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S. Strother Smith III

Allan Zaleski

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THE TRUSTEE AND THE N.L.R.B.— THE ADMINISTRATION OF LABOR CONTRACTS IN STRAIGHT BANKRUPTCY AND CORPORATE REORGANIZATION

INTRODUCTION

Two of the most important pieces of Federal legislation facing the general business lawyer are Titles 11 and 29 of the United States Code which are involved with the administration of debtors in bankruptcy and/or financial reorganization, and the administration of employer-employee relations. Standing alone, either of these two pieces of legislation, while they are not problem-free, are either clear on their face, or are clearly interpreted by a preponderance of case law. However, such is not the case in those instances where the two, because of the surrounding circumstances, must operate together.

While there is some slight discussion in each Act concerning its effect when the other is also in operation,¹ and while there are a few cases dealing with the subject, there appears to be no detailed discussion of the various problems which arise both from the point of view of the trustee in bankruptcy (or the receiver as the case may be) on the one hand and that of the labor unions and the National Labor Relations Board on the other. It is the purpose, therefore, of this paper to discuss in as much detail as possible these problems from both the practical and, where appropriate, the academic view points.

The first section of this paper concerns the powers of the Bankruptcy court over the debtor's business and property, as limited by the Norris LaGuardia Act. The second section will deal with the trustee's position as an employer during the time he administers a business enterprise under the supervision of the court. Next we will discuss the problems arising under the administration of the collective bargaining contract itself, and finally we will discuss the power of the N.L.R.B. over the trustee vis-a-vis the unfair labor practices provisions of the N.L.R.A. and the effect of any such proceedings on an adjudication of bankruptcy, or on a reorganization under chapter 10 of the Bankruptcy Act.

1. 1 CCH LABOR LAW REP. ¶ 1.7.00.

THE POWER OF THE BANKRUPTCY COURT TO DEAL WITH LABOR
DIFFICULTIES OF PARTIES UNDER ITS JURISDICTION

One of the first problems which will strike the experienced eye when dealing with a situation involving both bankruptcy proceedings (or reorganization proceedings under the Bankruptcy Act) and a labor dispute is the fact that both are rather closely governed by Federal statute. Furthermore, since one is aimed at preserving as much as possible of the employer's interests for his creditors, while the other is aimed at preserving the rights of employees even if, in so doing, the employer's interests may suffer,² it is highly likely where a situation involves both circumstances, that the two Federal statutes will conflict. The question then becomes, which shall control.

Generally speaking the Federal District Court sitting in Bankruptcy is invested with all the jurisdiction at law or in equity as will allow it to

(15) Make such orders, issue such processes, and enter such judgments, in addition to those specifically provided for as may be necessary for the enforcement of the provisions of the Act.³

In addition it is generally recognized that

The Court has the power to effectuate the jurisdiction granted to it and to prohibit acts tending to prevent the exercise of that jurisdiction and the achievement of the purposes for which the jurisdiction was conferred.⁴

On the other hand, the Norris LaGuardia Act states that, with certain exceptions not here relevant, no court of the United States may issue an injunction in any case involving or growing out of any labor dispute to prohibit any person participating in or interested in such a dispute from doing specific enumerated acts.⁵

It is the generally accepted rule that where the provisions of the

2. In *Local 205, United Electrical Radio & Machine Workers of America v. General Electric*, 233 F. 2d 85 (2nd Cir. 1956), *aff'd*, 353 U. S. 547, it was held that the Norris LaGuardia Act was intended for and has application mainly as a protection for union & employee activities. *See also* *Brotherhood of R.R. Trainmen v. Central of Georgia*, 229 F. 2d 901 (5th Cir. 1956).

3. 11 U.S.C.A. § 11(15)

4. 11 REMINGTON OF BANKRUPTCY § 4379 (1961 ed.); cf, *Dealtry v. Posse School*, 100 F. 2d 470, 38 Am.B.R. (N.S.) 674 (1938).

5. 29 U.S.C.A. § 104.

Bankruptcy Act come into conflict with those of the Norris LaGuardia Act, the powers of the Bankruptcy court must give way to the imposition of the Norris LaGuardia Act.⁶

The language of the court in the case of *Teamsters v. Quick Charge, Inc.*⁷ was most explicit in this regard, even if it were only dicta. In that case, while the court based its decision on the apparent fact that Quick Charge had filed the reorganization petition solely to rid itself of its labor dispute with the Union and stated that it would not allow such procedures to be "used as an avenue of escape by a company in a labor . . . dispute,"⁸ it went on to hold:

But even if the proceeding in the case be construed as a genuine proceeding for financial reorganization under the Chandler Act the injunction must still fail. There is nothing in the Norris LaGuardia Act which exempts equity receiverships of any kind from its provisions. It prohibits injunctions in any case involving or growing out of any labor dispute.

We accordingly hold that a Federal Court lacks jurisdiction to issue any injunction either in ordinary equity receiverships or receiverships arising under the Chandler Act in cases involving labor disputes.⁹

With this language in mind, the question arises: is the bankruptcy court then shorn of all its powers to preserve the property of the debtor from labor trouble? Here, as in most situations there are exceptions

6. Thus in *Anderson v. Bigelow*, 130 F. 2d 460 (9th Cir. 1942) where the question was whether or not a district court could issue an injunction restraining workers from picketing an employer who was in receivership, it was held:

. . . the history of federal injunctions does not warrant the inference that Congress regarded federal receivers to be above the prohibitions of the Norris LaGuardia Act. . . . A receiver's employee may ask for higher wages or shorter hours and resign if he does not obtain them. . . There seems no reason why several of them may not agree to do so, that is to strike. Having struck, it is proper to appeal for public support against claimed unfairness of the receiver, just as against unfair treatment of any employer.

7. 14 L.C. par. 64,496 (10th Cir. 1948).

8. The actual holding of the court in the Quick Charge case (see note 7, *supra*) was that:

It is difficult to escape the conclusion that the sole purpose on the part of Quick Charge in filing reorganization proceedings under § 77-B was to rid itself of the labor dispute with the union. . . . The purpose of the Chandler Act was to afford companies in financial distress an opportunity to reorganize on a sound basis and thereby to escape liquidation . . . through bankruptcy or receivership proceedings. It was not intended, & may not be used as an avenue of escape by a company from the provisions of the Norris LaGuardia Act in a labor dispute with its employees.

9. See note 8, *supra*.

to the general rule which prevents its working severe hardship on any party. The first of these exceptions manifests itself where the dispute directly threatens damage or destruction to the property of the bankrupt. The second comes into play where the dispute is not a labor dispute covered by §104 and §113 (c) of the Norris LaGuardia Act.

The rule of the first exception, which may be termed the "Preservation of Property" doctrine, states, in brief, that the court may issue an injunction against any labor activity which threatens to directly damage or destroy the property of the debtor.¹⁰ Under this doctrine it is generally recognized that the court has three criteria to follow in deciding whether it has jurisdiction to issue any order aimed at protecting the property from potential damage in a labor dispute, *i.e.* the property must:

- 1) be materially threatened by the violence of a dispute; or it must
- 2) be perishable in nature and will thereby be lost unless allowed to be removed and sold by the debtor and/or trustee; or
- 3) is in some other way materially threatened by damage or destruction by reason of labor activities sought to be enjoined.¹¹

It should be emphasized however, that in such a case the order of the bankruptcy court goes no further than is necessary to preserve the property of the debtor for the benefit of the creditors.¹²

The second exception to the normal limitations placed on the power of a bankruptcy court where a labor dispute is involved occurs when the "labor dispute" is not one which is specifically covered by §104 or conceded to be within the context of § 113 (c) of the Norris LaGuardia Act.¹³ Under this exception it would appear that the bankruptcy court

10. See *In Re Cleveland and Sandusky Brewing Co.*, 11 F. Supp. 198, 29 Am.B.R. (N.S.) 393 (1936) in which the workers in the debtor's Sandusky, Ohio plant went on strike and refused to allow 12,000 barrels of beer produced in that plant to be removed to Cleveland pursuant to reorganization proceedings in bankruptcy. The debtor trustee sought to enjoin the union activities on the grounds that they were causing significant harm to the reorganization process. The union answered that it was protected in its activities under the Norris LaGuardia Act. The Court held that where the debtor's property is subject to immediate loss or destruction from the union activities, the Bankruptcy Court has the power summarily to order the removal of the property and to enjoin the union and all others from interference by treating the proceedings as one for the preservation of the debtor's property.

11. While these three criteria are not specifically stated in these terms they are in essence the criteria laid down by the court in the *Cleveland & S. Brewing Co.* case (see note 10, *supra*).

12. Note 10, *supra*.

13. These two sections of the Act define in specific and general terms, respectively, just what a "labor dispute" is under the Act.

has the power to issue an injunction prohibiting any activity, which the trustee can show to be a result of some controversy beyond the usual scope of a "labor dispute" as defined by the Norris LaGuardia Act.¹⁴

The importance of this last exception should not be underestimated by a trustee in any case in which the success of reorganization may be threatened by labor activity since under such circumstances its scope can be quite large, overlapping and even encompassing the protection of the property limitation discussed above.¹⁵ While the cases are not numerous enough to be able to draw any definite conclusion it would appear with the operation of this exception that where the trustee or debtor keeps good faith with the union the court will have the jurisdiction to stop any union activity which seriously hampers the bankruptcy or re-organization proceedings but in any case where the trustee or debtor appears to be trying to use the bankruptcy proceeding as a shield for his labor troubles, or otherwise refuses to keep good faith with the union the court will find that it is barred by the Norris La Guardia Act from assuming such jurisdiction.¹⁶

14. The key case, establishing this exception is that of *Converse v. Highway Construction Co.*, 1 L.C. par. 18,463 (6th Cir. 1939). There the debtor acting as trustee under a Chapter X reorganization proceeding obtained an ex parte order from the court enjoining all persons from interfering with the property, assets, etc., of the debtor-in-reorganization. Converse the business agent of the international union of operating engineers insisted that the debtor must become a member of a professional association which had certain agreements with the union. The debtor refused to require supervisory personnel to join the union. As a result, the union picketed the debtor's equipment to such an extent as to prevent its use, thus forcing the debtor to discontinue its operations. On a motion to the debtor by the bankruptcy court to cite the union leaders for contempt in refusing to recognize its restraining order it was held that the bankruptcy court had the power under these circumstances to issue the injunction for contempt.

The reasoning behind this decision was based on the theory that the facts in this particular case did not present a labor dispute such as would bring it within the prohibitions of the Norris-LaGuardia Act.

15. Thus in *Third Ave. Transit Corp. v. Quill*, 192 F. 2d 971 (2nd Cir. 1951) we find the statement:

The case of *In Re Cleveland & S. Brewing Co.*; relied upon by the appellees [is] clearly distinguishable . . . [T]he injunction [there] did not cover any of the Acts enumerated . . . but instead merely restrained interference with the removal of property which would have spoiled if it was not removed.

16. Compare *Teamsters v. Quick Charge* (note 7, *supra*) where the debtor was using reorganization as a weapon in its anti-union war with the *Converse* case (note 14, *supra*) where the trustee at all times tried to keep good faith with the union, but the union seemed to insist on making things as difficult as possible for the trustee.

Compare also, *Third Ave. Transit Corp. v. Quill* (note 15, *supra*) where the plaintiffs, trustees of a New York company absolutely refused to discuss the reduction of the

THE TRUSTEE AS AN EMPLOYER

In a Chapter X reorganization the trustee is authorized to "operate the business and manage the property of the debtor."¹⁷ Once under the control of the Bankruptcy Court, the "executory" contracts of the debtor are subject to the possibility that the trustee will reject the contracts of the debtor rather than carry them out to the possible detriment of the bankrupt estate.¹⁸ The principles involved in the rejection of a labor contract, as an "executory" contract, seem to be the same as those involved in the rejection of any contract, under the terms of the Bankruptcy Act.¹⁹

Any contract which is executory, that is, which is to be performed in the future, must either be affirmed or disaffirmed by the trustee within 60 days of the trustee's appointment, or the contract will be assumed to be rejected.²⁰ If a claimant under such a contract wishes to recover under its terms, the claimant must show a clear and knowing assumption by the trustee, mere conformance of the trustee to the contract terms is not enough.²¹ But it will be shown here that case law regarding the burden of proof of assumption by the trustee is not the same as applied to a labor contract. The trustee may reject the collective bargaining agreement of the debtor and prefer to run the enterprise under other employment conditions during the reorganization period.²² The Bank-

work week from 48 hours to 40 hours and the possibility of a written contract with a union which had been highly cooperative even to the extent of operating without a contract for some time. There, even though the strike would cost the trustee over \$90,000 a day in lost revenues, the court held it had no jurisdiction to enjoin a strike. While on the other hand in *In Re Cleveland & S Brewing Co.* (note 10, *supra*) where the trustees were entirely innocent, the court held that in a case which usually would be considered a labor dispute under the Norris LaGuardia Act, there was no labor dispute such as would bar it from issuing an order enjoining the union's activity.

17. Chapter X, sec. 189 Bankruptcy Act.

18. Chapter X, sec. 202, sec. 216(4) Bankruptcy Act, the latter section provides for rejection in the plan itself.

19. *Supra* note 18, See the text of the sections, there is no distinction in these sections as to classes of executory contracts.

20. Chapter X, sec. 206 Bankruptcy Act; *In Re Petrol Terminal Corp.*, 120 F. Supp. 867 (D. C. Md. 1954); But as to the effect on this provision on the provision for rejection in the plan itself, See Silverstein, *Rejection of Executory Contracts in Bankruptcy and Reorganization*, 31 U. OF CHI. L.R. 467 (1964).

21. *Bank of America National Trust Co. v. Smith*, 336 F. 2d 528 (9th Cir. 1964), citing *In Re Luscombe Engineering Co.*, 268 F. 2d 683 (3rd Cir. 1959).

22. *Supra* note 18, this provision will be discussed with the Conflict of Laws provision of the NLRA, 29 U.S.C. sec. 165, further below.

ruptcy Act provides that if the trustee wishes to adopt any contract, he may only do so under the "supervision" of the Bankruptcy Court.²³ But, in practice, the "supervision" and approval of the Court may be implied, to bind the debtor's estate to obligations under the old labor contract, where the trustee has conformed to the terms of a labor contract by not changing working conditions.²⁴

In the administration involved in *In Re Public Ledger*²⁵ such an implication was made. There, the district court denied the claims of the members of two unions claiming amounts under the fringe benefits clause of their contracts, which had accrued while the enterprise was under the jurisdiction of the Bankruptcy Court. The district court found that in order for the trustee to be bound to pay such amounts as this, as an administration expense, the trustee "must positively indicate" an intention to accept the old contract.²⁶ But the Court of Appeals reversed, stating,

The Court knew, too, that good labor conditions under the contract constituted a valuable asset, and a necessary one. . . . It is unreasonable to assume that the Court contemplated anything but continuance of the labor contract as the basis for the continued services of the employees.²⁷

The Court found the contract to be a necessary part of the proper administration of the debtor's estate. Specifically the unions made the claim for severance pay under the old labor contract, when the enterprise was finally closed by the trustee. The Court, finding that the old contract applied, held that since the purpose of the severance pay clause was to protect the employees from a sudden loss of income, the granting of a claim on this clause as an administration expense would not be inconsistent with the general aim of properly administering the debtor's estate. Thus, the case may stand for the proposition that the principles expressed in the case regarding claims under the labor contract will not be blanketly allowed, but only where they are in harmony with the purpose of the reorganization.

A claim for wages as an administration expense is given full priority

23. Chapter X, sec. 189 Bankruptcy Act.

24. *In Re Public Ledger*, 161 F.2d 762 (3rd Cir. 1947) reversing 63 F. Supp. 1008 (E.D. Pa. 1945).

25. *Ibid.*

26. *Supra* note 24, 63 F. Supp. at 1014; *See Also In Re Capital Service*, 136 F. Supp. 430 (S.D. Calif. 1955).

27. *Supra* note 24, 161 F.2d at 676.

for amounts earned or accrued during the period of the administration of the debtor's estate.²⁸ If the benefits or terms of employment conditions are not viewed as a proper administration expense, then, other than an ordinary claim, their claim can only be a wage priority, which although given priority, is restricted in its terms and amount.²⁹ The rule as found in *Public Ledger*, has also been extended to clauses in the labor contract covering vacation pay³⁰ and employer contributions to an employee pension fund,³¹ where these clauses are viewed as a part of the consideration given for the efforts of the employees.

Where the trustee does act on the labor contract by rejection, the trustee may modify wages,³² or discharge employees when found necessary to the proper administration of the bankrupt's estate.³³ The N.L.R.B. may not interfere with the right of the trustee to exercise these rights.³⁴ While the N.L.R.A. provides for its precedence when in conflict with the Bankruptcy Act,³⁵ it has been found that rejection of the labor contract by a trustee in bankruptcy involves no conflict between the two laws and so the rejection is not brought within the purview of the N.L.R.A.³⁶ But these rules do not apply when the enterprise is one covered by the Railway Labor Act.³⁷ If the trustee wishes to reject or modify the labor contract, the procedure involved must conform to the exclusive means provided for in the scheme set up by Congress governing labor relations under that Act.³⁸

28. Chapter X, Article XIII Bankruptcy Act; *Also* sec. 64(1) Bankruptcy Act, allowing for "actual and necessary" administration expenses.

29. Sec. 64a(2) Bankruptcy Act, allows for "wages and commissions not to exceed \$600 to each claimant, which have been earned within 3 months before the date of commencement of the proceeding." Thus in some situations a claim as an administration expense would net the claimant more than under the wage priority.

30. *In Re Capital Service*, 136 F. Supp. 430 (S.D. Calif. 1955); *In Re Wil-low Cafeterias Inc.*, 111 F.2d 429 (2nd Cir. 1940), here the debtor remained in possession and agreed to continue the work with the workers under the same conditions, as the old contract.

31. *In Re Schenectady Railway Co.*, 93 F. Supp. 67 (D.C. N.Y. 1950).

32. *In Re New York, Ontario & Western Railway Co.*, 16 L. C. par. 65,009 (S.D. N.Y. 1949).

33. *Stevenot v. Narberg*, 210 F.2d 615 (9th Cir. 1954).

34. *Matter of American Buslines, Inc.*, 151 F. Supp. 877 (D.C. Nebk. 1957).

35. 29 U.S.C. sec. 165.

36. *In Re Klaber Brothers, Inc.*, 173 F. Supp. 83 (S.D. N.Y. 1959).

37. *In Re Overseas National Airways, Inc.*, 238 F. Supp. 359 (E.D. N.Y. 1965); *Railway Labor Act*, 45 U.S.C. chapter 8.

38. *In Re Overseas National Airways, Inc.*, *supra* note 37; Sec. 77n Bankruptcy Act, states that, "no judge or trustee acting under this Act shall change wages or working conditions of railroad employees except as provided in the Railway Labor Act."; In the *Railway Labor Act*, 45 U.S.C. sec. 151-163, and sec. 181-185, provide for the methods

Rejection by the trustee, of any contract, operates as a breach of contract by the debtor as of the date of the petition in bankruptcy and creates a claim in favor of the contract holder.³⁹ Such a claim is provable in and dischargeable in bankruptcy if the damages due to rejection are reasonably calculable at the time.⁴⁰ Adjudication of bankruptcy, itself, may be treated by the holder of an "executory" contract as an anticipatory breach of contract, which may give rise to a claim.⁴¹ However, for employees or their union, adjudication ends their formal rights under the collective bargaining agreement.⁴² In reorganization proceedings the union may only participate in the hearing on the Plan at the discretion of the presiding judge,⁴³ with no right of appeal as the union can not be considered an "affected" party.⁴⁴ In *In Re Overseas National Airways, Inc.*,⁴⁵ the Court pointed out some of the equitable considerations involved in any rejection of a labor contract by a trustee,

It seems to me, however, that the Bankruptcy Court, when it has the power to reject a collective bargaining agreement, should do so, only after a thorough scrutiny and a careful balancing of the equities on both sides, for in relieving the debtor from its obligations under the collective bargaining agreement, it may be depriving the employees affected of their seniority and pension rights, as well as other valuable rights which are incapable of forming the basis of a provable claim for money damages.

UNIONS AND EMPLOYEES IN "STRAIGHT" BANKRUPTCY AND REORGANIZATIONS

In Chapter X reorganizations the Bankruptcy Court should approve a plan, "if fair and equitable and feasible", and fix a time within which the creditors and stockholders "affected by the plan" may accept it.⁴⁶

of altering these things. Sec. 156 provides that the union must be given 30 days written notice of any change affecting working conditions and a conference shall be held between the parties with the Mediation Board to be called in in case of any disagreement.

39. Chapter X, sec. 202 Bankruptcy Act.

40. *Beggs v. Simon*, 163 S.W.2d 261 (Tex. 1942).

41. *Manufacturers Trading Corp. v. Roberts*, 138 F.2d 806 (5th Cir. 1943).

42. See sec. 70a, Chapter X, sec. 187 Bankruptcy Act.

43. Chapter X, sec. 206 Bankruptcy Act; Report of the Senate Committee on the Judiciary, May 27, 1938 p.6.

44. *Peckham v. Casaldue*, 261 F.2d 121 (1st Cir. 1958).

45. *Supra* note 37, at 361.

46. Chapter X, sec. 174 Bankruptcy Act.

The plan must be accepted by two-thirds of the creditors in amount and one-half of the creditors in number.⁴⁷ Even if accepted, creditors or stockholders who are adversely affected by the provisions of the plan may have a hearing before the Bankruptcy Court on their objections to the plan.⁴⁸ Such persons, adversely affected, have a right of appeal from the Court's order of approval of the plan.⁴⁹ In all these proceedings the union has no right to intervene, but may only be a participant, at the discretion of the Bankruptcy Court.⁵⁰ The mere fact that the union may have participated in the proceeding in this manner, gives it no right of appeal on any ruling made by the Court at the hearing.⁵¹ Only an adversely affected party has the right to intervene in the approval of the plan and carry its objection to appeal.⁵²

"Creditor", under the Act is defined as "the holder of any claim."⁵³ Further, the Act states,

[C]reditors or stockholders or any class thereof shall be deemed 'affected' by the plan only if their or its interest shall be materially and adversely affected thereby. In the event of controversy the Court shall, after hearing, upon notice, summarily determine whether any creditor or stockholder or class is so affected.⁵⁴

Thus, where the claim is without value in any case, the claimant is not considered as being adversely affected.⁵⁵ If the claimant's interest is adequately protected in the plan, in any case, the claimant is not viewed as being adversely affected.⁵⁶ A claim of a union founded on a breach of contract, due to the rejection of the trustee, can not be adversely affected by the plan, for adjudication ends the potential value of the labor contracts.⁵⁷ But the plan is binding on all parties regardless of

47. Chapter X, sec. 179 Bankruptcy Act.

48. Chapter X, sec. 206 Bankruptcy Act.

49. *In Re Keystone Realty Holding Co.*, 117 F.2d 1003 (3rd Cir. 1941), 45 Am.B.R. (N.S.) 536.

50. Chapter X, sec. 206 Bankruptcy Act.

51. *In Re South Streer Building Corp.*, 140 F.2d 363 (7th Cir. 1943).

52. *In Re Flour Mills of America, Inc.*, 27 F. Supp. 559 (D.C. Mo. 1939).

53. Chapter X, sec. 170a Bankruptcy Act.

54. Chapter X, sec. 106(4) Bankruptcy Act.

55. *In Re V-I-D, Inc.*, 226 F.2d 113 (7th Cir. 1955), the claimant must affirmatively show his claim would have been worth something, but for the reorganization plan; *Heard v. Peerless Cement Corp.*, 46 N.W.2d 411 (Mich. 1951); *See Also In Re Ebaloy, CCH BANKR. L. REP.* par. 57,022 (D.C. Ill. 1951).

56. *Country Life Apartments, Inc., v. Buckley*, 145 F.2d 935 (2nd Cir. 1944).

57. *Supra* note 42, This would only apply to future benefits of the labor contract to the union or its members. Past due debts to the union or its members are claims as any other debt and are dealt with below.

whether they are "affected" by it or not,⁵⁸ and the only liabilities of the debtor are those found in the plan.⁵⁹

In straight bankruptcy the problem of the labor contract is simpler, for a further continuation of the debtor's business is not contemplated. Therefore only the amount of the union claim and its priority are in question. The greatest protection afforded the employees is the wage priority in bankruptcy.⁶⁰ Whether the fringe benefit provisions of the labor contract come within the priority is the greatest area of controversy.⁶¹

Vacation pay is viewed as part of the consideration paid to the employees for their work and as accruing daily. Where under the labor contract, employees were entitled to vacation pay after one year's employment, and it was not due at all until the completion of that year, the wage priority for this item, would only go back to amounts earned within three months of bankruptcy.⁶² Even if the one year period is completed within three months of bankruptcy, only the amounts accrued within that time are entitled to the wage priority.⁶³ However, if the employer is to contribute amounts into a "vacation and holiday benefit fund" on a fixed percentage of the monthly payroll, the contract must give each employee a direct vested interest in the fund or unpaid employer contributions will not be entitled to the wage priority.⁶⁴

In general, the claim for unforwarded union dues from a bankrupt employer under a dues check-off clause of the labor contract, have been held to be entitled to a preference as a wage claim.⁶⁵ The right of the union as a claimant is founded upon the logic that the check-off clause gives the union the same right to the wage priority as an assignee of a wage earner would have.⁶⁶

58. Chapter X, sec. 224 Bankruptcy Act.

59. Chapter X, sec. 288(1), sec. 226 Bankruptcy Act.

60. Sec. 62a(2) Bankruptcy Act; *supra* note 29.

61. See *Generally, Fringe Benefits of the Labor Contract in Bankruptcy Court*, Daniel L. Schneidman, 15 L.L.J. 73 (1964).

62. *California Labor Law Enforcement Division v. Sampsell*, 172 F.2d 400 (9th Cir. 1949); *Matter of Ranalax Corp.*, 104 F. Supp. 25 (E.D. N.Y. 1958); *Arabian v. Coleman*, 388 F.2d 41 (6th Cir. 1964).

63. *Contra Matter of Munro-Van Helms Co.*, 30 L. C. par. 70,141 (N.D. Ala. 1956) reversed 243 F.2d 10 (5th Cir. 1957).

64. *Sulmeyer, trustee v. Southern California Pipe Trades Fund*, 301 F.2d 768 (9th Cir. 1962).

65. *In Re Reed Furniture Co.*, Referee's Memo., 15 L.C. par. 64,765 (S.D. Calif. 1948).

66. *Matter of Ram Table, Inc.*, Referee's Memo., 35 L.C. par. 71,725 (E.D. N.Y. 1958).

As to unpaid employer contributions to union welfare funds, the priority of these as wages was in doubt⁶⁷ until the Supreme Court of the United States in *United States v. Embassy Restaurant, Inc.*,⁶⁸ resolved the question. In that case the bankrupt employer had agreed to contribute \$8 a month per employee to a union welfare fund. The title to the fund was in the fund trustees and individual employees could not claim any specific portion of it. The Court stated that preferences in bankruptcy should be narrowly construed. The amounts paid by the employer had no relation to the compensation of the employees and the payment had none of the usual characteristics of a wage. Thus, unless the employees can claim a direct right in the fund or the contribution is related to individual compensation, the claim is not entitled to priority as a "wage".⁶⁹

THE COLLECTIVE BARGAINING AGREEMENT AND SUCCESSOR OWNERSHIP

As has been seen, there has been no recognition in the bankruptcy court, of a union claim as to potential benefits to the employees under the labor contract; to examine this principle critically, the present state of labor law regarding survivorship of obligations under the labor contract through changes of ownership, company mergers and plant removals, must be considered. The purpose of bankruptcy reorganization is to maintain the continuity of a going enterprise.⁷⁰ Thus if legal rights remain with the "res" of the industrial community,⁷¹ then there are substantial and potential contractual rights by reason of the labor contract which are entitled to recognition in bankruptcy.

The N.L.R.B. has consistently found that change in ownership or plant removal, does not affect the bargaining status of a certified unit, where there is a substantial continuity of interests and operations.⁷² The

67. No wage priority; *Security Fund v. Hack*, 242 F.2d 375 (2nd Cir. 1956); *Matter of Victory Apparel Mfg. Corp.*, 154 F. Supp. 819 (D.C. N.J. 1957); *Matter of Sleep Products, Inc.*, 30 L.C. par. 69,848 (S.D. N.Y. 1956); *Matter of Brassel*, 135 F. Supp. 827 (N.D. N.Y. 1955). *Contra*, given the wage priority as a part of "agreed compensation" for services, *Matter of Otto*, Referee's Memo., 30 L.C. par. 70,027 (S.D. Calif. 1956) affirmed *Matter of Otto*, 146 F. Supp. 786 (S.D. Calif. 1956).

68. 359 U.S. 29 (1959).

69. This decision is criticized in 15 L.L.J. 73, *Supra* note 61.

70. See REMINGTON ON BANKRUPTCY, vol. 11 *Corporate Reorganization* Sec. 4345 to 4348.

71. *Contract Enforcement and the Courts, Labor Contracts in the Courts*, Theodore J. St. Antoine, 15 L.L.J. 583 at 589 (1964).

72. See *Herman Lowenstein, Inc.*, 75 NLRB 377 (1947), at 379 the Board laid down this rule, "While the Board has on occasion held that the purchaser is the successor of the seller and bound by the latter's obligations where the record discloses a con-

Board has held that there must be an unusual change of circumstances for decertification of a proper unit to take place.⁷³ When the employing industry remains essentially the same, a change of ownership is no such unusual circumstance.⁷⁴ But the N.L.R.B. has been reluctant to hold that the successor is bound by the terms of the labor contract, where the successor performs no acts of assumption of the old contract.⁷⁵ It has been held, however, that where a successor wishes to alter any condition of employment, he may not do so without regard to the bargaining unit's rights.⁷⁶ The substantive affect of the old contract has not yet been decided by the N.L.R.B. The more common characterization of this issue as a breach of contract action has been heard in the federal district courts,⁷⁷ usually under the arbitration clause of the old contract.

In applying the old labor contract to a successor, there are two common law hurdles that must be overcome; (1) the law of contracts which states that he who is not a party to a contract should not be bound by it,⁷⁸ and (2) the rule that employment rights terminate when the employment relationship ends.⁷⁹

tinuity of interest and operations, the Board has also held that mere purchase of certain physical assets, without the assumption of obligation with respect to employees of the seller, does not constitute a successor of the seller."

73. *Johnson Ready Mix Co.*, 142 NLRB 437 (1963).

74. *Id.*, at 442, The Board also stated, "Respondent urges that it is not the successor to Missouri because the terms of the Sales Agreement did not provide that respondent assume any of Missouri's liabilities, accounts payable or obligations, because it did not purchase any of Missouri's accounts receivable, because it did not purchase any Missouri good will, and because it never represented to anyone that it was the successor in interest to Missouri. In sum, the respondent contends that all it purchased from Missouri were certain physical assets. . . .

We find, however, that the advent of respondent affected no substantial changes in the operating entity . . . It is conceded that respondent continued Missouri's business from the same location, handled the same products, used the same equipment and continued to serve the same customers and, most significantly, a majority of the employees in the unit, we have found, were formerly Missouri's employees." at 441; *See Also Maintenance, Incorporated*, 148 NLRB 1299 (1964); *Randolph Rubber Co. Inc.*, 152 NLRB No. 46 (1965).

75. *Rohlik Inc.*, 145 NLRB 1236 (1964).

76. *Chemrock Corp.*, 151 NLRB No. 111 (1965), But here the majority of the Board restricted its opinion, "We do not hold . . . that the purchaser of an enterprise is legally obligated to refrain from making any changes . . . Rather we hold that . . . the purchaser may not ignore the collective bargaining representative in dealing with them as to matters related to the continuation of their employment and the terms and conditions of such employment." footnote number 8, of the majority opinion.

77. 29 U.S.C. Sec. 185.

78. *Steelworkers v. Reliance Universal Inc.*, 227 F. Supp. 843 (W.D. Pa. 1964) reversed 335 F.2d 891 (3rd Cir. 1964).

79. *N. Y. Labor Relations Board v. Club Transportation Corp.*, 192 Misc. 1000, 81

A formal employer-employee relationship in the enterprise is no longer necessary to give persons certain rights in the enterprise under the labor contract. Certain of these rights are said to have "vested" and cannot be destroyed by a change of plant location.⁸⁰ But these rights must be subject to modification due to actual changes in the industrial community caused by this action.⁸¹ The United States Supreme Court in *John Wiley & Sons v. Livingston*⁸² has held that it is for the arbitrator to account for the changes and their effects on employee rights. There the union brought an action in the district court to compel arbitration under a collective bargaining agreement executed by a company which Wiley had acquired by merger. The union sought to arbitrate the effect of the merger on the employee's rights under the old contract. The Court stated that the successor was required to arbitrate the effect of the old contract rights of the employees on the present employer-employee relationship. The Court found that as a matter of law the arbitrator could find that the employees were entitled to the same seniority rights, the same wage structure, the same grievance procedure, the same severance pay, and the same vacation pay.⁸³ The Court further stated,

the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with the union does not automatically terminate all rights of the employees covered by the agreement, and that in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.⁸⁴

The Court held that the usual laws of contracts do not apply to the collective bargaining agreement, but policy considerations of the National Labor Relations Act make the labor contract the "common law" of the industrial community which binds the parties.⁸⁵ But, for the same agreement to apply, there must be "substantial continuity" of opera-

N.Y.S.2d 598 (Sup. Ct. Westch. Co. 1948) reversed 275 A.D. 536, 90 N.Y.S.2d 367 (Sup. Ct. A.D. 1949).

80. *Zdanok v. Glidden Co.*, 288 F.2d 99 (2nd Cir. 1961); *Contra* *Am. Bakery and Confectionary Int. Union v. Liberty Baking Co.*, 242 F. Supp. 238 (W.D. Pa. 1965), holding that the union security clause is binding only so long as an employer-employee relationship exists.

81. *Zdanok v. Glidden Co.*, *supra* note 80.

82. 376 U.S. 543 (1964).

83. *Id.*, at 558.

84. *Id.*, at 548.

85. *Id.*, at 550.

tions.⁸⁶ In *Wiley*, the Court was careful to point out that the actual terms of sale or merger were unimportant, the test being whether the industrial community remained intact.⁸⁷

Changes in the industrial community, if not so substantial as to disrupt its continuity, must be weighed by the arbitrator. In *Steelworkers v. Reliance Universal, Inc.*,⁸⁸ the paramount role of the arbitrator was set out in a situation where employees rights under an old labor contract were sought to be imposed on a successor company. While holding that the old contract could not be applied absolutely, the court found that it had some effect,

The pre-existing labor contract indicates the structure of labor relations and the established practice of the shop at the beginning of the new proprietorship, an arbiter of a subsequent complaint charging unwarranted departure from that scheme may properly consider any relevant circumstances arising out of the change of ownership, as well as the provisions and practices under the old contract.⁸⁹

Thus, the party succeeding to the business where there is a labor contract is bound by the provisions of the contract to the extent that there are no extensive changes at the work place. But is a bankruptcy reorganization a sufficient change in circumstances? The purpose of a bankruptcy reorganization is to allow the bankrupt to remain in business; the enterprise should not be considered as defunct.⁹⁰ It has been held under the New York State Labor Relations Law that reorganization is not a sufficient change so as to decertify a proper bargaining unit.⁹¹ It may be that circumstances of a plan of reorganization are sufficient to allow enough continuity to give the old labor contract some effect.

The effect of any changes in the community is to be determined by the labor arbitrator who is especially qualified to consider all relevant matters regarding the needs of a particular industrial community.⁹² Arbitrator's opinions have differed as to the effect on a successor enter-

86. *Id.*, at 551.

87. *Supra* note 82; This conclusion has been failed to be drawn by some courts from *Wiley*, in *McLeod v. Local 202*, 239 F. Supp. 452 (S.D. N.Y. 1965), the court looked to specific terms of sale to determine the question.

88. 335 F.2d 891 (3rd Cir. 1964) reversing 327 F. Supp. 843 (W.D. Pa. 1964); *Also* *Wackenhut Corp. v. United Plant Guard Wk. Union*, 332 F.2d 954 (9th Cir. 1964).

89. *Id.*, 335 F.2d at 895.

90. REMINGTON ON BANKRUPTCY, vol. 11 *Corporate Reorganization* Sec. 4345 note 3.

91. N.Y. State Labor Relations Bd. v. Club Transportation Corp., 275 A.D. 536, 90 N.Y.S.2d 367 (Sup. Ct. 1949); *But See* *McGuire v. Humble Oil & Refining Co.*, 53 L.C. par. 11,026 (2nd Cir. 1966) reversing 247 F. Supp. 113 (S.D. N.Y. 1965).

92. *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960).

prise when the predecessor has merged, changed ownership, or changed location. Where the old contract contained a clause purporting to bind successors or assigns of the parties,⁹³ the arbitrators have held that the successor's knowledge of the liabilities of the predecessor to the union under the contract, is the controlling factor.⁹⁴ Some arbitrators have simply weighed the equities involved in either dove-tailing seniority or lessening a man's job security.⁹⁵ Others have considered the subject merely from the standpoint of who is a party to the labor contract, stating that if the successor was not a party to the contract he cannot be bound by it.⁹⁶ Others have looked to see whether the enterprise has remained essentially the same after either a change in ownership, merger, or change of location; if there is no essential change then the old contract will be applied as circumstances warrant.⁹⁷

In the arbitration of *S. B. Penick & Co.*,⁹⁸ the arbitrator stated the scope given arbitrators in these situations by the *Wiley*⁹⁹ case as follows,

The Court has by no means either hurled the gates open or leveled the barrier whereby one not a party to a contract can be indefinitely held accountable for all obligations thereunder under any and all circumstances—but to the contrary, have left the door ajar for penetration solely in the discretion of the arbitrator.¹⁰⁰

It must be concluded then that the effect of the collective bargaining agreement must be regarded as "running" with the enterprise, at least as long as the enterprise maintains its individual identity,¹⁰¹ and it is for

93. See *Dawn Farms Corp.*, BNA 45 LA 1075 (1965), where the arbitrator found that a successor clause adds nothing that Wiley doesn't; A typical successor clause would read, "During the period of this agreement, as extended from time to time, it shall be binding upon and inure to the benefit of, the successors and assigns of the respective parties hereto."

(National Automatic Tool Co. Inc., Richmond, Indiana and Int. Assoc. of Machinists) P-H INDUSTRIAL RELATIONS par. 53,093.1.

94. *Madison-White Motors, Inc.*, BNA 41 LA 759 (1963); *Sanborn's Motor Express, Inc.*, BNA 44 LA 346 (1965).

95. *American Linen Service*, CCH 61-3 ARB par. 8643; *S. B. Penick & Co.*, BNA 43 LA 798 (1964).

96. *Linde Company*, CCH 63-2 ARB par. 8512; *Lagomarcino-Grupe Company*, CCH 64-3 ARB par. 9261; *Marsh Wall Products* BNA 45 LA 551 (1965).

97. *Northwestern Drug Co.*, CCH 62-2 ARB par. 8553; *Calcor Space Facility, Inc.*, BNA 41 646 (1962); *Walker Bros.*, BNA 41 LA 845 (1963); *S. B. Penwick & Co.*, BNA 43 LA 798 (1964).

98. *Supra* note 97.

99. *Supra* note 87.

100. *Supra* note 97, BNA 43 LA at 803-804.

101. *Contract Enforcement and the Courts, Labor Contracts in the Courts*, *supra* note 71 at 589.

the labor arbitrator to decide what effect the changes in the structure of the employing entity will have on the old contract.

THE PLAN OF REORGANIZATION AND UNION CLAIMS—ARBITRATION?

As has been shown, the union may only participate in the hearing on the plan of reorganization at the discretion of the presiding judge.¹⁰² As merely a participant, the union has no right of appeal.¹⁰³

If a trustee rejects an executory contract, it gives rise to a debt in favor of the party holding the contract, which is provable in bankruptcy.¹⁰⁴ Furthermore, the claim may include not only past and present benefits under the contract, but also all future benefits which the contract gives the aggrieved party.¹⁰⁵ The union contract is considered terminated when the petition is filed, and the right of the union to a claim for future benefits is not considered a "debt".¹⁰⁶ On the other hand, a party whose contract is rejected is considered a creditor for all purposes as regarding acceptance of the plan.¹⁰⁷ Such a person has a right to participate in the proceedings in order to protect his rights.¹⁰⁸

The question then, if the union is to be considered as an "affected" party in reorganization, is whether the union is adversely affected. The claim as to future benefits must be worth something or there can be no adverse effect to the union by the plan.¹⁰⁹ There are rights which survive changes in ownership, mergers, or plant removals in the labor field,¹¹⁰ and these rights can be of some value, in many situations. While it is true that the trustee may reject the collective bargaining agreement and still not violate the Conflict of Laws provision of the N.L.R.A.,¹¹¹

102. *cf.* text accompanying notes 50 and 51 *supra*. See *In Re William Jameson & Co.*, CCH BANKR. L. REP. par. 53,990 (D.C. N.Y. 1942), right of appeal is given to "affected" parties.

103. *Peckham v. Casaldue*, 261 F.2d 121 (1st Cir. 1958).

104. *Beggs v. Simon*, 163 S.W.2d 261 (Tex. 1942).

105. *In Re Winn Shoe Co., Inc.*, 87 F.2d 713 (2nd Cir. 1937), 33 AM. B. R. (N.S.) 228.

106. *In Re Petrol Terminal Corp.*, 120 F. Supp. 867 (D.C. Md. 1954).

107. *In Re Grayson-Robinson Stores, Inc.*, 227 F. Supp. 609 (S.D. N.Y. 1964).

108. *Id.*, at 614.

109. Chapter X, Sec. 107 Bankruptcy Act; *In Re Ebaloy*, CCH BANKR. L. REP. par. 57,022 (D.C. Ill. 1951); *In Re V-I-D, Inc.*, 226 F.2d 113 (7th Cir. 1955). Since the employment has ended, then it assumed that the future rights under the labor contract are without value.

110. *The Collective Bargaining Agreement and Successor Ownership, Supra*.

111. *In Re Klaber Bros. Inc.*, 173 F. Supp. 83 (S.D. N.Y. 1959).

the value of the rights under the agreement remain, and are real.¹¹² If the enterprise is to continue under the administration of the Bankruptcy Court, the conditions of employment may be determined by the trustee on approval of the Court. The trustee may negotiate with the union as to conditions of employment, but if there is no agreement, and the Bankruptcy Court finds that the offer of the trustee is as much as may be offered at this time, the employees may thereafter find themselves subject to Court injunction if they engage in concerted activity to press their position.¹¹³ It is better that the union claims under the old labor contract be brought into the Bankruptcy Court with the union being an "affected" party. The effect of adjudication on the "industrial community" or the "common law" of the plant is a proper factor to be considered when determining the effect of the old labor contract. It may be that the adjudication is such a devastating circumstance that the contract has little effect on present conditions. In the *Wiley* case¹¹⁴ these effects were to be weighed by the labor arbitrator, whose specialized knowledge is needed to adjust equities within the industrial community. The policy of the N.L.R.A. favors the resolution of labor disputes by means of arbitration.¹¹⁵ Thus, while the trustee may reject the labor contract as a legal obligation of the debtor, the effect of reorganization on the contract may be an arbitrable question.

The rule to be followed in such situations is found in *Johnson v. England*.¹¹⁶ In that case, a union brought an action in a state court to compel arbitration on the amount of a claim under the collective bargaining agreement, even though the plant was in the hands of a

112. See *Bee Line Bus Co.*, P-H 1 ALAA par. 67,161 (1946), there the arbitrator found that where the union, being fearful of a company merger, put a successor clause in the labor contract, it was binding on the successor-employer.

113. cf. text accompanying note 16, *supra*, the Bankruptcy Court could find that *Norris-La Guardia* would not apply, as there is no labor dispute; this is so because the Court has found that for purposes of Reorganization the wages must be at a certain level and it is financially impossible to pay more.

114. 376 U.S. 543 (1964); See Also *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, at 582 (1960), "The parties expect that his judgment of a particular grievance will reflect not only what the contract says, but insofar as the collective bargaining agreement permits, such factors as the effect on productivity of a particular result, its consequences to the morale of the shop, his judgment whether its tensions will be lightened or diminished. For the parties objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement." The Bankruptcy Act, at 11 U.S.C. Sec. 49 allows for arbitration of claims as to amount, but it has no provision for special arbitration of disputes of a "labor nature".

115. *Supra*, cases cited in note 114.

116. 51 L.C. par. 11,005 (9th Cir. 1966).

trustee, as the employer had been adjudicated a bankrupt. The union claimed that the arbitration clause was still in effect and bound the trustee.¹¹⁷ But the union sought labor arbitration as to the amount of unpaid pension payments. After removal to the federal court, it was found by the Court of Appeals that the issues raised by the union were within the competency of the Bankruptcy Court and did not require the specialized knowledge of a labor arbitrator. Here, the only question was as to the amount of the claim. The Court found that if arbitration of this question was desirable, the Bankruptcy Court would be empowered to appoint a special arbitration board in bankruptcy,¹¹⁸ and there would be no reason to compel a *labor* arbitration. Thus, where the union claim for labor arbitration under the contract, only involves a question as to the amount of the claim, and the business is defunct, the labor arbitration clause will not apply.¹¹⁹ But where there is still industrial continuity and the business is intact, the labor arbitration clause will apply, where the matter in question requires the specialized knowledge of customs and practices of a particular factory or industry.¹²⁰

If the arbitrator, in a proper situation, can find that substantial and potential rights remain through a reorganization, until the trustee rejects the labor contract, then that rejection may give rise to a debt which would make the union an "affected" party.

THE EFFECT OF PROCEEDINGS BEFORE THE N.L.R.B. ON BANKRUPTCY ADMINISTRATION

While the discussion in the first part of this paper is applicable in general to any case where the trustee or debtor under chapter X

117. *Id.*, the Court's footnote number 5, "Appellants (the union) also set forth their proposition in the following language: 'It must be concluded that these important employee rights, including the right of arbitration under a collective bargaining contract, which have been recognized by the courts as surviving the termination of an employers operations, may not be destroyed merely because an employer files a voluntary petition in bankruptcy.'"; See Also *In Re Muskegon Specialties Co.*, 313 F.2d 841 (6th Cir. 1963) *cert. denied* 375 U.S. 832 (1963), where the union made the same contention for arbitration of the amount of vacation due from an employer in corporate reorganization, but actually defunct.

118. 11 U.S.C. Sec. 49.

119. *Supra* note 116 and *In Re Muskegon Specialties Co.*, note 117.

120. This conclusion is inescapable, for in both *England* and *Muskegon*, the Courts were careful to state that labor arbitration is not required under the contract unless; (1) labor peace at the plant is in issue, (2) the right claimed by the employees under the contract is not clear, or (3) the character of the claim was that of the usual labor "dispute". In both cases the plant was not operating and it was intimated in both Courts that in such situations where the plants were in operation the result might be different.

reorganization proceedings seeks to invoke the plenary power¹²¹ of the Bankruptcy Court as a means of stopping damaging labor activities, the parties must look to a somewhat different set of principles in any case in which either party has invoked the jurisdiction of the National Labor Relations Board.

As in all cases involving labor disputes over which the jurisdiction of the N.L.R.B. is invoked, the Board basically derives its power from the Labor Management Relations Act of 1947. Section 10 (a)¹²² of that Act specifically authorizes the N.L.R.B. to prevent "any person" from engaging in any unfair labor practices affecting interstate commerce. Reading this section in connection with section 2 (1) of the N.L.R.A.¹²³ which defines *person* as:

...one or more individuals, labor organizations, partnerships... corporations... [or] *trustees in bankruptcy* [emphasis supplied]¹²⁴

It becomes apparent that for purposes of the N.L.R.A. a trustee [and/or a debtor in Chapter X reorganization proceedings] is subject as any other "person" to the jurisdiction of the N.L.R.B. Furthermore in this instance there is no problem with a conflict between the labor law and the Bankruptcy Act since, unlike the Norris LaGuardia Act, Section 15 of the N.L.R.A.¹²⁵ provides that in any case of conflict between the N.L.R.A. and the Bankruptcy Act, the provisions of the N.L.R.A. shall control except where they cannot be validly enforced. Thus the "practical effect" of the National Labor Relations Act in regards to a bankruptcy or reorganization proceeding is that the Board's jurisdiction over elections and unfair labor practices cannot be preempted by the courts having jurisdiction over bankrupts.¹²⁶

Not only is the power of the N.L.R.B. over the employer in bankruptcy made secure by §15 of the Act,¹²⁷ but its extent is clearly developed in the case law on the point and is broad enough to include not only a trustee per se, but anyone acting in the same capacity as a trustee in bankruptcy.¹²⁸ In the case of *N.L.R.B. v. The Baldwin*

121. 11 U.S.C.A. § 511.

122. 29 U.S.C.A. § 160 (a).

123. 29 U.S.C.A. § 152 (1).

124. *Ibid.*

125. 29 U.S.C.A. § 165.

126. 1 CCH LABOR LAW REPORTER par. 1700.

127. 29 U.S.C.A. § 165.

128. Thus in *American Buslines, Inc.*, 151 F. Supp. 877, 32 L.C. par. 70,772 (D.C. Neb. 1957), it was held that

The legislative purpose to include within the employers affected judicially desig-

*Locomotive Works*¹²⁹ it was clearly pointed out that where the bankrupt itself was operating the business under the direction of the District Court, he was in effect the same as the trustee in bankruptcy and was therefore subject to the Board's jurisdiction in-so-far as unfair labor practices were concerned.¹³⁰ Furthermore, the Board's power over unfair labor practices is—as is otherwise generally true—not generally limited by the fact that the employer may be going through bankruptcy or reorganization proceedings.¹³¹

While the general statement that the assumption of jurisdiction over an employer by a court of bankruptcy will not limit the power of the N.L.R.B. over any labor disputes with which the employer may be connected is true, there is one situation which, while at first glance it may appear to be an unimportant detail, may very well serve to limit the Board's power in a number of cases.

This specific situation arises in regards to the time of filing of the complaint with the Board. Where the complaint is made with the Board prior to the employer's filing for reorganization of bankruptcy, the Board's proceedings are not, thereby, in any way affected. Doubt about this question was finally resolved by the Supreme Court when

nated trustees or receivers, & even by express mention, trustees in bankruptcy, is made unmistakably clear. The existence or intervention of bankruptcy or the corporate reorganization of an employer is not allowed to deprive his or its employees of the rights defined & assured to them by the act.

129. *N.L.R.B. v. Baldwin Locomotive Works*, 128 F. 2d 39 (3rd. Cir. 1942).

130. *See N.L.R.B. v. Baldwin Locomotive Works*, *ibid.* in which the court held:

The jurisdiction of a United States District Court in Bankruptcy does not embrace the power to treat with a debtor's unfair labor practice which may interfere with interstate commerce. Nor is such a court's leave to the Board to proceed in [the] appropriate manner required. By sec. 10 (a) Of the N.L.R.A. the Board is expressly empowered to prevent any person from engaging in and unfair labor practices affecting commerce and that power is exclusive in the Board and [is] unaffected by any other means of adjustment or prevention that has been or may be established. . . The act moreover explicitly removes the possibility of any restraint upon the Board's power which might be thought to arise where the employer's properties and business are operated under an order of a District Court in a reorganization proceeding in bankruptcy.

131. *Cf. Matter of American Buslines*, (Note 128, *supra*) in which it was specifically argued that the bankruptcy court ought to claim and exercise jurisdiction to intercept the proceeding from the Board by virtue of the pendency of the main reorganization action and as a means of protecting its jurisdiction & exclusive control over the debtor. There it was held:

. . . bankruptcy & reorganization proceedings in federal courts have been held inadequate to invest the courts in which they are pending with the authority to intercept or control the Board's exercise of its jurisdiction to administer the Act.

in the case of *Nathanson v. the N.L.R.B.*¹³² it was held that the bankruptcy court shall "stay its hand" for a reasonable period of time pending the determination by the N.L.R.B. of the amount of back pay certain persons were entitled to receive from the corporation which was found by the Board prior to adjudication in bankruptcy to have engaged in unfair labor practices.¹³³ That this particular point is so well established as to be taken for granted can be seen in such cases as *McKesson & Robbins, Inc.*¹³⁴

It would thus appear that the only difference between a proceeding before the Board where the employer subsequent to the complaint, but prior to the decision becomes insolvent, and the usual case where the employer remains solvent throughout would be the minor procedural details of re-opening the record—if all evidence had earlier been taken—so as to make the trustee in bankruptcy a party to the proceeding.¹³⁵ Furthermore, it would appear that even this wouldn't be necessary in a case where the employer-debtor was serving as a receiver under Chapter X reorganization proceedings.¹³⁶

On the other hand, where the complaint is filed with the Board after the employer has filed bankruptcy or reorganization papers there appears to be some authority to the effect that the bankruptcy court has exclusive jurisdiction and that the Board cannot pre-empt the court once the court has begun its proceedings. Thus in the *Matter of Grower Shipper Vegetable Association v. Fruit & Vegetable Worker's Union*¹³⁷ where several of the individual members of the Vegetable Grower-shipper Association had filed petitions under the Bankruptcy Act prior to the Union's charges of unfair labor practices, the Board dismissed the charges against one of the employers even though it had found that that employer was directly involved with the commission of the unfair labor practices, with which it had been charged.¹³⁸ The sole basis

132. 344 U.S. 25, (1952).

133. The bankruptcy court normally supervises the liquidation of claims but the rule is not inexorable. A sound discretion may indicate that a particular controversy should be remitted to another tribunal for litigation. And where the matter in controversy has been entrusted by Congress to an administrative agency the bankruptcy court normally should stay its hand pending an administrative decision.—*Smith v. Hoboken R. Co.*, 328 U.S. 123 (1945); *Thomson v. Texas M.R. Co.*, 328 U.S. 134 (1945).

134. *In Re McKesson & Robbins, Inc.*, 19 NLRB 778 (1940).

135. *See Ryan Car Co.*, 21 NLRB 139 (1940).

136. *See Baldwin Locomotive Works*, Note 129, *supra*.

137. 15 NLRB 322 (1939).

138. As to this matter the authors would take direct issue with the discussion of the Vegetable Association case found at 1 CCH LABOR LAW REPORTER par. 1700.07. CCH

for this dismissal was, apparently, the fact that the employer was undergoing bankruptcy at the time the charges were filed.

This apparent limitation on the N.L.R.B.'s power is not, however, so well established as to be free from all doubt. Two years prior to the *Vegetable Association* case, the Board, in deciding basically the same question in the *Matter of Ralph A. Frundlich*¹³⁹ held that it would not stay its hearings in spite of the fact that proceedings for reorganization had been initiated prior to the issuance of the Board's complaint. It might be noted in this case, however, that the plan of reorganization prepared by the debtor-employer itself did call for the Board's proceeding with its hearing.¹⁴⁰ Thus two interpretations of the Board's decision in the *Frundlich* case can be made:

correctly states that the Board dismissed the case against one employer where reorganization proceedings had begun prior to the filing of the charges, but it goes on to throw doubt on the matter by saying, "It also appeared from the evidence that the company had probably not violated the act." The inaccuracy of this statement can clearly be seen at the top of p. 366 of the Board's decision. There, the Board says:

Of the firms named as respondents, however, only one was directly involved in any of the individual cases discussed. . . .

At that point the Board has a footnote 34 which says: "also H.P. Garin Co. . . . but for reasons explained below, the case against the respondent will be dismissed. . . ." In explaining why the charges "against the respondent will be dismissed," the Board near the bottom of p. 366 states: "We are also granting the motion of H.P. Garin, to dismiss the complaint against [his company] of the estate of which he has been appointed receiver." H.P. Garin had filed in bankruptcy prior to the issuance of the Board's complaint.

The authors of this paper contend that the reading of these statements in their proper context would require the conclusion that here the Board has said that it will not entertain charges, even where there is evidence to support them, against an employer who filed in Bankruptcy prior to the filing of charges with the Board.

The fact that the Board is limiting this exception to cases where the employer had already filed prior to the charges being made against it appears in the Board's dicta on p. 367 where it states:

Moreover, proof of [bankruptcy] of a corporation occurring after its commission of unfair labor practices would not appear to require dismissal of a complaint against it. . . .

139. 2 NLRB 802, (1937).

140. 1 CCH LABOR LAW REPORTER par. 1700.09 states in regards to this case: ". . . hearings were held by the Board prior to the approval of the plan of reorganization. . . ." If this statement be correct, the argument that in the *Frundlich* case the Board refused to recognize any limitation on its jurisdiction in spite of prior jurisdiction by the Bankruptcy Court, would be given strong support. However, according to the report of the case the hearing apparently was not held until after the reorganization plan had been approved. The petition for reorganization was filed on March 8, 1935. The complaint was filed with the Board in November of 1935, however, the hearings apparently did not start until Feb. 1936; one month after the plan for reorganization had been approved by the bankruptcy court. (See pp 803 & 804 of the Board's ruling.)

- 1) that the Board in this case refused to recognize the theory that where the reorganization begins prior to the filing of the unfair labor practice complaint the Board should not interfere with the bankruptcy proceedings; or
- 2) that the Board, while recognizing the above theory, felt that the continuation of its hearings in this case would not conflict with the jurisdiction of the bankruptcy court (since the reorganization plan itself specifically called for the continuation of the Board's hearings, and further provided that the Board's decision should bind the successor.)

In a similar situation decided by the U.S. District Court for Eastern Pa.¹⁴¹ it was held that the Board could not succeed in vacating the restraining order in a case where the labor complaint was filed after the initiation of bankruptcy proceedings.¹⁴² However, the effect of the ruling was somewhat clouded by the reasoning of the court that:

There is no practical need to vacate the restraining order because the 77-B proceedings have been concluded and only await the final order of the court. As we view it, when the final order is made, all persons are then as free to pursue the debtor as if the petition under 77-B had not been filed.¹⁴³

In spite of the lack of any clear cut decision enunciating a rule stating this time limitation on the Board's jurisdiction it would appear from what precedent there is that such is indeed the rule. The underlying basis for such a conclusion is that such a rule would best effectuate the Congressional intent in regard to both the N.L.R.A. and the Chandler Act, *i.e.* the fact that such a rule would best effectuate the purpose of both acts without thereby defeating the intent of either. This would be so in that, by allowing the Board to continue proceedings begun prior to filing under the Chandler Act there would be no deleterious effect on the successful completion of the bankruptcy proceedings since the proceedings before the Board would be taken into consideration in any order of the bankruptcy or reorganization court. Furthermore, not to do so would be to defeat the intent of the N.L.R.A., since any award that might be given by the Board based on proceedings

141. In the Matter of Baldwin Locomotive Works, 21 F. Supp. 91 (1938).

142. The court will not disturb a plan of reorganization with all the required approvals to include obligations which the N.L.R.B. may impose. *Id.* at page 422.

143. *Id.* at 423.

begun prior to filing would be a provable claim in bankruptcy,¹⁴⁴ and thus would be discharged by the final order in the bankruptcy court. This, of course, would then mean that any claims would be lost to the union if the Board could not proceed.

On the other hand, to allow the Board to come in on a case after the bankruptcy or reorganization proceeding had begun would have the exact opposite effect. It would defeat the intent of the Bankruptcy Act to provide for the orderly and equitable discharge or reorganization of debtor-employers unable to meet maturing obligations by providing a method of expeditious reorganization on terms insuring fair treatment to all parties.¹⁴⁵ If the Board, or any worker could come in at any time after the dissolution or reorganization proceedings had begun and assert new claims against the debtor, it would destroy the stability of the debtor's position and thereby considerably weaken or even destroy the satisfactory conclusion of the bankruptcy proceedings. In addition, to allow such intervention would be to allow new claims to be brought after all rights had supposedly been frozen—*i.e.* those which are established as of the date of filing in bankruptcy or reorganization proceedings. This would produce a result which would make the job of the court overseeing the bankruptcy or reorganization proceedings almost impossible. At the same time, however, such a rule would not harm the workers or the Union since the Board's proceedings would simply be postponed until after the reorganization proceedings were concluded, and thus any award would not thereby be discharged.¹⁴⁶

THE EFFECT OF N.L.R.B. PROCEEDINGS ON THE ADMINISTRATION OF THE DEBTOR'S ESTATE

Once the question of the power of the N.L.R.B. over the trustee or debtor is established, it becomes important to know the effect that such proceedings will have on the administration of the debtor's estate. One of the most common problems that any party to simulations bank-

144. See *Nathanson v. N.L.R.B.*, 344 U.S. 25, 32 (1952).

145. See 8 (b) C.J.S. *Bankruptcy* § 873.

146. See *In the Matter of Baldwin Locomotive Works*, note 141, *supra*:

... When a plan, as it is called, is finally approved, the debtor, as we have often said, resumes control of its affairs as if no 77-B petition had been filed. When done, we are done with this debtor & will be quite willing to turn it over to the tender mercies of the Labor Board, or of any Court or tribunal. We naturally, and we think quite properly, prefer to keep our proceedings undisturbed by those of any other court.

ruptcy and N.L.R.B. proceedings will have to face is determining the effect the finding of unfair labor practices will have on the bankruptcy proceedings. Basically, in this regards, the rule is that the Board's power, where it assumes jurisdiction, is wholly unaffected by the reorganization proceedings.¹⁴⁷

The best example of the operation of this general principal can be seen in those cases where the Board, having taken jurisdiction finds against the employers and makes a back pay award. In such a case the award becomes a valid claim on the estate, provable on bankruptcy just as any other claim.¹⁴⁸ On the other hand, the award will not be given any special priority because it is awarded by a government agency,¹⁴⁹ and thus it will be treated as any other claim for wages under normal bankruptcy proceedings.¹⁵⁰ Likewise, the bankruptcy court need not recognize any backpay award where it is unliquidated; and though the establishment of the exact amount owed under such an order is the responsibility of the Board, if the Board does not act within a reasonable time to liquidate the claim, the law does not require the court to hold up the bankruptcy or reorganization proceedings.¹⁵¹

A second rather common problem facing both the trustee in bankruptcy and his employees is the effect that a petition for representation will have on the bankruptcy proceedings, and visa versa. Here again, the result will usually be the same as if there were no bankruptcy proceeding involved.

It has been held that since the holding of a representation election does not significantly disrupt bankruptcy or reorganization proceedings,¹⁵²

147. Even though some of the unfair labor practices with which the respondent is charged were committed while it was managing and operating its business and properties as the debtor in possession under court order, it will hardly be denied that a debtor in possession is responsible for unfair labor practices which occur during a reorganization. Its status as an employer is no different, in so far as the N.L.R.A. . . . is concerned than that of any other employer.

. . . Court supervision of corporate reorganization affords the operating possessor no freedom from its statutory duty to its employees. And where managerial control and economic interest of the debtor in possession and the reorganization are the same it could be only the blindness of formalism that would suggest separately instituted proceedings against the predecessor and the successor for the redress of their respective grievances. . . .

148. *Nathanson v. the N.L.R.B.*, 344 U.S. 25 (1952).

149. *Ibid.*

150. *Ibid.*

151. *Ibid.*

152. . . . The language of the order [*i.e.*, the usual restraining order in bankruptcy proceedings] . . . has reference to several specific activities, none of which, as the court believes . . . will, either interfere with possession or management

the federal courts are without power to enjoin the N.L.R.B. from holding a representation election among the debtor's employees.¹⁵³ In such a situation the Board has exclusive jurisdiction to hold the election just as if there were no bankruptcy proceedings involved, and once the election is held the trustee has just as much duty to bargain collectively with the representative¹⁵⁴ as it would under normal circumstances.¹⁵⁵

CONCLUSION

Every year in the United States there are many thousands of bankruptcies and reorganization proceedings before the various federal district courts.¹⁵⁶ It is reasonable to assume since so much of our industry today is unionized that a large portion of these proceedings may involve some conflict with the national labor policy as expressed in the Wagner Act and the National Labor Relations Act.

It is with this in mind that we have attempted here to formulate a few general rules which may serve as guidelines to those parties who may find themselves involved in such a situation either as an employer, or as the representative of the employees of a firm going through such proceedings.

In brief, there are three points that should be remembered by the parties in any such a position:

First, it should be noted that in spite of the language used by the courts in many cases, and in spite of the explicit language used in section 14 of the N.L.R.A., it appears to be clear that the labor law

by the debtor . . . in the discharge of his duties or interfere with the exclusive jurisdiction of this court over said debtor . . . and [his] . . . properties.—In *Re American Buslines*, 157 F. Supp. 877 at 881 (D.C. Neb., 1957).

153. *Id.* at 885.

154. *Third Ave. Transit v. Quill*, 192 F. 2d 971 (2nd Cir. 1951).

155. *But See*; In all cases in which a representative election has been envolved, the question of employee representation arose prior to the filing of the employer in bankruptcy. What effect such an order would have if filed after the bankruptcy proceedings had begun has not been determined. See the discussion of time element in such cases at pages 37-44, *supra*.

Furthermore, what effect the complete dissolution of the debtor will have on the representation petition is not fully clear. From the language of the various cases which have discussed the point it is probable that the Board would not decree such an election where it is certain that the debtor will shortly thereafter be dissolved, however, if there be the slightest possibility that the debtor will survive the bankruptcy or reorganization, the election will be held. See *In Re Costal Plywood & Timber Co.*, 102 NLRB 300 (1952).

156. CCH BANKR. L. REP. 10-27-65 No. 42 states that in 1965 there were 88 Chapter X reorganization proceedings and 149,820 voluntary straight bankruptcies filed; of these almost 17,000 were business filings.

will not always take precedence over that of the Bankruptcy Act, but rather that the courts will try to balance the equities between the parties so as to give maximum justice to both.

Thus, while under no circumstances may an employer seek to avoid the effects of the national labor legislation by filing for reorganization under Chapter X of the Bankruptcy Act,¹⁵⁷ it is equally settled that a labor union may not run roughshod over an employer in bankruptcy or reorganization who has at all times tried to keep good faith with his employees.¹⁵⁸ And while the cases say that the labor law will take precedence in any bankruptcy case in which there is a labor dispute¹⁵⁹ it is also apparent that where the court feels that the equities lie with the employer, it will attempt to treat the matter as something other than a "labor dispute" as defined by section 104 of the Norris LaGuardia Act.¹⁶⁰

Secondly, and again in line with the theory of balancing the equities, it seems highly unlikely that the Bankruptcy Court would still view the labor contract as it is discussed in *Wiley*, i.e., that the court will still view an employees' union as not being an "affected" party in a reorganization. While it may be true, that the best solution in this area would be specific legislation allowing for a special labor arbitrator in bankruptcy proceedings, in any case where there is a labor contract and a substantial continuity of the debtor enterprise is contemplated, it appears that the courts will recognize the union's claims where there is a labor contract in existence which includes an arbitration clause, and it furthermore appears that the union's status as an affected party can no longer be ignored.

Finally, it similarly appears that while the general rule is that the N.L.R.B. will not be limited in any way in its handling of labor disputes by bankruptcy or reorganization proceedings, there is at least a strong indication that the Board itself as well as some courts will recognize such a limitation in any case where the continuation or commencement of Board proceedings will seriously disrupt the administration of the bankrupt's estate.¹⁶¹

On the other hand, it also appears that both the courts and the Board (and arbitrators where they may be involved) are striving to so construe matters which normally are within the exclusive jurisdiction

157. *Teamsters v. Quick Charge*, 14 L.C. par. 64,496 (10th Cir. 1948).

158. *In Re Cleveland & S. Brewing Co.*, 11 F. Supp. 198 (1936).

159. *Supra* note 157.

160. *Supra* see note 16.

161. *Supra* see pages 37 & 38.

of the Bankruptcy Court, as to provide the greatest possible protection of the rights of the employees.

In brief, the rule governing any conflict between the policies expressed in the various national labor acts, and that of the national Bankruptcy Act should be restated to recognize that where there is such conflict there will be a weighing of the equities involved, and that the law will prevail which will best effectuate the justifiable expectations of all the parties with the least interference with the policy of the conflicting legislation, provided:

1: that all things being equal there is a legislative presumption in favor of the labor law controlling; and

2: that whichever tribunal ultimately does take jurisdiction over the particular problem, its power over the matter will be exclusive and complete.¹⁶²

S. Strother Smith, III
Allan Zaleski

162. *cf.* N.L.R.B. v. Baldwin Locomotive Works, 128 F. 2d 39,44 (1942) with the language of the court in the case of *In Re Cleveland & S. Brewing Co.*, 11 F. Supp. 198, 201:

. . . After the bankruptcy court has assumed jurisdiction over the property it has jurisdiction to determine all rights there-in.