasse.

This analysis raises two problems. First, it runs counter to prior judicial and Board decisions, all of which have consistently imposed a duty to bargain to impasse subsequent to the rejection of a labor agreement.<sup>128</sup> It seems unlikely that the *Bildisco* Court would suggest the reversal of this relatively settled issue of law without more explicit discussion. Second, diluting the employer's duty to bargain by eliminating the requirement of impasse as a condition precedent to changes in employment terms unduly undermines the policies of the NLRA. The duty to bargain in "good faith" would have little content if the employer were also free to alter wages at will.<sup>129</sup> The Supreme Court permitted this result pending rejec-

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123. *Id.* at 1198-1201 (Brennan, J., dissenting in part).

124. *Id.* at 1196.

125. See NLRA § 8(d), 29 U.S.C.A. § 158(d); *supra* notes 35-36 and accompanying text.

126. See *Bildisco*, 104 S. Ct. at 1195 ("[B]ecause of the special nature of a collective-bargaining contract, and the consequent 'law of the shop' which it creates . . . a somewhat stricter standard should govern the decision of the Bankruptcy Court to allow rejection of a collective-bargaining agreement") (citations omitted).

127. *Id.* at 1199.

128. See *supra* notes 68-70 and accompanying text.

129. The counter argument is that the union retains its ultimate economic weapon in striking. Courts considering the issue have generally agreed that the Norris-LaGuardia Act, 29 U.S.C.A. §§



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tion to allow the debtor-in-possession some immediate relief from the contract. Once the constraints of the collective bargaining agreement have been removed, however, only a complete abandonment of all NLRA obligations would justify this further release from all duties under section 8(a)(5). Accommodation of both the Labor Act and the Bankruptcy Code unquestionably is required, but no court has suggested that the Act becomes meaningless upon the filing of a Chapter 11 petition.

### C. *Bargaining to Impasse After Initial Unilateral Changes*

A final possible approach to defining the duty to bargain absent a labor contract involves the new entity theory used by the Third Circuit, but rejected by the Supreme Court, in *Bildisco*.<sup>130</sup> Adopting the Second Circuit's analysis,<sup>131</sup> the Third Circuit held that the debtor-in-possession was a "new entity" not bound by the debtor's collective bargaining agreement and subject only to the NLRA obligations of a "successor employer." The concept of "successor employer" in labor law generally refers to an independent person or company that has purchased an ongoing business.<sup>132</sup> The purchaser may be deemed a successor employer if she continues operations essentially unchanged and hires enough of her predecessor's employees to constitute a majority of her workforce.<sup>133</sup> Once successor status is established, the new employer must recognize and bargain with the representative of the predecessor's employees as required by sections 8(a)(5) and 8(d) of the Labor Act.<sup>134</sup> Unless she voluntarily assumes the agree-

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101-115 (West 1973 & Supp. 1985), prohibiting federal courts from issuing injunctions against strikes involving "labor disputes," 29 U.S.C. § 104, bars a bankruptcy court from enjoining a labor strike against the debtor. See *Bildisco*, 682 F.2d at 80; *Crowe & Assocs. v. Bricklayers & Masons Local 2* (*In re Crowe & Assocs.*), 713 F.2d 211, 213 (6th Cir. 1983); *Petrusch v. Teamsters Local 317* (*In re Petrusch*), 667 F.2d 297, 298-300 (2d Cir. 1981), *cert. denied*, 456 U.S. 974 (1982); *Local 886, Int'l Bhd. of Teamsters v. Quick Charge, Inc.*, 168 F.2d 513, 515-16 (10th Cir. 1948); *Anderson v. Bigelow*, 130 F.2d 460, 462-63 (9th Cir. 1942).

While the union retains the right to strike, it may be reluctant to exercise that power. The typical consequences of a strike, involving the slowing down or discontinuance of operations, could prove too great a burden for the financially-troubled debtor. A union may be unwilling to risk the possibility that the strike will ultimately eliminate the employees' jobs altogether should the business fail. See Comment, *Collective Bargaining and Bankruptcy*, 42 S. CAL. L. REV. 477, 482 (1969).

130. *Bildisco*, 682 F.2d at 82-83; *Bildisco*, 104 S. Ct. at 1197.

131. See *Shopmen's Local Union Number 455 v. Kevin Steel Prods.*, 519 F.2d 698, 704 (2d Cir. 1975).

132. See generally 1 THE DEVELOPING LABOR LAW 695-756 (C. Morris 2d ed. 1983) (discussing determination of successorship status and obligations of successor employer); Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759 (1975) (examining successor employer's duty to bargain).

133. *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 262-64 (1974); *NLRB v. Burns Int'l Security Servs.*, 406 U.S. 272, 281 (1972). The successorship doctrine also requires continuity of an appropriate bargaining unit. 406 U.S. at 281.

134. *Burns*, 406 U.S. at 281. See also sources cited *supra* note 132.

ment, the successor is not bound to any labor contract of her predecessor since the successor was never a party to that agreement.<sup>135</sup>

Prior to *Bildisco*, appellate courts invoked the new entity/successor theory to avoid the modification restrictions for collective bargaining agreements imposed by section 8(d) of the Act. The Board and unions had argued that rejection of a labor contract by a bankruptcy court was improper unless the debtor-in-possession first complied with section 8(d)(1-4).<sup>136</sup> By considering the debtor-in-possession a "new entity," however, the appellate courts adopting this approach reasoned that the debtor-in-possession was not a "party" to the contract and thus was unaffected by section 8(d).<sup>137</sup>

Courts had also relied on the successor theory to support a Chapter 11 employer's right to alter employment terms unilaterally. A successor employer generally may set *initial* terms of employment without prior consultation with the union.<sup>138</sup> A successor's bargaining obligation becomes effective only when the successor has hired a sufficient number of the predecessor's employees to constitute a majority of the successor's full workforce.<sup>139</sup> Before reaching that point in hiring, the new employer has not yet become a "successor" and may lawfully establish or alter employment terms as she desires. By analogy, some courts had suggested that the debtor-in-possession, as a "new entity," could unilaterally alter wages or benefits upon the filing of a Chapter 11 petition without violating section 8(a)(5).<sup>140</sup>

The new entity/successor approach provoked substantial criticism<sup>141</sup> and was discarded by the Supreme Court in *Bildisco*. Recognizing the theory for the legal fiction it is, the Court concluded that it is more "sensible" to treat the debtor-in-possession as the same "entity" as the pre-

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135. *Burns*, 406 U.S. at 281-84. *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), carved out a limited exception to the general rule in *Burns*. The predecessor employer in *Wiley*, Interscience, merged into a much larger company, John Wiley & Sons. Interscience ceased to exist as a separate entity. Forty of Interscience's 80 employees were covered by a collective bargaining agreement. Wiley's 300 employees were unorganized. Under these unusual circumstances, involving the "disappearance" of the predecessor by merger and the unchanged nature of the business, the Court required Wiley to arbitrate the extent of its obligations under the collective bargaining agreement signed by Interscience. *Id.* at 548. Wiley has been limited to its particular facts. See *Burns*, 406 U.S. at 285-86; *Howard Johnson*, 417 U.S. at 256-59.

136. See, e.g., *Kevin Steel Prods.*, 519 F.2d at 702-03.

137. *Id.* at 704.

138. *Burns*, 406 U.S. at 294-95.

139. *Id.* at 294-95.

140. See *Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, Inc.*, 523 F.2d 164, 170-71 (2d Cir.), cert. denied, 423 U.S. 1017 (1975).

141. See *In re Brada Miller Freight Sys.*, 702 F.2d 890, 894-95 (11th Cir. 1983); Bordewick and Countryman, *supra* note 11, at 301-09; Note, *Labor-Bankruptcy Conflict*, *supra* note 11, at 137-42; Note, *Bankruptcy Law's Effect*, *supra* note 11, at 404; Note, *Rejection of Collective Bargaining Agreements*, *supra* note 11, at 172-73.

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petition employer.<sup>142</sup> Yet only a few pages later in the opinion, the successor theory returns to haunt us. In support of its statement that the debtor-in-possession is obligated to bargain about the terms of a new contract both pending and after rejection, the *Bildisco* Court cited one of the leading cases on the obligations of a successor employer, *NLRB v. Burns Security Services*.<sup>143</sup>

The Court's reference to *Burns* may have been inadvertent. Given the Court's earlier dismissal of the successor theory,<sup>144</sup> it seems unlikely that the Court would signify the adoption of the successor analogy simply by referring to *Burns* without further explanation. Perhaps the *Burns* cite was intended only as general authority for the proposition that the debtor-in-possession has a continuing bargaining obligation even in the absence of an enforceable contract. *Burns* was not a bankruptcy case, however, and a number of more appropriate sources could have been used for such a reference.<sup>145</sup> The use of *Burns* therefore appears deliberate. Given the usual right of the successor employer to set initial terms and conditions of employment,<sup>146</sup> the *Bildisco* Court may have been suggesting that the Chapter 11 employer has the right to alter employment terms unilaterally immediately after rejection but thereafter must bargain to impasse concerning any additional changes.

The successor approach is more analytically sound than requiring bargaining in good faith short of impasse. Allowing the debtor-in-possession initial flexibility in changing employment terms somewhat alleviates the problem of imposing more severe bargaining obligations on the employer without a contract than on an employer with a contract. Moreover, requiring impasse bargaining after those initial changes aligns the Court's position more closely with that of prior courts considering the issue.<sup>147</sup> Finally, the underlying policies of the NLRA seem better balanced with the "breathing space" needed by the employer undergoing reorganization.<sup>148</sup>

Ultimately, however, the successor analysis, like the first two attempts to reconcile the *Bildisco* opinion, proves untenable. As the *Bildisco* Court implicitly acknowledged, the successor theory entails an unconvincing legal fiction. Although the debtor's business is subject to bankruptcy court supervision during Chapter 11 proceedings, the debtor-in-possession is in fact the same person operating the same business as before the Chapter 11

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142. *Bildisco*, 104 S. Ct. at 1197.

143. 406 U.S. 272 (1972), cited by *Bildisco*, 104 S. Ct. at 1201.

144. See cases cited *supra* notes 69–71.

145. See cases cited in *Bildisco*, 104 S. Ct. at 1196–97.

146. See *supra* text accompanying notes 138–40.

147. See *supra* notes 68–70 and accompanying text.

148. *Bildisco*, 104 S. Ct. at 1199.

petition was filed.<sup>149</sup> Treating the debtor-in-possession as an entirely new person for the sole purpose of avoiding certain obligations under the NLRA seems a strained manipulation of reality. As noted in *Bildisco*, if the debtor-in-possession were actually a new entity and not a party to the labor contract, requiring rejection of the collective bargaining agreement would be unnecessary and nonsensical.<sup>150</sup>

The successor theory also leads to the same inconsistency as the bargain to impasse approach in that it illogically permits an employer bound by a collective bargaining agreement greater freedom to make unilateral changes than an employer without a contract. The right of a debtor-in-possession under the successor analogy to alter employment terms unilaterally after rejection provides only a "one shot" opportunity.<sup>151</sup> Any future changes require union agreement or bargaining to impasse. *Bildisco*, by contrast, was permitted to alter employment terms without bargaining at various times prior to rejection of the collective bargaining agreement.<sup>152</sup>

Moreover, application of the successor analogy would provide an incentive for the Chapter 11 employer to reduce wages and benefits more than warranted by the circumstances. Because initial changes in employment terms could be made without negotiation while subsequent changes would require bargaining to impasse, the debtor would be encouraged to make drastic initial cuts. A later negotiation of increases in benefits is always easier than the negotiation of further reductions. Larger initial cuts would further exacerbate the tense labor relations and charges of employer bad faith that often occur in Chapter 11 situations. If consistently required to bargain from the beginning, however, the employer may be more likely to reduce benefits in smaller increments, thereby increasing the potential for union agreement and cooperation.

Finally, even accepting the successor analogy, it is not clear that successorship law itself would permit initial unilateral changes in these circum-

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149. See *supra* note 42 and accompanying text. The "new entity" analysis is more persuasive where the business is being operated by a trustee rather than a debtor-in-possession. The Code makes clear, however, that the rights and responsibilities of the two are essentially identical, and there is no good justification for distinguishing them. See 11 U.S.C.A. §1107(a) (West 1979 & Supp. 1985). Since the trustee steps into the shoes of the debtor, it is reasonable to attribute to the trustee the debtor's collective bargaining obligations.

150. *Bildisco*, 104 S. Ct. at 1197; *In re Brada Miller Freight Sys.*, 702 F.2d 890, 895 (11th Cir. 1983). Even the Second Circuit later acknowledged this inconsistency in its own theory. See *Truck Drivers Local 807 v. Bohack Corp.*, 541 F.2d 312, 320 (2d Cir. 1976) ("Of course, the statement that the debtor is not a 'party,' and the analogy to the successor employer, cannot be taken literally, since neither affrmance nor rejection of the collective bargaining agreement would be possible by one not a party to it.").

151. See *supra* notes 138-39 and accompanying text.

152. *Bildisco* ceased pension contributions in January, 1980, prior to filing a Chapter 11 petition in April, 1980. It also denied a contractual wage increase in May, 1980. *Bildisco*, 104 S. Ct. at 1192.

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stances. The right of a successor employer to establish initial terms of employment is not absolute. In *NLRB v. Burns Security Services, Inc.*,<sup>153</sup> the Supreme Court stated that a successor may be obligated to consult with the union about initial employment terms where it is "perfectly clear" that the employer intends to retain all of the employees as part of the same business.<sup>154</sup> The National Labor Relations Board has limited this requirement to circumstances where the successor employer explicitly or implicitly advises the predecessor employees that they will continue in their jobs with unchanged employment terms.<sup>155</sup> Even where the new employer intends to retain the entire workforce, she may unilaterally set initial employment terms if she makes her plans clear to the employees before hiring. Should she imply or advise the employees that business will continue "as usual," however, the successor may be required to bargain before any changes in her predecessor's wages and benefits are allowed.<sup>156</sup>

Where the debtor-in-possession under Chapter 11 continues to operate what is in fact the same business, the replacement of existing employees with new employees is not an issue, unlike in the successor situation.<sup>157</sup>

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153. 406 U.S. 272 (1972).

154. *Id.* at 294-95 ("Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."); *see also* *NLRB v. Edjo, Inc.*, 631 F.2d 604, 607-08 (9th Cir. 1980) ("It is now well settled that where the employer retains all of the employees from his predecessor's bargaining unit, it is appropriate that he first consult with the collective bargaining agent before altering the terms and conditions of employment.").

155. In *Spruce-Up Corp.*, 209 N.L.R.B. 194 (1974), the Board limited the *Burns* language, *supra* note 154, to situations where "the new employer has either actively, or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Id.* at 195 (footnote omitted); *see* *Spitzer Akron, Inc. v. NLRB*, 540 F.2d 841, 845-46 (6th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977) (successor employer required to bargain about initial employment terms where he advised employees he wanted them to "stay on the job, and would carry on as usual"); *Stewart Granite Enterprises*, 255 N.L.R.B. 569, 575 n.27 (1981) (successor employer estopped from setting initial terms of employment by actions suggesting to predecessor employees that they would be retained at same wages). The Board was concerned in *Spruce-Up* that any other interpretation would encourage a new employer not to hire her predecessor's employees in order to avoid the bargaining obligation over initial terms of employment. The Board's restrictive interpretation permits a new employer lawfully to announce new terms of employment before hiring begins even if the successor subsequently hires her predecessor's entire work force. *Spruce-Up*, 209 N.L.R.B. at 195.

156. *See* *Spitzer Akron, Inc. v. NLRB*, 540 F.2d 841, 845-46 (6th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

157. Employees may anticipate work reduction and layoffs during reorganization, but the hiring of new employees under different terms of employment is rarely to be expected. Unlike in the successor situation, the employees clearly were not "hired" with the knowledge that their wages would be reduced. They likely were employees of the debtor long before the Chapter 11 petition was filed.

The employees, of course, reasonably may contemplate wage and benefit reductions following court approval of the collective bargaining agreement. Perhaps such expectations are common from the initiation of Chapter 11 proceedings. This does not mean, however, that the employees expect such

Even if the debtor-in-possession is considered a successor employer, a persuasive argument can be made that the debtor-in-possession is barred from making initial unilateral changes under the *Burns* "perfectly clear" exception. Hence, the successor analogy is at best an uncomfortable and shaky basis for reconciling the policies of the Bankruptcy Code and the NLRA.<sup>158</sup> It is unlikely that the Court would adopt such a novel and questionable analysis without directly addressing the issue.

#### D. *Re-evaluating Bildisco and the Duty to Bargain*

The *Bildisco* Court has made it impossible to define rationally the bargaining obligations of the Chapter 11 employer without a labor contract. Surely the employees covered by a collective bargaining agreement are entitled to equal or greater protection under the NLRA *and* the Bankruptcy Code than employees without one. Yet imposing a duty to bargain to impasse immediately after rejection creates, within the *Bildisco* framework, the contrary result. While employers not bound by labor contracts are required to bargain to impasse, those with agreements were permitted by the Court in *Bildisco* to make changes in employment terms unilaterally. The two potential alternative theories—excusing the duty to bargain to impasse entirely or permitting initial unilateral changes—must also be rejected as involving too radical a departure from accepted doctrine to be adopted absent explicit guidance from the Court. By allowing the Chapter 11 employer bound by a contract the freedom to make unilateral changes in employment conditions, the Court has deprived employees protected by a collective bargaining agreement of any meaningful representative rights, and has created uncertainty as to the rights of employees who do not have a contract.

The employer's duty to bargain represents the cornerstone of the NLRA, giving substance to the employees' right to organize and deal collectively with their employer.<sup>159</sup> The Board and the courts have no power

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changes without their union's participation.

158. In *REA Express*, the Second Circuit held the *Burns* exception inapplicable to the Chapter 11 situation, reasoning that employees could not have been misled because the bankruptcy "was widely publicized" and "put the unions and REA employees on notice that changes would be required to avert collapse of REA." *Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, Inc.*, 523 F.2d 164, 171 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

159. See 79 CONG. REC. 7565 (1935), *reprinted in* 2 NLRA HISTORY, *supra* note 23, at 2321, 2336 ("[T]he right of workers to bargain collectively through representatives of their own choosing must be matched by the correlative duty of employers to recognize and deal in good faith with these representatives. The Government itself is held up to ridicule when the elections which it supervises are rendered illusory by failure to acknowledge their results."); S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935), *reprinted in* 2 NLRA HISTORY, *supra* note 23, at 2300, 2312 (employees' right to bargain collectively is a "mere delusion" in absence of corresponding duty to bargain on part of employer); *see also* NLRA § 1, 29 U.S.C. § 151 (1982).

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to mandate agreement; only bargaining is required.<sup>160</sup> If the employer can avoid that obligation by filing a petition under Chapter 11, the union is virtually powerless to protect the employees' rights and benefits. The purported goal of accommodating the policies of the two statutes is rejected in favor of the complete elimination of employee bargaining rights.<sup>161</sup>

The *Bildisco* Court specifically noted that after rejection of the collective bargaining agreement, the debtor-in-possession must bargain for a new contract under section 8(a)(5) of the NLRA.<sup>162</sup> There is no justification for distinguishing between the debtor-in-possession who files a petition while not bound by a collective bargaining agreement and the debtor-in-possession after rejection who is also without a labor contract. Both should be held to the same duty to bargain to impasse, including the usual section 8(a)(5) prohibition on unilateral changes in employment terms.<sup>163</sup>

In excusing the debtor-in-possession from the constraints of section 8(d) and the duty to bargain to impasse, the *Bildisco* Court was apparently concerned with two issues. As an overriding consideration, the Court cited the "flexibility and breathing space" needed by the debtor-in-possession to restructure the business.<sup>164</sup> Requiring adherence to section 8(d)(1-4) of the NLRA, the Court stated, would have the practical effect of binding the debtor-in-possession to the terms of a contract that may hinder the company's rehabilitation.<sup>165</sup> As a secondary matter, the Court was reluctant to require the bankruptcy courts to determine the existence of a lawful impasse, an issue traditionally determined by the Board.<sup>166</sup> Neither of these concerns, however, justifies the Court's drastic solution of reducing the bargaining obligation to an empty promise.

### 1. *The Need for Flexibility*

The debtor-in-possession's need for flexibility constitutes the most frequent chorus in support of arguments aimed at avoiding or excusing NLRA obligations.<sup>167</sup> The persuasiveness of the flexibility argument is enhanced by two refrains of its advocates. The first emphasizes the impor-

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160. NLRA § 8(d), 29 U.S.C.A. § 158(d) (West 1973 & Supp. 1985) ("such obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession"); *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

161. See *Bildisco*, 104 S. Ct. at 1197 ("action by the Bankruptcy Court is required, while the policies of the Labor Act have been adequately served").

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

163. *NLRB v. Katz*, 369 U.S. 736, 737 (1962).

164. *Bildisco*, 104 S. Ct. at 1199, 1200.

165. *Id.* at 1199.

166. *Id.* at 1200.

167. See, e.g., *Bildisco*, 104 S. Ct. at 1199; *In re Brada Miller Freight Sys.*, 702 F.2d 890, 897 (11th Cir. 1983); *Local Joint Executive Bd. v. Hotel Circle*, 613 F.2d 210, 214 (9th Cir. 1980); *Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, Inc.*, 523 F.2d 164, 170 (2d Cir. 1975), *cert. denied*, 423 U.S. 1017 (1975); Pulliam, *supra* note 11, at 7-8.

tance of the ultimate goal—saving a failing business—and claims that the ends sought justify the means used. Employers have asserted that, in order to maximize the chance of rehabilitation, the debtor-in-possession must be given wide latitude to restructure its financial affairs.<sup>168</sup> The repudiation of burdensome contracts is a critical aspect of that restructuring. After all, the argument continues, if the reorganization fails, everyone loses and the employees being “protected” are left without their jobs entirely.<sup>169</sup> It is therefore in everyone’s best interest to remove all obstacles, including the NLRA, to the rehabilitation. The second refrain in support of the debtor-in-possession’s need for flexibility asserts that the obligation to bargain would impose a tremendous burden on Chapter 11 employers. Each of these justifications is irreparably flawed.

a. *Saving the Business at Any Cost: The Ends as Justifying the Means*

The flexibility argument may be appealing but it goes too far if one is referring to *all* Labor Act obligations. The necessity of permitting the rejection of collective bargaining agreements under *some* standard is easy to accept. Neither the courts nor the commentators have ever suggested that a labor contract should be completely immune from rejection.<sup>170</sup> The ability to reject executory contracts is an essential part of the Code’s reorganization scheme.<sup>171</sup> For a labor-intensive business, the success of the rehabilitation efforts may very well depend on the debtor’s right to avoid an onerous labor contract. It must be recognized, however, that this only excuses adherence to the NLRA’s prohibition of mid-term contract modifications. The separate issue of the debtor’s ability to alter employment terms without bargaining poses a distinct statutory question independent of the contract. Regardless of the standard used for rejection, the duty to bargain remains unaffected. Even if the Supreme Court in *Bildisco* permitted rejection under the business judgment test used for other executory contracts, that decision alone would not explain its failure to impose a duty to bargain.

Consideration of other federally imposed obligations on a debtor-in-possession illustrates the limited reach of the flexibility argument. While paying employees below the minimum wage would clearly assist the debtor in regaining financial stability, a Chapter 11 petition does not suspend the Fair Labor Standards Act.<sup>172</sup> Similarly, social security contribu-

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168. See *Bildisco*, 104 S. Ct. at 1197–99.

169. *Id.* at 1197. See *In re Southern Elecs. Co.*, 23 Bankr. 348, 363 (Bankr. E.D. Tenn. 1982).

170. See *supra* note 11; note 55 and accompanying text.

171. See *supra* notes 48–51 and accompanying text.

172. 29 U.S.C. §§ 201–219 (1982).



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tions, the Occupational Safety and Health Act,<sup>173</sup> and environmental regulations, to name a few, all increase the cost of doing business. For some businesses, the cost of complying with those laws may be substantial and may jeopardize the ability of the debtor to rehabilitate successfully. Yet no one would seriously suggest that these statutory requirements be excused by a Chapter 11 filing. The duty to bargain cannot be distinguished. The Bankruptcy Code may require flexibility, but only within the bounds of the employer's statutory obligations.

The *Bildisco* Court could have addressed its concern with flexibility by focusing on the collective bargaining agreement alone, independent of the unilateral changes in employment terms. Accepting the potential need of a debtor-in-possession to reduce contractual wages and benefits as part of the reorganization efforts, the Court could have found the agreement unenforceable, thereby relieving the debtor-in-possession of restrictions under section 8(d) but leaving intact the duty to bargain.<sup>174</sup> In other words, a bankruptcy court's approval of the rejection of a labor contract would place the debtor-in-possession in the same position as a debtor-in-possession without a labor contract. The collective bargaining agreement could be avoided but not the general duty to bargain. The unilateral changes in employment terms would then be treated as a separate and independent issue under section 8(a)(5).

In response to the union's argument that *Bildisco* should have been required to bargain to impasse before rejection, the Court noted that this assertion would impose on the debtor-in-possession "a standard little different from that imposed on all employers subject to the NLRA."<sup>175</sup> The Court's point ignores the fact that the debtor-in-possession already has been given substantial advantages over other employers by her ability to seek contract rejection. Releasing the employer from the labor contract enables her to alter employment terms once impasse is reached, a right that exists only when there is no collective bargaining agreement in force. Thus, the Court allowed the debtor-in-possession the special privilege of seeking mid-term contract modifications in what otherwise would be a violation of section 8(d)(1-4).<sup>176</sup> By also permitting the debtor-in-

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173. 29 U.S.C. §§ 651-678 (1982).

174. The dissenting opinion in *Bildisco* recognized that the debtor-in-possession's right to alter unilaterally employment terms "does not necessarily follow" from the majority's conclusion that the collective bargaining agreement became unenforceable when the Chapter 11 petition was filed. *Bildisco*, 104 S. Ct. at 1207 n.14 (Brennan, J., dissenting in part). Citing *NLRB v. Katz*, 369 U.S. 736 (1962), Justice Brennan noted that an employer may not lawfully alter employment terms unilaterally even in the absence of a contract. *Bildisco*, 104 S. Ct. at 1207 n.14. The argument was not developed further, however, because the dissenters took the position that the labor agreement remains in effect until rejection. *Id.* at 1206-10. See *supra* notes 93-96 and accompanying text.

175. *Bildisco*, 104 S. Ct. at 1200.

176. See *supra* notes 87-89 and accompanying text.

possession to make such changes without bargaining to impasse, the Court granted a *second*, unwarranted privilege by excusing Bildisco from the separate section 8(a)(5) violation resulting from making those changes unilaterally.<sup>177</sup>

b. *The Myth of the Burden of Bargaining*

Critics who present the duty to bargain as an unacceptable obstacle to the debtor-in-possession's reorganization efforts do so by inflating the bargaining obligation into a burden of overwhelming proportions—creating a mountain out of the proverbial molehill. That is not to say that the bargaining obligation is insignificant: It is crucial to the employees and central to the Labor Act's scheme.<sup>178</sup> The "mountain" has developed, however, from the incorrect assumption that bargaining will block the employer from restructuring her company and financial obligations.

The duty to bargain is neither an unreasonable nor a burdensome requirement. The Act requires only that the debtor-in-possession meet with the union and discuss changes in wages, benefits, and other working conditions that the employer believes are needed to assist her rehabilitation.<sup>179</sup> Instead of attempting to hinder the reorganization, the union may be able to suggest alternatives to reduce costs or to make the operations more efficient.<sup>180</sup> The union can also convey to the employer any employee preferences or concerns. The employees may recognize the need for cuts, but may prefer, for example, to work for reduced wages if their health and pension insurance benefits are maintained. This valuable interaction clearly cannot occur unless the union has the opportunity to discuss these issues with the debtor-in-possession.

In some circumstances the union will be unable to offer any assistance

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177. See *supra* notes 82-91 and accompanying text; cf. *In re Tucker Freight Lines*, 115 L.R.R.M. (BNA) 2202, 2207 (Bankr. W.D. Mich. 1983) ("[T]he new entity/successor employer theory enunciated in the Court decisions is not intended to provide justification for a [debtor-in-possession's] unilateral changes of union contracts, but rather to set forth a proposition that unrelated entit[ies] to the preexisting contracts will not be bound.").

In its final footnote, the *Bildisco* majority acknowledged that the NLRA prohibits an employer from altering employment terms during negotiations, citing the leading case of *NLRB v. Katz*, 369 U.S. 736 (1962). *Bildisco*, 104 S. Ct. at 1200 n.14. The Court went on to explain, however, that *Katz* was inapplicable since it did not address the conflict with the Bankruptcy Code. *Id.* While the Court's statement is correct, it hardly constitutes a convincing reason for ignoring *Katz*. Since no prior Supreme Court cases had directly addressed the issue, the Court's reasoning would disqualify as irrelevant authority virtually every case cited in Part III of its opinion. *Id.* at 1197-1201. In noting that the debtor-in-possession remained obligated to bargain about a new contract pending rejection, the Court had no difficulty in citing another case, *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), which dealt only with the NLRA and involved no bankruptcy issues. *Bildisco*, 104 S. Ct. at 1201. See *supra* note 112 and accompanying text.

178. See *supra* notes 22-26 and accompanying text.

179. See *supra* notes 26-31 and accompanying text.

180. See *supra* note 3 and accompanying text.

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to the debtor-in-possession. If so, the debtor-in-possession must bargain only to impasse. When it becomes clear that no agreement can be reached, the debtor-in-possession may lawfully implement the proposed changes.<sup>181</sup> The union no longer has legal power to prevent the changes or further impede the reorganization efforts.<sup>182</sup>

The concern that bargaining will interfere with the success of the debtor-in-possession's rehabilitation may be based on the fear that "impasse" will take too long to reach. This fear would be understandable if bargaining to impasse necessarily was a process measured in months. The debtor-in-possession may often need to move much more quickly if the business is to be saved. But the time and effort required to satisfy the duty to bargain can vary substantially depending on the context of the negotiations. Even though bargaining to impasse can be a lengthy process in non-crisis situations, it also can be accomplished as quickly as demanded by the circumstances.<sup>183</sup> Where the employer needs to act expeditiously, impasse may be reached within a few days.<sup>184</sup> In the absence of union agreement or an acceptable compromise, the debtor-in-possession can then implement the proposed changes.<sup>185</sup> As an accommodation to the policies of both the Bankruptcy Code and the NLRA, such a result would permit the

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181. See *supra* notes 29-31 and accompanying text.

182. Although the union cannot legally require the debtor-in-possession to maintain wages and benefits at their current level, see *supra* notes 29-31 and accompanying text, it can impose economic pressure through a strike. As discussed *supra* note 129, however, a union may be unwilling to jeopardize further the already unstable financial condition of the debtor.

183. See *Shell Oil Co.*, 149 N.L.R.B. 305, 307 (1964) ("[T]he amount of time and discussion required to satisfy the statutory obligation 'to meet at reasonable times and confer in good faith' may vary with the character of the [proposed change], the impact on employees, and the exigencies of the particular business situation involved. In short, the principles in this area are not, nor are they intended to be, inflexibly rigid in application."); *Sands Mfg. Co.*, 1 N.L.R.B. 546, 557 (1936) ("[N]o general rule as to the process of collective bargaining can be made to apply to all cases. The process required varies with the circumstances in each case."). In its brief to the Supreme Court in *Bildisco*, the Board made a similar argument. See Brief for the National Labor Relations Board, at 29 n.17 ("Although in some circumstances it may be important for an employer to act quickly in changing the terms under which it operates, its bargaining obligation under the NLRA requires it only to bargain until a genuine impasse exists. In circumstances in which the employer claims a need to change particular terms because of severe financial hardship, the bargaining could well be quite abbreviated."); see also Brief of the Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers, at 16 n.21 ("The system of collective bargaining is flexible enough to adapt to the exigencies of the business situation. If the economic circumstances are truly drastic, and the union can offer no sufficient concession, then an impasse in the negotiations that would permit the employers to seek rejection will be reached far sooner than where there is ample time for negotiations, or where the union is in a position to alleviate conditions and is advancing meaningful alternatives."); cf. *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1398 (5th Cir. 1983) ("Whether an impasse exists depends on whether, in view of all the circumstances of the bargaining, further discussions would be futile.").

184. See *Betlem Serv. Corp.*, 268 N.L.R.B. 354 (1983) (impasse reached after two bargaining sessions and two telephone contacts where union refused to consider terms other than those contained in local area industry contract); *E.I. DuPont DeNemours & Co.*, 189 N.L.R.B. 753, 754 (1971) (impasse reached in a few days where union's alternatives to employer's proposal were "frivolous" and its position was "fixed"); *Shell Oil Co.*, 149 N.L.R.B. 305, 307 (1964) (three-day notice of work transfer and willingness to discuss proposed change satisfied employer's duty to bargain).

185. *NLRB v. Katz*, 369 U.S. 736, 745 (1962).

debtor-in-possession sufficient flexibility to alter employment terms within a matter of days as required by the reorganization, while still allowing the union some opportunity to discuss and affect those employment decisions.

## 2. *The Consideration of Labor Issues by Bankruptcy Courts*

The Court's additional justification for not requiring bargaining to impasse before rejection was to avoid "diverting" the bankruptcy courts with determinations of "impasse" that traditionally have required the special expertise of the National Labor Relations Board.<sup>186</sup> The erroneous belief that the bankruptcy court would be required to make such judgments arises from the Court's initial failure to distinguish the two separate unfair labor practices involved. It is not the rejection of the labor contract that mandates bargaining but the desire of the debtor-in-possession to change employment terms. The bankruptcy court, within its customary area of expertise, would determine the propriety of rejection under the standard developed by the Court. Any changes in employment terms, however, would be subject to negotiation with the union. If the union claimed the debtor-in-possession failed to bargain to impasse before implementing a wage reduction, for example, that charge properly would be handled by the Board's usual processes, just as other claims of unfair labor practices are resolved during the reorganization period.<sup>187</sup> The determination of "impasse" could and should remain with the Board, independent of the bankruptcy court's consideration of contract rejection.

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186. *Bildisco*, 104 S. Ct. at 1200.

187. See *NLRB v. Superior Forwarding, Inc.*, 103 Lab. Cas. (CCH) ¶ 11,509, at 24,159 (8th Cir. 1985) (Board has jurisdiction "if an unfair labor practice charge stems from a debtor's failure to bargain in good faith over the terms and conditions of a new contract" after rejection); *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 43 (3d Cir. 1942) ("[A] debtor in possession is responsible for the unfair labor practices which occur during a reorganization. Its status as an employer is no different . . . than that of any other employer."); *I.S.G. Extrusion Toolings, Inc.*, 262 N.L.R.B. 114, 115 (1982) ("[T]he Board is not deprived of its jurisdiction or authority to process an unfair labor practice complaint to final disposition upon the adjudication of a respondent as a bankrupt.") (footnote omitted); *M&M Transp. Co.*, 239 N.L.R.B. 73, 75 (1978).

Under § 362(b)(4) of the Code, the automatic stay is inapplicable to "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory powers." 11 U.S.C.A. § 362(b)(4) (West 1979 & Supp. 1984). The courts generally have agreed that NLRB proceedings fall within this exception. See *Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23, 24 (1st Cir. 1983); *NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981); *In re Shippers Interstate Serv.*, 618 F.2d 9, 12-13 (7th Cir. 1980); *In re Bel Air Chateau Hosp.*, 611 F.2d 1248, 1251 (9th Cir. 1979). But see *In re Theobald Industries*, 16 Bankr. 537, 539 (Bankr. D. N.J. 1981) (holding NLRB proceeding not within § 362(b)(4) exception because it is an adjudication of private rights). A stay may be imposed, however, where the Board's proceedings threaten the assets of the debtor. See *In re Tucson Yellow Cab Co.*, 27 Bankr. 621, 623 (Bankr. 9th Cir. 1983); *In re Shippers Interstate Serv.*, 618 F.2d, at 13; *In re Bel Air Chateau Hosp.*, 611 F.2d at 1251; see also *NLRB v. Superior Forwarding, Inc.*, 103 Lab. Cas. at 24,158 (anticipated costs of litigation may be sufficient burden on assets to justify enjoining proceeding). The jurisdiction of the NLRB is exclusive, and unfair labor practice proceedings may not be removed to the bankruptcy court. *NLRB v. Adams Delivery Serv.*, 24 Bankr. 589, 592 (Bankr. 9th Cir. 1982).

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### 3. *Bargaining to Impasse*

In addition to providing a more rational accommodation between the Code and the Labor Act, requiring bargaining to impasse offers several other advantages. If an employer is permitted to make unilateral changes upon the filing of a petition, she may be encouraged to file under Chapter 11 to avoid her NLRA obligations. If the bargaining obligation continued after filing, however, the employer would be more likely to begin discussions before filing and perhaps even avoid Chapter 11 entirely if assisted by union concessions.<sup>188</sup>

Bargaining to impasse also would provide tangible benefits for the bargaining relationship itself. A discussion of the employer's financial concerns creates an opportunity for the union to propose alternatives that the employer may not have considered. Even if no solutions are reached through negotiations, the union's participation benefits both the employer and the employees.<sup>189</sup> The employees and their representative are more likely to cooperate with the reorganization if they understand the employer's problems and feel a "part" of the rebuilding process. The frustration of exclusion can lead to animosity, which hampers the daily working relationship; unilateral changes also could prompt a strike, jeopardizing the entire enterprise.<sup>190</sup>

Why the Court failed to address the existence of two section 8(a)(5) violations in *Bildisco* is difficult to surmise. The Court may have considered separate analyses unnecessary if it concluded that the debtor-in-possession's contract obligations and duty to bargain to impasse were each independently suspended upon the filing of the Chapter 11 petition. To simplify the discussion, the separate unfair labor practices might have

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188. See *supra* note 3.

189. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 214 (1964) ("[I]t is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints. . . .") (quoting from the opinion below of the Court of Appeals for the District of Columbia, *East Bay Union of Machinists, Local 1304 v. NLRB*, 322 F.2d 411, 414 (D.C. Cir. 1963)); Case Comment, *Duty to Bargain About Termination of Operations: Brockway Motor Trucks v. NLRB*, 92 HARV. L. REV. 768, 779-80 (1979) ("[P]articipation by employees in managerial decisions which affect their vital personal interests may be desirable for its own sake, apart from any dividends it may yield in terms of socially efficient decisionmaking. Such a value has implicitly been recognized in the NLRA since its inception.") (footnotes omitted). See generally George, *To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN. L. REV. 667, 700-03 (1985) (discussing the communication value of collective bargaining apart from its usual problem-solving function).

190. See *supra* note 129. On July 17, 1985, a bankruptcy court in Pennsylvania approved the first labor contract rejection under the new legislation. *In re Wheeling-Pittsburgh Steel Corp.*, 119 L.R.R.M. (BNA) 3277, 3288 (Bankr. W.D. Pa.), *aff'd*, 120 L.R.R.M. (BNA) 2198 (W.D. Pa. 1985). In response to the company's attempt to implement wage and benefit reductions after rejection, the union initiated the first major strike in the steel industry in over 25 years. *N.Y. Times*, Aug. 14, 1985, at A21, col. 1. While bargaining to impasse is no guarantee that a strike will be avoided, it may make a strike less likely.

been collapsed and examined as one. More likely, the Court was primarily concerned with the perceived burdens imposed on the employer by the labor agreement and simply neglected to focus on the implications of its discussion for the bargaining obligation. Because the Court failed to recognize the significance of the duty to bargain apart from the existence of the contract, the *Bildisco* decision should be limited to its facts. The *Bildisco* Court's failure to perceive the nature of the violations may, however, intimate more serious and extensive consequences for the nation's labor policy than excusing a Chapter 11 employer from the requirements of the NLRA.

## VI. COLLECTIVE BARGAINING IN CHAPTER 11 AND BEYOND

While legislation now prohibits the Chapter 11 employer from unilaterally altering contract terms before rejection,<sup>191</sup> the duty to bargain after rejection remains an open question. *Bildisco* may continue to be important as the Supreme Court's only decision addressing management-labor relations under Chapter 11. Unions will rely upon the Court's language as a reaffirmation of the debtor-in-possession's duty to bargain.<sup>192</sup> Employers might argue that *Bildisco* implies that a debtor-in-possession has greater leeway under the NLRA than traditionally has been permitted, allowing initial unilateral changes after contract rejection or unilateral changes throughout the reorganization process.<sup>193</sup>

If *Bildisco* is to be used by the courts or the Board for guidance in resolving related labor relations issues within a Chapter 11 reorganization, an analysis of the Court's decision is valuable in guiding its use and preventing its abuse. The long-term effects of *Bildisco*, however, may extend far beyond the confines of the Bankruptcy Code. The Court's basic misunderstanding of the labor law principles at issue in the case should give pause to advocates of both labor and management rights. By fostering an image of bargaining as obstructive to the employer, the Court undermines the ideal of the cooperative collective bargaining relationship that the Labor Act was intended to promote.

### A. *Erosion of the Duty to Bargain: First National Maintenance*

*Bildisco* represents only one step in what appears to be a disheartening erosion of the very foundation of the National Labor Relations Act—the employer's duty to bargain. The Court made an earlier significant step in this direction in its 1981 decision in *First National Maintenance Corp. v.*

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191. See *supra* note 103.

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

193. See *supra* notes 124–128, 130–40.

## The Duty to Bargain

*NLRB*.<sup>194</sup> In *First National Maintenance*, the Court addressed the employer's duty to bargain about the decision to close part of its operations.<sup>195</sup> Following almost two decades of precedent,<sup>196</sup> the Board considered the decision a "term or condition of employment" under sections 8(a)(5) and 8(d) of the Act and therefore a mandatory subject of bargaining.<sup>197</sup> The Second Circuit enforced the Board's order but developed and applied a different standard. The court rejected a per se rule and adopted a presumption in favor of bargaining over partial closure decisions. This presumption was rebuttable, under the court's formulation, "by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain."<sup>198</sup>

In reversing the Second Circuit's decision, the Supreme Court purported to establish a balancing test to be applied to partial closure and other related types of management decisions, such as plant relocations, sales, and subcontracting. Under the test, bargaining is not routinely required in such circumstances involving a business judgment outside of the employment relationship, even though management's decision directly affects the employees and usually results in their termination.<sup>199</sup> The Court focused on the "employer's need for unencumbered decisionmaking" in these instances. A duty to bargain is therefore imposed only "if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."<sup>200</sup>

The *First National Maintenance* decision prompted substantial commentary and criticism.<sup>201</sup> For present purposes, the opinion is disturbing for two reasons. First, the Court misconceives the role of collective bar-

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194. 452 U.S. 666 (1981).

195. *Id.* at 667.

196. See, e.g., *ABC Trans-Nat'l Transp., Inc.*, 247 N.L.R.B. 240, 242-43 (1980) (closing truck terminal), *modified*, 642 F.2d 675 (3d Cir. 1981); *Electrical Prods. Div. of Midland-Ross Corp.*, 239 N.L.R.B. 323, 330 (1978) (closing electrical products plant), *enforced*, 617 F.2d 977 (3d Cir.), *cert. denied*, 449 U.S. 871 (1980); *L.E. Davis*, 237 N.L.R.B. 1042, 1043 (1978) (eliminating unit jobs in conversion to self-service unit), *enforced in relevant part*, 617 F.2d 1264 (7th Cir. 1980); *Brockway Motor Trucks, Inc.*, 230 N.L.R.B. 1002, 1003 (1977) (closing area sales and service center), *enforcement denied without prejudice*, 582 F.2d 720 (3d Cir. 1978); see also George, *supra* note 189, at 683 n.85 (citing cases).

197. NLRA §§ 8(a)(5), 8(d), 29 U.S.C. §§ 158(a)(5), 158(d) (1982). The employer in *First Nat'l Maintenance* was in the business of providing maintenance services to commercial enterprises. Following a dispute with a nursing home about its management fees, First National Maintenance terminated its contract with that client. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. at 668-69. The First National Maintenance employees at the facility, represented by a union granted certification four months earlier, were discharged with three days notice. The union was given no opportunity to discuss the matter with the employer. *Id.* at 669-71.

198. *NLRB v. First Nat'l Maintenance Corp.*, 627 F.2d 596, 601-02 (2d Cir. 1980).

199. *First Nat'l Maintenance*, 452 U.S. at 677, 686 n.22.

200. *Id.* at 679.

201. See generally George, *supra* note 189, at 669 n.17 (reviewing literature).

gaining in the Act's scheme.<sup>202</sup> Second, the manner in which the Court applied its balancing test effectively creates a per se rule excusing the bargaining requirement for any partial closure decision.<sup>203</sup>

The Supreme Court rejected the Second Circuit's presumption in favor of bargaining as "ill-suited to advance harmonious relations between employer and employee."<sup>204</sup> The Court explained that the employer would have difficulty deciding which situations required bargaining under this approach. Thus, the employer would be compelled to negotiate or risk the "harsh" remedies of a section 8(a)(5) violation if she mistakenly determined there was no bargaining obligation.<sup>205</sup> It is difficult to understand how the Court's balancing test provides a more predictable and more easily applicable analysis than the Second Circuit's presumption approach. Even more baffling, however, is the notion that excusing the duty to bargain will advance harmonious labor relations more than requiring bargaining in these situations.

Although the decision to close part of a business almost inevitably involves some conflicting goals and concerns between the employer and the affected employees, the employer's willingness or duty to discuss that decision with the union must certainly promote a more cooperative relationship than the employer's refusal to consult with the employees' representative.<sup>206</sup> The employees, it must be remembered, are likely to lose their jobs once the decision has been made and implemented—a powerful incentive for the development and suggestion of other options to ease the employer's plight. When the employer refuses to bargain, however, the employees have had no chance to propose alternative solutions. Even if the union and employer are unable to agree upon a feasible alternative, the opportunity to discuss and understand the employer's decision in and of itself can have a salutary effect on employer-labor relations.<sup>207</sup>

The Court in *First National Maintenance* was concerned only with the risk to the employer of "harsh" remedies if management erroneously decided there was no duty to bargain about plans for a partial closure.<sup>208</sup> The Court did not address, however, the more fundamental question of which party should bear the burden of such a mistake. Given the devastating impact on the employees involved, the employer seems a far more appropriate recipient. It is, after all, the employer who controls the issue.

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202. See *infra* notes 204–12 and accompanying text.

203. See *infra* notes 213–18 and accompanying text.

204. *First Nat'l Maintenance*, 452 U.S. at 684.

205. *Id.*

206. Cf. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1936) ("Refusal to confer and negotiate has been one of the most prolific causes of [labor] strife.").

207. See *supra* note 189.

208. *First Nat'l Maintenance*, 452 U.S. at 684.



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If the employer is concerned about the legal consequences of an unlawful refusal to bargain, she can protect herself simply by bargaining. As in other contexts where bargaining is required, the employer is free to implement her decision after the parties reach impasse.<sup>209</sup> At worst, a few employers may bargain to be “safe” when they are not legally required to do so—not a particularly dire consequence given the policies and goals of the NLRA.<sup>210</sup>

The Court’s attitude towards the duty to bargain is revealed by the opinion’s mischaracterization of the bargaining obligation as a union benefit which must be weighed against the consequent interference with the employer. The Court correctly notes that the NLRA was not intended to serve the individual interests of the employer or the union “but to foster in a neutral manner a system in which the conflict between these interests may be resolved.”<sup>211</sup> The “system” to which the Court must be referring is collective bargaining—the mechanism established by the Act to allow the parties to discuss and “resolve” employment-related issues. The Court’s misconception is found in the next sentence of the opinion: “It seems particularly important, therefore, to consider whether requiring bargaining over this sort of decision will advance the neutral purposes of the Act.”<sup>212</sup> If the encouragement of the “system” of collective bargaining is in fact the neutral purpose of the Act, the Court’s statement is nonsensical. The Court’s assertion, in effect, transforms the “purpose” of the Act into maintaining neutrality between the respective interests of the parties. The promotion of the process of collective bargaining becomes, instead of an ultimate goal in interpreting the NLRA, the union’s “benefit” side of the balancing equation in evaluating the duty to bargain.

The result of this transformation is evident in the Court’s application of its balancing test to the partial closure issue. The Court almost summarily dismisses the “benefit” of negotiations by finding it “unlikely” that bargaining would assist the employer in solving its problems.<sup>213</sup> On the “bur-

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209. See *supra* notes 30–31 and accompanying text.

210. Cf. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), where the Supreme Court considered the issue of whether the employer’s statements during an election campaign constituted unlawful threats or permissible “predictions” about the consequences of unionization. In response to the employer’s argument that the line between the two was “too vague,” the Court noted that:

[A]n employer, who has control over that [employee] relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in “brinkmanship” when it becomes all too easy to “overstep and tumble [over] the brink,” [citation omitted]. At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.

*Id.* at 620.

211. *First Nat’l Maintenance*, 452 U.S. at 680–81.

212. *Id.* at 681.

213. *Id.*

den" side of the balance, however, the Court lists a variety of hypothetical problems the business might face when considering the closure of part of its operation. Because the employer "may" require speed, flexibility, and secrecy in its action, the Court concludes that the harm "likely to be done" to the employer outweighs the "incremental benefit" of bargaining to the union.<sup>214</sup> Since the Court at no point in this discussion addresses the *actual* burdens on First National Maintenance or the *actual* benefits of bargaining for the company's employees, the holding apparently creates a per se rule excusing bargaining over any partial closure decision.<sup>215</sup>

The *First National Maintenance* balancing test will become meaningless rhetoric if applied to other management decisions in a similar fashion. One can hypothesize similar potential burdens on an employer considering a plant relocation, the sale of a portion of the business, or subcontracting. The benefit of bargaining will never outweigh the burden on the employer as long as the Court speculates about what burdens *could* exist as opposed to the burdens that *do* exist.

Somewhere in its confusing discussion in *First National Maintenance*, the Court missed the mark. The Court regarded the duty to bargain as a benefit exclusively for the union and *assumed* that the union would use negotiations to hinder the employer's efforts to run a profitable business. Yet the "system" of collective bargaining is not one means to a neutral end; collective bargaining itself is the end the NLRA was intended to promote.<sup>216</sup> If a presumption is to be made, it is that collective bargaining will be a productive endeavor allowing the union and the employer to resolve their respective concerns to the benefit of both parties.<sup>217</sup> While there may indeed be instances in the partial closure situation where the employer's need for flexibility or secrecy should override its bargaining obligation, such circumstances should be the exception and not the rule.<sup>218</sup>

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214. *Id.* at 682-83, 686.

215. Although the Court later returned to the facts of the case "to illustrate the limits of [its] holding," *id.* at 687-88, this was not done until after its conclusion that a partial shutdown decision was not a mandatory subject of bargaining, *id.* at 686.

216. *Id.* at 674.

217. This is not to say that the Court should have made a per se rule requiring bargaining for all partial closure decisions. An employer's decision to close part of a business does not involve so clearly a "term of employment" as the debtor-in-possession's decision to reduce wages. *See id.* at 677; *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

218. The developing trend away from the bargaining requirement is further reflected in recent Board law. As part of a growing list of cases reversing prior decisions, the current Board in *Otis Elevator Co. II* excused an employer from the duty to bargain about a work relocation decision. 269 N.L.R.B. 891 (1984), *rev'g* 255 N.L.R.B. 235 (1981). The employer in that case had failed to discuss with the union its plans to update and consolidate its research and development functions, including the relocation of some employees working in that department. Purporting to apply *First Nat'l Maintenance* to the issue of work relocation, the Board's plurality opinion concluded that such a decision would only require bargaining if it "turn[ed] upon labor costs." 269 N.L.R.B. at 892 n.3. Because the company's decision was based on the problem of outdated technology, Otis Elevator therefore had no obligation to discuss the relocation decision with the union. Unless labor costs are the motivating

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### B. *The Erosion Continues: Bildisco*

By shifting its focus away from the core of the Labor Act—the duty to bargain—the Court in *First National Maintenance* began an erosion of the Act itself. *Bildisco* perpetuates the perception of the bargaining requirement as burdensome to and interfering with the employer's operation. The Court in *Bildisco* describes the requirements of section 8(d) as “cumbersome and rigid,” interfering with the “flexibility” needed by the debtor-in-possession.<sup>219</sup> The Court's refusal or failure to recognize and address *Bildisco*'s unilateral change in employment terms as an unfair labor practice separate from the breach of its collective bargaining agreement again reflects little sensitivity to the nature and purpose of the bargaining requirement.<sup>220</sup>

Similar to its treatment of the issue in *First National Maintenance*, the Court in *Bildisco* viewed bargaining as adversarial in nature, something from which the Chapter 11 employer must be “protected.” With these preconceptions, the Court's conclusion that it must shield the struggling debtor from such destructive interference that blocks reorganization efforts is hardly surprising. The NLRA, under this analysis, becomes a one-dimensional statute focused solely on union and employee rights. When weighed against the survival rights of the debtor-in-possession, the union's rights and interests must inevitably give way to the “greater good” of continuing operations.

The *Bildisco* Court assumed that a union would be willing to allow a debtor to fail rather than concede to wage and benefit reductions, thus necessitating the protection of the employer from the burden of bargaining. The result of destroying the company and permanently eliminating the employees' jobs seems so contrary to the union's interests that assuming it as a behavioral norm is misguided. Such a result would rarely occur *unless* the relationship is so distrustful that the union refuses to believe that the wage reductions demanded are essential to the company's survival.<sup>221</sup> The mere possibility that a union might act against the interests of its members certainly should not govern the Court's determination of labor law principles of general applicability.<sup>222</sup>

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factor behind a relocation decision, the duty to bargain is excused under current Board law, reversing several decades of precedent on the issue. *Id.*; see George, *supra* note 189, at 681–90.

219. *Bildisco*, 104 S. Ct. at 1199, 1200.

220. See *supra* notes 22–26 and accompanying text.

221. Eastern Airlines, for example, agreed, among other things, to provide its unions access to company financial information in exchange for an 18 to 22% wage reduction. *Eastern Airlines Wage Concessions*, 118 LAB. REL. REP. (BNA) 21–22 (Jan. 14, 1985).

222. Perhaps a large union representing a very small bargaining unit in the debtor's company would be willing to sacrifice the unit rather than accept wage concessions which might in turn be demanded by competing businesses in the same industry. In the unusual instance where this occurs, the Court has already provided the employees with a remedy under the NLRA for the union's failure

The Court's view of the Labor Act ignores both the Act's purpose and its complexity. The NLRA quite obviously provides a number of benefits to the employees—the right to demand bargaining on a collective basis,<sup>223</sup> the consequent increase in bargaining power that generally occurs with collective action,<sup>224</sup> and the right to be consulted on any changes in employment terms.<sup>225</sup> The benefits for the employer are equally significant, however, even if less apparent. A variety of the Act's provisions protect the employer, just as the Bankruptcy Code contains protections for the creditors<sup>226</sup> and employees,<sup>227</sup> in addition to the more obvious benefits for the debtor.<sup>228</sup> The protection of a collective bargaining agreement permits the employer to determine and project labor costs with certainty.<sup>229</sup> Labor contracts commonly contain a no-strike clause prohibiting work interruptions during the term of the agreement.<sup>230</sup> Blackmail tactics used by unions in organizational picketing are illegal, protecting the employer from being forced to recognize a union that does not represent her employees.<sup>231</sup> The Act prohibits secondary boycotts as well, allowing a company to avoid involvement in another employer's dispute.<sup>232</sup>

The adversarial concept of employer-union relations suggested by the Court in *First National Maintenance* and implicitly adopted by the *Bildisco* majority conflicts with stated congressional policy. It was the judgment of the legislature that actions by both employers and labor organizations obstructed the free flow of commerce and prevented the "stabilization of competitive wage rates and working conditions."<sup>233</sup> Congress chose to eliminate these obstructions "by encouraging the practice and procedure of collective bargaining" and other practices "fundamental to

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to represent its constituency fairly. See *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Hoffman*, 345 U.S. 330 (1953). The union's self-interest, as opposed to the interests of the employees, is not considered an appropriate basis for a union's representational decisions. See *Strick Corp.*, 241 N.L.R.B. 210, 217-18 (1979). This discussion assumes, of course, that the employees would consider it in their self-interest to continue in employment at reduced wages rather than be without jobs.

223. NLRA § 7, 29 U.S.C. § 157 (1982).

224. See NLRA § 1, 29 U.S.C.A. § 151 (West 1973 & Supp. 1985).

225. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5). See *supra* notes 28-29 and accompanying text.

226. See *supra* note 44.

227. See *supra* note 47.

228. See *supra* notes 38-39 and accompanying text.

229. Since the union, as well as the employer, is bound by the collective bargaining agreement, the union may not lawfully demand any changes in contractual wages and benefits during its term. NLRA §§ 8(b)(3), 8(d), 29 U.S.C.A. §§ 158(b)(3), 158(d). See *supra* notes 33-35 and accompanying text.

230. In one survey of collective bargaining agreements, 94% of all contracts studied contained a no-strike provision. 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) 77:1 (1983). Even if the contract does not contain a no-strike clause, the Supreme Court has held that such a provision may be implied from the existence of a binding grievance-arbitration procedure in the agreement. See *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974).

231. NLRA § 8(b)(7), 29 U.S.C. § 158(b)(7).

232. NLRA § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B).

233. NLRA § 1, 29 U.S.C. § 151.

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the *friendly* adjustment of industrial disputes.”<sup>234</sup> Congress was undoubtedly concerned with the “right” of labor to organize but also considered labor peace necessary to a healthy and efficient economy. Congress viewed the ideal relationship between employers and labor organizations as a symbiotic one—a relationship of mutual benefit—not the adversarial model endorsed by the current Supreme Court. The Court has failed to acknowledge the significance of its own statement in *First National Maintenance*: “[A] fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce . . . . Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management.”<sup>235</sup>

Even if congressional intent could be disregarded, a high price must be paid by both parties for shifting the emphasis away from collective bargaining to an increasing deference to the business concerns of the employer. For the employer, *Bildisco*’s subtle characterization of the collective bargaining process as obstructive may be viewed with enthusiastic approval. The stereotypical employer, eager to avoid unions and their corresponding obligations, presumably is anxious for the Court to excuse the duty to bargain at every available opportunity. Suspending the bargaining obligation, however, may require the Court to scrutinize management decisions more closely.

The Court has traditionally refused to second-guess the reasonableness of an employer’s bargaining demands.<sup>236</sup> While the employer must negotiate in good faith, neither the Board nor the courts can dictate the terms of agreement or require concession to any proposal.<sup>237</sup> Yet if the Court is willing to excuse the duty to bargain when that obligation becomes too

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234. *Id.* (emphasis added).

235. 452 U.S. at 674 (citation omitted). *See also* H.K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970) (“The object of this Act was . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.”); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42, 45 (1937) (“Refusal to confer and negotiate has been one of the most prolific causes of strife . . . .” “The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace . . . .”).

236. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99, 107–08 (1970) (“It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties . . . . [A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.”); NLRB v. American Nat’l Ins. Co., 343 U.S. 395, 404 (1952) (“[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.”); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) (“The Act does not compel agreements between employers and employees. It does not compel any agreement whatever.”).

237. NLRA § 8(d), 29 U.S.C.A. § 158(d) (West 1973 & Supp. 1985).

much of a burden or interference for the business, it must necessarily evaluate the justifications for the employer's actions.<sup>238</sup> The reasons behind Bildisco's failure to pay pension contributions and a contractual wage increase were evident from the filing of a Chapter 11 petition. In other contexts, however, the employer may subject its motives to a closer examination if the duty to bargain is to be removed. The careful scrutiny required to excuse the bargaining obligation could be significantly more intrusive than the more typical determination of good faith.<sup>239</sup> Even the employer adamantly opposed to unions may not be receptive to the additional governmental interference in management-labor relations that could result from the Court's attitude.

On a more fundamental level, undermining the system of collective bargaining will inevitably undermine management-labor relations and the advantages that can be realized from that partnership. The employer-union relationship offers the employer a variety of benefits. The union provides management with an orderly, structured method for dealing with employee problems and demands. Employers depend on unions to communicate to the employees. Manufacturing problems are employees' problems as well, and unions are often helpful in identifying mutual concerns and suggesting solutions.<sup>240</sup> Disagreements may arise frequently in the process, but few management or union representatives are likely to forget that the relationship is ongoing and ultimately depends on mutual cooperation.<sup>241</sup> The industrial strife that would result from upsetting that

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238. Cf. *First Nat'l Maintenance v. NLRB*, 452 U.S. 666 (1981) (excusing employer's duty to bargain about partial closure decisions).

239. NLRB § 8(d), 29 U.S.C.A. § 158(d). See generally R. GORMAN, *supra* note 100 (discussing requirements of duty to bargain in good faith); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958) (examining good faith obligation).

240. See *supra* note 3.

241. See Cox, *supra* note 239, at 1409:

Collective bargaining is curiously ambivalent even today. In one aspect collective bargaining is a brute contest of economic power somewhat masked by polite manners and voluminous statistics. As the relation matures, Lilliputian bonds control the opposing concentrations of economic power; they lack legal sanctions but are nonetheless effective to contain the use of power. Initially it may be only fear of the economic consequences of disagreement that turns the parties to facts, reason, a sense of responsibility, a responsiveness to government and public opinion, and moral principle; but in time these forces generate their own compulsions, and negotiating a contract approaches the ideal of informed persuasion.

See also R. SMITH, L. MERRIFIELD, T. ST. ANTOINE, & C. CRAVER, *LABOR RELATIONS LAW* 71 (7th ed. 1984) ("The keynote of a desirable relationship between [the union and the employer] will be their mutual acceptance of the fact that each has a status in the enterprise. When they have accepted this elemental fact, the rudimentary legal obligations which the law may impose upon them will be of minor significance. . . . [T]he necessity of continuing relations calls for a code of conduct much above and beyond the call of legal duty."); *The Role of and Challenges Facing Unions in the 1940's and the 1980's—A Comparison*, 52 FORDHAM L. REV. 1062, 1077 (1984) (remarks of A. Raskin, former Chief Labor Correspondent of the New York Times) ("The shift has to be away from the adversarial stance of yore toward a cooperative industrial society based on democratic values and on equitable sharing of gains and sacrifices."); *id.* at 1062-70 (remarks by T. Donahue, Secretary-Treasurer of the AFL-CIO, discussing need for union-management cooperation).

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balance would be of little benefit to either party and is contrary to the union-management relationship envisioned by Congress.<sup>242</sup>

The view of labor-management relations and the collective bargaining process as symbiotic is unquestionably more of a goal than a reality; several prominent union leaders have become so disillusioned by the current state of labor relations in this country that they believe the NLRA has "failed" and must be repealed or substantially overhauled.<sup>243</sup> Nonetheless, it is a goal set by Congress in the Labor Act. Against this goal we must measure the effect of *Bildisco* and future Supreme Court decisions. Had the Court considered the relationship between the debtor-in-possession and the union an opportunity for mutual assistance and gain, perhaps it would have examined more carefully *Bildisco's* duty to bargain.<sup>244</sup>

### CONCLUSION

Prior to *Bildisco*, there seemed little doubt that an employer's duty to bargain under section 8(a)(5) of the NLRA continued during a Chapter 11 reorganization where no contract was in effect at the time of filing or after the rejection of an existing agreement was approved by the bankruptcy court. These issues have been substantially confused by the *Bildisco* Court and were left unresolved by the legislation passed in the wake of the case. By failing to distinguish between the enforceability of a labor contract and unilateral changes in the employment terms, the Court appeared to allow the debtor-in-possession bound by a labor agreement greater flexibility under the NLRA than the debtor-in-possession without a contract. Such a result is illogical and unacceptable. Until the Supreme Court has an opportunity to reconsider the matter, *Bildisco* should be limited to its specific facts—unilateral changes in a collective bargaining agreement pending rejection—now mooted by statute.

*Bildisco* is a disappointment on one level because of the potential confu-

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An attitude of compromise may be reflected in the Board's current statistics on settlements of unfair labor practice charges. During the NLRB's 1984 fiscal year, 95.8% of all unfair labor practice charges were resolved before adjudication. *NLRB General Counsel's Summary of Operations for FY 1984*, 118 LAB. REL. REP. (BNA) 121, 122 (Feb. 18, 1985).

242. See *supra* notes 230-35 and accompanying text.

243. See Report by House Labor-Management Relations Subcommittee on 'Failure of Labor Law—A Betrayal of American Workers,' DAILY LABOR REPORT (BNA) No. 193, at D-1 (Oct. 4, 1984); *Jt. Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. and Labor and the Manpower and Housing Subcomm. of the House Comm. on Gov't Operations*, 98th Cong., 2d Sess. 3-16 (1984) (statement of Richard Trumka, President of the United Mine Workers of America); *id.* at 57-60 (statement of William Wynn, President of the United Food & Commercial Workers of America, AFL-CIO); *id.* at 71-73 (statement of William H. Bywater, President of the Int'l Union of Electronic, Electrical, Technical, Salaried & Machine Workers, AFL-CIO).

244. See generally Getman, *The Courts and Collective Bargaining*, 59 CHI.-KENT L. REV. 969, 970 (1983) (discussing the judicial attitude towards collective bargaining as "one of suspicion and hostility").

sion it may create concerning the extent of the bargaining obligation of the Chapter 11 employer. The decision is a disappointment of far greater magnitude, however, when viewed as a statement of policy by the Supreme Court. No employer-union relationship will become a cooperative venture simply by stating it should be so, but it is the Supreme Court's obligation to promote that result. By allowing the debtor-in-possession to alter employment terms without bargaining to impasse, the *Bildisco* Court only pushed the parties further apart.





# The Yale Law Journal

Volume 95, Number 2, December 1985

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