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The Continuing Conflict Between Bankruptcy and Labor Law—The Issues that *Bildisco* and the 1984 Bankruptcy Amendments Did Not Resolve

*Thomas R. Haggard**

Bankruptcy[1] has been described as "a distinct system of jurisprudence the nature of which is to sort out *all* of the debtor's legal relationships with others, and to apply the principles and rules of the bankruptcy laws to those relationships . . . ."[2] Most bankruptcy rules and principles dictate how an estate's resources will be allocated among various creditors. Once the bankruptcy system acquires jurisdiction over a failing business, it is usually not willing to surrender it "except under exceptional circumstances,"[3] and even mere interference with the court's exercise of jurisdiction over the debtor and its assets is subject to constraint.[4]

On the other hand, the triangular relationship among employers, employees, and unions is governed extensively by the National Labor Relations Act of 1935 and its subsequent amendments (NLRA).[5] Violations of this act often result in an

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This article will appear in revised form as a chapter in a book on the relationship between labor and bankruptcy law, which will be co-authored by Mark Pulliam and published by the Industrial Research Unit, Wharton School, University of Pennsylvania, in 1986.

1. Current bankruptcy law is contained in the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, 11 U.S.C. §§ 101-1501 (Supp. II 1984); 28 U.S.C.A. §§ 151-58, 581-89, 1334, 1408-12, 1452, & 1930 (Supp. 1985).

2. 1 BANKR. SERV. § 1:1, at 4-5 (L. Ed. 1985) (emphasis added).

3. *In re* Muskegon Motor Specialities Co., 313 F.2d 841, 842 (6th Cir.), *cert. denied*, 375 U.S. 832 (1963) (citing Mangus v. Miller, 317 U.S. 178, 186 (1942)).

4. *See Ex parte* Baldwin, 291 U.S. 610, 615 (1934).

5. 29 U.S.C. §§ 141-187 (1982).

order requiring an employer to give back wages to employees it has wronged.[6] Adjudication and enforcement of such claims is normally the exclusive prerogative of the National Labor Relations Board (NLRB or board).[7]

Who, then, has jurisdiction to resolve a claim that arises under the NLRA, but is being asserted against an employer who has filed in bankruptcy? What procedural devices can either forum use to protect its jurisdiction, and under what circumstances? Related to the issue of jurisdiction, and indeed determinative of it in many instances, is the question of what substantive law controls when provisions of the Bankruptcy Code conflict with those of the NLRA.

This article explores certain substantive and jurisdictional conflicts that exist between bankruptcy and labor law and suggests an appropriate resolution.[8] In this regard, the court in *Durand v. NLRB* stated the controlling principle:

> When in a given situation the two Acts [the Bankruptcy and the NLRA] come into contact with each other, they should, if possible, be so construed and applied as to avoid conflicts between them; and the tribunal concerned, whether court or agency, should be careful not to trespass upon the jurisdiction of some other tribunal.[9]

If conflict is unavoidable, however, then both *NLRB v. Bildisco & Bildisco*[10] and the congressional response to *Bildisco*[11] indi-

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6. 29 U.S.C. § 160(c) (authorizing the board to order reinstatement of employees "with or without backpay").

7. Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261, 264-65 (1940).

8. Other articles in this series dealt with Bankruptcy Code conflicts with the appointment of union representatives to Chapter 11 creditors committees: Haggard, *The Appointment of Union Representatives to Creditors' Committees Under Chapter 11 of the Bankruptcy Code,* 35 S.C.L. Rev. 517 (1984) [hereinafter cited as Haggard, *Creditors' Committee*]; with the anti-injunction provisions of the Norris-LaGuardia Act, Haggard, *The Power of the Bankruptcy Court to Enjoin Strikes: Resolving the Apparent Conflict Between the Bankruptcy Code and the Anti-Injunction Provisions of the Norris-La-Guardia Act,* 53 Geo. Wash. L. Rev. 703 (1985) [hereinafter cited as Haggard, *Norris-LaGuardia*]; with the federal statutory policy in favor of resolving contract disputes by arbitration, Haggard, *Labor Arbitration and Bankruptcy: A Trek Into the Serbonian Bog,* 17 Loy. U. Chi. L.J. 171 (1985); and with the NLRA duty to honor collective bargaining agreements, Pulliam, *The Collision of Labor and Bankruptcy Law: Bildisco and the Legislative Response,* 36 Labor L.J. 390 (1985).

9. 296 F. Supp. 1049, 1055 (W.D. Ark. 1969).

10. 465 U.S. 513 (1984). *See infra* text accompanying notes 25-27.

11. *See infra* notes 29-40 and accompanying text.

cate that the narrow but more specific exigencies of bankruptcy law must prevail over the broader provisions of labor law.

I. Conflicts of Substantive Law

A. *Power of a Bankrupt Employer to Reject Terms of a Collective Bargaining Agreement*

Contract rejection has been the *cause célèbre* of the conflict between bankruptcy and labor law. This conflict was originally very simple. Section 365(a) of the Bankruptcy Code authorizes a trustee or debtor-in-possession to reject executory contracts.[12] If the contract is rejected, the debtor is excused from future performance and the contract is regarded as having been breached as of the day prior to the bankruptcy filing.[13] As a result, the other contracting party becomes a general unsecured creditor with respect to damages flowing from this breach.[14] But since section 8(d) of the NLRA makes midterm alteration or repudiation of a collective bargaining agreement an unfair labor practice,[15] a conflict arises.

Increased use of the reorganization provisions of Chapter 11, coupled with well-publicized claims that certain employers were using bankruptcy and section 365(a) to rid themselves of unfavorable labor contracts,[16] brought the issue to a head. Lower federal courts, however, were unable to resolve the conflict,[17] and the matter broke into a firestorm of controversy when the Supreme Court decided *NLRB v. Bildisco & Bildisco*.[18] The Supreme Court's resolution of the issue was unacceptable to the labor community, and political pressure led to eventual enact-

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12. 11 U.S.C. § 365(a) (1982).
13. *Id.* § 502(g).
14. 11 U.S.C. § 507 (1982).
15. 29 U.S.C. § 158(d) (1982).

> [W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that *no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification . . . 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.

Id. (emphasis added).

16. *See* Pulliam, *supra* note 8, at 395 & n.17.
17. *See generally* Pulliam, *The Rejection of Collective Bargaining Agreements Under Section 365 of the Bankruptcy Code,* 58 Am. Bankr. L.J. 1, 2 n.11 (1984).
18. 465 U.S. 513 (1984).

ment of section 1113,[19] which was part of the Bankruptcy Amendments and Federal Judgeship Act of 1984.[20] Although *Bildisco* and section 1113 both purported to resolve a specific aspect of the conflict between bankruptcy and labor law, each opened a Pandora's box of additional conflicts. Conflicts posed by *Bildisco* are now more or less moot, but those posed by section 1113 are not. In order to understand these conflicts, one must first understand what section 1113 was—namely, a response to the *Bildisco* decision.

The Court was faced with two issues in *Bildisco:* (1) what standard a bankruptcy court should use in deciding whether to allow a debtor-in-possession to reject a collective bargaining agreement, and (2) whether suspension of performance under the agreement, pending bankruptcy court approval of the rejection, violated section 8(d) of the NLRA.

On the first issue, the Court held that because of the special nature of a collective bargaining contract, rejection should be judged by a stricter standard than the normal "business judgment" test used for ordinary commercial contracts. But the Court also thought that the "liquidation" test, which would permit rejection only if continued adherence to the contract would cause the reorganization to fail, was too stringent.[21] The Court thus opted for a middle position, holding that if the debtor-in-possession could show that the collective bargaining agreement "burdens the estate" and that "the equities balance in favor of rejecting the labor contract,"[22] then the bankruptcy court should allow such rejection.

The Court also held, however, that "[b]efore acting on a petition to modify or reject . . . the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution."[23] Recognizing that the bankruptcy court lacked expertise in the fine nuances of collective bargaining law under the NLRA,[24] the Court apparently intended for the bankruptcy court to do little more than determine that the

19. 11 U.S.C. § 1113 (Supp. II 1984).

20. Pub. L. No. 98-353, 98 Stat. 333 (1984). *See generally* Pulliam, *supra* note 8.

21. 465 U.S. at 524-25.

22. *Id.* at 526.

23. *Id.*

24. *Id.* at 527-28, 534.

debtor-in-possession made a proposal to the union and that the parties were unable to agree to it.

With respect to the second issue, the Court held that a debtor-in-possession does not commit an unfair labor practice under section 8(d) of the NLRA when it unilaterally repudiates a collective bargaining agreement pending bankruptcy court approval. Such action is not an unfair labor practice because "from the filing of a petition in bankruptcy until formal acceptance [of the petition to reject], the collective-bargaining agreement is not an enforceable contract within the meaning of NLRA § 8(d)."[25] But the Court's reason for regarding the agreement as unenforceable flowed not only from the perceived purpose of section 8(d), but also, and more importantly, from the premise that the Bankruptcy Code and exigencies of a Chapter 11 reorganization must necessarily prevail over inconsistent provisions of the NLRA.[26]

In sum, the Court held that the *power* of a debtor-in-possession to suspend performance of an executory contract under the Bankruptcy Code preempts the *duty* of an employer to adhere to the terms of a collective bargaining agreement under section 8(d) of the NLRA. The Court also said that during the prerejection period, the exigencies of bankruptcy override an employer's NLRA section 8(a)(5) duty to bargain to impasse before making unilateral changes in or seeking rejection of the contract.[27] But apart from those exceptions, the Court maintained that a debtor-in-possession is otherwise still subject to the provisions of the NLRA and is therefore "obligated to bargain collectively with the employees' certified representative over the terms of a new contract pending rejection of the existing contract or following formal approval of rejection by the Bankruptcy Court."[28]

The Court's delineation of the controlling law and its resolution of the conflict between the Code and the NLRA was fairly clear. The feasibility of its solution is another matter. Particularly questionable was the Court's rather facile assumption that in bargaining about contract modification the debtor-in-possession should be subject to two statutory definitions of its bargaining duty—NLRA sections 8(a)(5) and 8(d) which require "good faith," and the attenuated implied Bankruptcy Code require-

25. *Id.* at 532.
26. *Id.* at 527-34.
27. *Id.* at 533 & n.14.
28. *Id.* at 534.

ment of a reasonable effort to negotiate voluntary modification. The Court imposed a limited bargaining duty under the Bankruptcy Code out of deference to the bankruptcy court's lack of expertise in traditional labor law. But having established a different standard for the bankruptcy court to apply, the Supreme Court should also have considered the effect of continued applicability of the higher NLRA bargaining standard on the debtor's bargaining and its overall Chapter 11 reorganization efforts.

In any event, congressional reaction to *Bildisco* was as swift as it was chaotic. The Bankruptcy Amendments and Federal Judgeship Act of 1984[29] enacted section 1113, dealing specifically with the rejection of collective bargaining agreements by a debtor-in-possession or trustee. Section 1113 represents a compromise between several competing proposals; thus it modifies the *Bildisco* decision in some respects, but appears to codify it in others.

Its most striking departure from *Bildisco* is that a debtor-in-possession can no longer unilaterally terminate provisions of its collective bargaining agreement pending bankruptcy court approval.[30] Moreover, prior to tbe bankruptcy court hearing on that issue, the employer must make a proposal to the union outlining modifications in employee benefits and protections that the employer believes "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."[31] The debtor-in-possession must provide the union with whatever "rel-

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29. PUB. L. No. 98-353, 98 Stat. 333 (1984).

30. 11 U.S.C. § 1113(f) (Supp. II 1984). If, however, the court does not rule on the application for rejection or modification within 30 days of the commencement of the hearing, then the trustee or debtor-in-possession may terminate or alter the provisions without such a ruling. *Id.* § 1113(d)(2). As Senator Thurmond explained, in this eventuality the debtor-in-possession "would essentially be in the same position he is now in under the Bildisco decision—that is he mey unilaterally abrogate the contract pending the court's decision." 130 CONG. REC. S8888 (daily ed. June 29, 1984) (statement of Sen. Thurmond).

31. 11 U.S.C. § 1113(b)(1)(A) (Supp. II 1984). This language was a compromise between the proposal of Senator Packwood, which required the debtor to propose "the minimum modifications . . . that would permit the reorganization," DAILY LABOR REPORT (BNA) No. 103, at C-4 (May 29, 1984), and the proposal of Senator Thurmond, which would have codified the *Bildisco* test by merely requiring the debtor to make "reasonable efforts to negotiate *a change* in the contractual terms." *Id.* at C-3 (emphasis added). The requirement of section 1113(b)(1)(A) that the debtor's proposal possess a certain substantive quality—namely, what is "necessary to permit the reorganization"—thus adds something to the *Bildisco* bargaining requirement. It is difficult, however, to predict exactly how courts will construe this extremely ambiguous language.

evant information . . . is necessary to evaluate the proposal,"[32] and then "meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement."[33] After an application for rejection is filed, the bankruptcy court has fourteen days to schedule a hearing.[34] The court can then approve contract rejection only if it finds that the employer has (1) made the required proposal,[35] (2) the union has refused to accept it "without good cause,"[36] and (3) "the balance of equities clearly favors rejection" of the collective bargaining agreement.[37] The court must make this determination within thirty days after commencement of the hearing, and if the court fails to do so, the employer may unilaterally terminate or alter any provision of the agreement pending the court's final ruling on the application.[38] In addition, while the contract is still in effect, "if [it is] essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court . . . may authorize the trustee [or the debtor-in-possession] to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement."[39]

Determining section 1113's meaning will keep courts busy for a considerable time. The section contains many ambiguous terms and the legislative history is scant and unenlightening.[40] But regardless of the section's meaning, the issue here, and a very troubling one, is how the section relates to provisions of the NLRA.

To begin with, one must consider the new prohibition against unilateral termination or alteration of the collective bargaining agreement. The bankruptcy law power of a debtor-in-possession to suspend performance under an executory contract pending court approval of its rejection was the predicate of the

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32. 11 U.S.C. § 1113(b)(1)(B) (Supp. II 1984).

33. *Id.* § 1113(b)(2).

34. *Id.* § 1113(d)(1).

35. *Id.* § 1113(c)(1).

36. *Id.* § 1113(c)(2).

37. *Id.* § 1113(c)(3).

38. *Id.* § 1113(d)(2).

39. *Id.* § 1113(e).

40. Senator Thurmond, referring to the scope of the duty to bargain, admitted that "[l]egitimate concerns have been raised regarding the broadness and vagueness of this language." 130 CONG. REC. S8888 (daily ed. June 29, 1984) (statement of Sen. Thurmond).

Supreme Court's conclusion in *Bildisco* that a collective bargaining agreement was no longer an "enforceable contract," and therefore NLRA section 8(d) was inapplicable. But does section 1113's prohibition of unilateral suspension make the collective bargaining agreement an "enforceable contract" once again, thus activating NLRA section 8(a)(5) and 8(d) prohibitions?

Although there may be some logic to the argument that it does,[41] that interpretation should be rejected. The new provision does not expressly overrule the judicial gloss that *Bildisco* put on section 8(d) of the NLRA. Congress disagreed with the Court over an interpretation of the Bankruptcy Code not the NLRA, and amended the code rather than the NLRA. The Court thought that the exigencies of a Chapter 11 reorganization required that the debtor-in-possession have power to unilaterally terminate or alter the collective bargaining agreement pending court approval of rejection. Congress thought otherwise, but provided procedures to expedite rejection. Both the Court and Congress thought, however, that bankruptcy law and not labor law controls the debtor-employer's power to terminate or alter the terms of a collective hargaining agreement. The bankruptcy court has adequate power to deal with a debtor-in-possession who fails to adhere to provisions of section 1113; to simultaneously subject that debtor to NLRA unfair labor practice procedures would be both pointless and counterproductive. In this regard, section 1113 should be deemed totally preemptive of the NLRA.

Under *Bildisco,* as a condition of obtaining bankruptcy court approval of rejection, the employer was required at least to attempt to negotiate a change in the collective bargaining agreement. The Court also held that the NLRA duty to bargain applied to these negotiations. The new section 1113 now expressly imposes a bargaining duty on a debtor-in-possession who seeks to reject its collective bargaining agreement. Although the statute is loaded with various NLRA-sounding terms—like "good faith," a phrase that does not appear in the *Bildisco* decision—legislative history, such as it is, suggests that the intent was merely to codify the limited *Bildisco* requirement,[42] not to

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41. *See* Note, NLRB v. Bildisco & Bildisco: *Rejection of Collective Bargaining Agreements by Chapter 11 Debtors Receives High Court Approval,* 1984 N. ILL. U.L. REV. 295, 326-27.

42. Senator Hatch noted that

> [t]he first step of this process [leading to rejection of the contract] will of

require bankruptcy courts to enforce NLRA collective bargaining duties.[43] But if section 1113 duties are somehow less demanding (and even if they are not), the question remains whether the debtor-in-possession is also subject to provisions of the NLRA, as construed and enforced by the NLRB, during the prerejection negotiation period. Although the Supreme Court may have been reluctant to read a duty to bargain into the Bankruptcy Code and then to say that this implied duty nevertheless preempted the analogous but specific provisions of the NLRA, for Congress itself to impose a limited bargaining duty as part of the Bankruptcy Code with the intention of thereby superseding more general bargaining provisions of the NLRA is an entirely different matter. Indeed, it would be senseless and futile for a bankruptcy court to determine that a debtor-in-possession's bargaining was adequate for contract rejection purposes only to have the NLRB hold later that the bargaining was not in "good faith" under NLRA precedent.[44]

Just as the section 8(d) (unilateral changes) and section 8(a)(5) (state-of-mind) aspects of NLRA bargaining law should be deemed preempted by narrower provisions of the Bankruptcy Code, so too should the NLRA duty to supply information. Originating simply as a duty to substantiate claims regarding an employer's alleged inability to pay a demanded increase,[45] the NLRA duty to supply the union with relevant bargaining information has burgeoned into a significant and complex area of labor law.[46] Whether the Bankruptcy Code section 1113(b)(1)(B) duty to supply the union "with such relevant information as is

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> course involve good faith negotiations between the parties. This was a requirement articulated by the Supreme Court in the Bildisco case. The conference, once again, preserved the spirit of that Court holding by requiring good faith efforts to confer . . . .

130 CONG. REC. S8892 (daily ed. June 29, 1984) (statement of Sen. Hatch).

43. In reference to the bargaining standard to be applied in evaluating the union's rejection of proposed modifications, Senator Thurmond stated that the statute "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." 130 CONG. REC. S8888 (daily ed. June 29, 1984) (statement of Sen. Thurmond).

44. "Application of the requirements of both section 1113 of the Bankruptcy Code and section 8 of the NLRA would be ludicrous. The result of the concurrent jurisdiction of the bankruptcy court and the NLRB could only be chaotic, and would certainly imperil, if not prevent, effective reorganization." Comment, Bildisco: *Are Some Creditors More Equal Than Others?*, 35 S.C.L. REV. 573, 611 (1984).

45. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

46. *See generally* J. O'REILLY, UNIONS' RIGHTS TO COMPANY INFORMATION (Labor Relations and Public Policy Series No. 21 1980).

necessary to evaluate the [debtor-in-possession's] proposal"[47] regarding contract modification is broader, narrower, or essentially the same as the NLRA duty is not clear. In any event, whatever the Bankruptcy Code requires should be regarded as exclusive. By the time the NLRB could process and obtain judicial enforcement of a duty-to-supply information order, a bankruptcy court would have long since acted on the petition to modify or reject the contract. In addition, the debtor-in-possession, in the interest of preserving assets of the estate, should be protected from having to litigate the NLRA issue.

In sum, pending bankruptcy court action on a petition to reject a collective bargaining agreement, irrespective of bargaining duties an employer would otherwise have under sections 8(a)(5) and 8(d) of the NLRA, the employer's NLRA bargaining duties should be suspended in favor of the more specific provisions of the Bankruptcy Code.

B. Postrejection Bargaining Issues

Bildisco held that even after an existing contract has been rejected, a debtor-in-possession is still subject to the NLRA section 8(a)(5) duty to bargain over the terms of a new collective bargaining agreement.[48] Section 1113 does not deal specifically with this matter, and one may assume that Congress also intended continued applicability of the NLRA duty to bargain. This assumption, however, causes some complications.

If the bankruptcy court has approved only a modification or partial rejection, then the unrejected portion of the contract remains in effect. Thus, in the period following bankruptcy court action, the debtor-in-possession's unilateral abrogation of the terms of the remaining contract would be an unfair labor practice under NLRA section 8(d).[49] Complications may arise, however, with respect to provisions that have been removed from the contract by a court-approved modification.

Subject to the limitations discussed in the next section, the

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47. 11 U.S.C. § 1113(b)(1)(B) (Supp. II 1984).

48. NLRB v. Bildisco & Bildisco, 465 U.S. 513, 534 (1984). This was consistent with prior court and board authority. *See* Brotherhood of Ry. Clerks v. REA Express, Inc., 523 F.2d 164, 169 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975); Oxford Structures, Ltd., 245 N.L.R.B. 1180, 1183 (1979).

49. For a discussion of the conflict that would exist if an alleged contract "breach" also involved a court approved change in the debtor's business operations, see *infra* text accompanying notes 63-96.

NLRA bargaining duties generally apply during the postrejection period. Section 8(d), however, provides that these duties "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period."[50] The "contained in" requirement is generally met if a topic has been " 'fully discussed' or 'consciously explored,' " and it can be fairly concluded that the matter was put to rest for the term of the contract; the omission of that topic from the contract is considered part of the contemporaneous bargain.[51] There is no reason why bargaining that precedes court approval or rejection of a particular contract term, pursuant to provisions of section 1113, should be treated any differently. The result is that there will be no contract limitations or provisions with respect to that topic.

This result means that the debtor-in-possession would have no duty to bargain further. But it also means that any attempt to force the debtor to bargain over this topic by means of a strike would itself be an unfair labor practice under NLRA section 8(d), and strike participants would lose their status as employees because such conduct would be a breach of the section 8(d) duty to continue "in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract"[52]—including the implied term about omission.[53] In this instance, provisions of section 8(d) actually complement and reinforce the binding effect that a section 1113 modification is intended to have.

If the old contract is rejected in its entirety, the debtor-in-possession will presumably have an NLRA section 8(a)(5) duty to bargain with the union over the terms of a new agreement. Although as a practical matter the debtor-in-possession would simply continue the bargaining that occurred prior to rejection,

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50. 29 U.S.C. § 158(d) (1982).

51. *See, e.g.,* Jacobs Mfg. Co., 94 N.L.R.B. 1214, 1228 (1951), *enforced,* 196 F.2d 680 (2d Cir. 1952); Proctor Mfg. Corp., 131 N.L.R.B. 1166, 1169 (1961). *See generally* F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 176-77 (1977); 1 A.B.A. SECTION OF LABOR AND EMPLOYMENT LAW, THE DEVELOPING LABOR LAW 672-74 (C. Morris 2d ed. 1983) [hereinafter THE DEVELOPING LABOR LAW].

52. 29 U.S.C. § 158(d)(4); *see* Local No. 3, United Packing House Workers v. NLRB, 210 F.2d 325 (8th Cir.), *cert. denied,* 348 U.S. 822 (1954) (loss of employee status); Carpenters' Dist. Council, 172 N.L.R.B. 793 (1968) (strike as an unfair labor practice).

53. If the unrejected portion of the contract contains a broad no-strike clause (*e.g.,* one that is not limited by the scope of the arbitration clause), then a strike in this situation would also be a breach of contract and actionable on that basis as well. *Accord* Pacemaker Yacht Co. v. NLRB, 663 F.2d 455 (3d Cir. 1981).

this bargaining would now be governed by NLRA standards. If negotiations are successful, the debtor-in-possession will then have the duty under NLRA section 8(d) to execute "a written contract incorporating any agreement reached during the bargaining process." At this point, however, there is a potential conflict with the requirements of the Bankruptcy Code.

In *Local Joint Executive Board v. Hotel Circle, Inc.*,[54] which was decided under the Bankruptcy Act of 1898, the Ninth Circuit held that a trustee lacked authority either to affirm a collective bargaining agreement without court approval, now an express requirement,[55] or to enter into a new agreement without court approval. Although the court conceded that a trustee has authority to enter into contracts "incidental and usual" to operation of the business, it thought that this authority referred only to contracts for supplies and services needed by the trustee in daily business operations.[56] Major long-term contracts extending beyond the receivership, such as collective bargaining agreements, required bankruptcy court approval.[57] However, a contrary result was reached in *In re DeLuca Distributing Co.*,[58] which was decided under the current Bankruptcy Code. The court noted that while the former act, under which *Hotel Circle* was decided, required a high degree of judicial supervision over the debtor's estate, one of the code's purposes was to relieve bankruptcy judges from the business details involved in case administration.[59] Thus, section 363(c)(1) authorized the trustee to "enter into transactions . . . in the ordinary course of business, without notice or a hearing . . . ."[60] The court further defined "ordinariness" in terms of "the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business."[61] The debtor-employer in this case was a member of a multi-employer bargaining unit. After the bankruptcy petition was filed the employer bargaining association renegotiated the group's contract with the union. The debtor-employer was clearly bound by the new contract as a

54. 613 F.2d 210 (9th Cir. 1980).
55. 29 U.S.C. § 158(d) (1982).
56. *Hotel Circle*, 613 F.2d at 217-18.
57. *Accord* Chicago Deposit Vault Co. v. McNulta, 153 U.S. 554, 561 (1894).
58. 38 Bankr. 588 (Bankr. N.D. Ohio 1984).
59. *Id.* at 592-93.
60. 11 U.S.C. § 363(c)(1) (1982).
61. *DeLuca*, 38 Bankr. at 593 (quoting *In re* James A. Phillips, Inc., 29 Bankr. 391, 394 (S.D.N.Y. 1983)).

matter of federal labor law, but maintained that since the bankruptcy court had not approved the new agreement, it could not be enforced against him. The court, however, concluded that the creditors had a reasonable expectation that this debtor would continue to be subject to collective bargaining agreements and found, therefore, "that where the debtor's employees have continually been covered by a collective bargaining agreement, a new collective bargaining agreement is a transaction in the ordinary course of business . . . ."[62]

Although it seems a bit anomalous to hold that assuming an existing collective bargaining agreement requires court approval but negotiating a new one does not, the *DeLuca* result may be proper under the facts of that case: the collective bargaining agreements were apparently not a point of controversy in the bankruptcy; the employer had acquiesced in the new contract without objection; it had enjoyed the benefits of labor peace under the agreements during its peak business period; and the court obviously thought that the employer's after-the-fact attempt to escape the agreement bordered on fraud.

The *DeLuca* case, however, should not be read as holding that the negotiation of a new collective bargaining agreement by a debtor-in-possession is *always* a transaction "in the ordinary course of business," which *never* requires prior court approval. To the contrary, when the debtor under section 1113 rejects a contract that had burdened the estate, and then negotiates a new contract, the new agreement can hardly be considered "in the ordinary course of business." If the debtor-in-possession actually signs the new agreement and none of the creditors later object, then he should probably be bound. On the other hand, the debtor or any objecting creditor should have the right to request court review of the new contract, and if approval is not given, then the debtor's NLRA section 8(d) duty to sign the agreement and abide by its terms should be abrogated in favor of the exigencies of bankruptcy.

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62. *DeLuca*, 38 Bankr. at 594; *accord* Sealift Maritime, Inc., 265 N.L.R.B. 1219 (1982). In *Sealift*, the debtor-in-possession first assumed the collective bargaining agreement with bankruptcy court approval, but later agreed to a modification. The NLRB found that this modification was "in the ordinary course of business" under the Bankruptcy Code, that court approval was not required, and that the modified contract was thus valid for the purposes of the "contract bar doctrine." *Id.* at 1220; *see also In re* IML Freight, Inc., 37 Bankr. 556, 559 (Bankr. D. Utah 1984) ("[t]he delicate mechanism of negotiations leading to post-petition contracts should not be influenced by the expectation of court approval or disapproval").

C. Other NLRA Bargaining Duties

Bankruptcy and labor law bargaining duty conflicts can occur even if the Chapter 11 debtor-in-possession does not formally attempt to modify or reject its collective bargaining agreement. For example, as a part of its reorganization plan, a Chapter 11 employer may find it necessary to close, relocate, or substantially alter the nature of its business operation. Decisions of this kind may implicate three different kinds of NLRA bargaining duties.[63]

In *Milwaukee Spring I*,[64] the NLRB held that relocation of unit work from a union to a nonunion facility during the term of a collective bargaining agreement constituted a midterm repudiation of the agreement in violation of section 8(d). Later, in *Milwaukee Spring II*,[65] the board reversed itself, holding that the section 8(d) prohibition against midterm modification or repudiation applied only to terms "contained in" the agreement. Since the board could find no express or implied agreement to preserve work at the Milwaukee plant for the duration of the contract, the relocation did not breach the contract and thus did not violate section 8(d). *Milwaukee Spring II* was affirmed on appeal, albeit on a slightly different theory—namely, the decision to relocate was either an inherent "reserved right" or was authorized by the management rights clause. Either construction obviated any possible section 8(d) violation.

Although the law in this area is still somewhat obscure, it would appear that in certain narrow circumstances a decision to relocate or close a facility might still be covered by section 8(d); the employer would then be required to obtain union approval before implementing the decision. The conflict arises when relocation or closing has also been made part of a Chapter 11 reorganization plan approved by the bankruptcy court.

This conflict, however, is fairly easy to resolve. If a decision to relocate or close a facility is of a kind that would violate sec-

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63. *See generally* P. MISCIMARAA, THE NLRB AND MANAGERIAL DISCRETION: PLANT CLOSINGS, RELOCATIONS, SUBCONTRACTING AND AUTOMATION (1983).

64. 265 N.L.R.B. 206 (1982), *rev'd*, 268 N.L.R.B. 601 (1984); *see also* Los Angeles Marine Hardware Co., 235 N.L.R.B. 720 (1978), *enforced*, 602 F.2d 1302 (9th Cir. 1979); The Boeing Co., 230 N.L.R.B. 696 (1977), *enforcement denied*, 581 F.2d 793 (9th Cir. 1978); University of Chicago, 210 N.L.R.B. 190 (1974), *enforcement denied*, 514 F.2d 942 (7th Cir. 1975).

65. 268 N.L.R.B. 601 (1984), *enforced sub nom.* Local 547, UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

tion 8(d), then *a fortiori* it is also a partial modification if not total repudiation of the collective bargaining agreement. If the closure or relocation is so construed, it necessarily follows that section 1113 of the Bankruptcy Code applies. But since an employer's *right* to modify or repudiate a contract under section 1113 supersedes its *duty* to adhere to terms of that contract under section 8(d) of the NLRA, the employer must only satisfy the section 1113 requirements. Thus, although an employer should be required to engage in some degree of "bargaining" with the union about a decision to relocate or close, it is not required to obtain the union's approval as would be the case under the NLRA.

In sum, bankruptcy law should take labor law interests into account in the following fashion. If, but only if, the decision to close or relocate a facility would otherwise qualify as a section 8(d) violation, the court should treat it as a partial modification or repudiation of the contract requiring exhaustion of all section 1113 procedures. But, as with literal contract modification or rejection, duties imposed by the Bankruptcy Code completely supersede those imposed by section 8(d).[66]

The second NLRA bargaining duty that may be implicated by a Chapter 11 reorganization is an employer's section 8(a)(5) duty to bargain to impasse before making any changes with respect to a matter statutorily defined as a mandatory subject of bargaining.[67] This duty goes beyond the section 8(d) duty to honor terms of an existing agreement, and thus applies even when the contract is silent. As was seen earlier, except in the contract rejection context, Congress apparently intended that normal section 8(a)(5) bargaining duties would continue to apply to a debtor-in-possession. The duty to bargain before making changes in wages, hours, and working conditions is an integral part of section 8(a)(5). It would thus seem that unilateral change

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66. Bankruptcy court approval of the change should also be dispositive of any alleged antiunion discrimination under section 8(a)(3). 29 U.S.C. § 158(a)(3) (1982). Regardless of the debtor's subjective motivation, if the change is found to be justified by the exigencies of bankruptcy, then that should be controlling. From the bankruptcy perspective, it is irrelevant whether the NLRB interference flows from section 8(a)(3), rather than sections 8(a)(5) and 8(d). Other aspects of section 8(a)(3), such as the prohibition against discrimination toward specific individuals, would of course remain in effect.

67. NLRB v. Katz, 369 U.S. 736 (1962). *See generally* 1 The Developing Labor Law, *supra* note 51, at 563-66; Turner, *Impasse in the "Real World" of Labor Relations: Where Does the Board Stand?*, 10 Employee Rel. L.J. 468 (1985).

by a debtor-in-possession or trustee should be considered an unfair labor practice.[68] In most instances, imposition of such a duty would implicate no bankruptcy law interests. But if the change also requires bankruptcy court approval, then the question becomes whetber the debtor's duty to obtain approval supersedes its duty under the NLRA to also hargain first with the union.

The problem is probably not significant since the issue would arise only when the change in question is one that would otherwise be subject *both* to bankruptcy court approval *and* NLRA bargaining requirements. Bankruptcy court approval, however, would normally be required only for major operational changes—plant closures, relocations, sales, large-scale subcontracting, and other matters necessarily included in a reorganization plan. The NLRA duty to bargain over matters of this genre is somewhat limited. The Supreme Court in *First National Maintenance Corp. v. NLRB*[69] held that a decision to close part of a business for economic reasons unrelated to wages did not involve a mandatory subject of bargaining. Although the Court limited the decision to the facts before it and expressly declined to rule on "other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc. . . .",[70] subsequent decisions have used the underlying philosophy of *First National Maintenance* as justification for limiting the duty to bargain over those kinds of business decisions as well.[71]

Nevertheless, cases will doubtless still arise in which the debtor-in-possession's court-approved reorganization plan in-

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68. *Bildisco's* implications for this issue are unclear. The Supreme Court suggested in a footnote that changes in working conditions and other mandatory subjects of bargaining that would necessarily accompany contract rejection could not be considered § 8(a)(5) violations of the "unilateral change" variety. It is not an 8(a)(5) violation because that interpretation would simply be another way of achieving what the Court said § 8(d) itself did not achieve, namely interim enforcement of the contract pending court approval of its rejection. NLRB v. Bildisco & Bildisco, 465 U.S. 513, 533 n.14 (1984); *see also* Durand v. NLRB, 296 F. Supp. 1049, 1056 (W.D. Ark. 1969). But the opinion leaves open the question of whether a unilateral change that did not also involve a potential section 8(d) violation could still be considered an unfair labor practice under section 8(a)(5).

69. 452 U.S. 666 (1981).

70. *Id.* at 686 n.22.

71. *See, e.g.,* Gar Wood-Detroit Truck Equipment, Inc., 274 N.L.R.B. No. 23 (1985) (subcontracting); Bostrom Div., UOP, Inc., 272 N.L.R.B. 999 (1984) (closure, consolidation of operations, and subcontracting); Fraser Shipyards, Inc., 272 N.L.R.B. 496 (1984) (closure and subcontracting); Otis Elevator Co. (II), 269 N.L.R.B. 891 (1984) (relocations and sales).

cludes some kind of operational change that is arguably also a mandatory subject of bargaining. The question is whether the two laws can both apply in this context. At first blush, it would seem that the debtor-in-possession should be able to discharge its NLRA duty without much difficulty or interference with the bankruptcy process. The NLRA requires only notice and good faith bargaining, possibly to impasse; it does not require that the employer necessarily obtain union agreement to the change.[72]

On the other hand, while *discharge* of the NLRA bargaining duty over operational changes would not seem to impose any significant impediments to the bankruptcy process, *administrative enforcement* of that duty would. Whether the change involved a mandatory subject of bargaining, whether the debtor-in-possession evidenced the required amount of "good faith,"[73] and whether impasse was reached before the change was made,[74] are all complicated issues. Participation in unfair labor practice proceedings would be burdensome to the debtor-in-possession, to the estate, and to all other creditors.[75] If the charge is found to have been without merit, then the estate will have been unnecessarily burdened. Even if the charge is ultimately upheld, by then there will be no remedy that the NLRB can impose that will not be blatantly inconsistent with bankruptcy court approval of the change.

For example, in the nonbankruptcy context, the board has sometimes ordered an employer to first restore the *status quo ante* and then bargain about the desired change.[76] The NLRB, however, should not be allowed to unravel a Chapter 11 court-approved reorganization plan in that fashion. Alternatively, the board has sometimes held that the employer is liable for backpay to terminated employees because of the change, with

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72. Bi-Rite Foods, Inc., 147 N.L.R.B. 59, 64-65 (1964).

73. *See generally* 1 THE DEVELOPING LABOR LAW, *supra* note 51, at 570-606.

74. *Id.* at 634-36.

75. Judicial notice may be taken of the fact that proceedings before the Board and review or enforcement proceedings in the courts are protracted and expensive, and to the extent that expenses of litigation are paid out of the bankruptcy estate, the burden will fall ultimately on the former employees of the bankrupt or on the secured claimants.

Durand v. NLRB, 296 F. Supp. 1049, 1054 (W.D.Ark. 1969). *See generally* E. MILLER, AN ADMINISTRATIVE APPRAISAL OF THE NLRB (rev. ed. 1980).

76. Weather Tamer, Inc., 253 N.L.R.B. 293 (1980), *enforced in part, enforcement denied in part,* 676 F.2d 483 (11th Cir. 1982); Smyth Mfg. Co. 247 N.L.R.B. 1139 (1980). *See generally* D. MCDOWELL & K. HUHN, NLRB REMEDIES FOR UNFAIR LABOR PRACTICES 210-11 (1976).

liability running from the date of termination until the earliest of four conditions: (1) the parties reach an "agreement" about the change that the employer has already made; (2) they bargain about it to impasse; (3) the union fails to promptly request or commence bargaining; or (4) the union bargains in bad faith.[77] But backpay liability here is simply the "wages equivalent" or "counterpart" of actually reopening the facility. After the bankruptcy court has authorized a closure, the debtor-in-possession should have *no* further liability for its operation—either literally, by being required to reopen the facility, or figuratively, by being required to pay employees the wages they would have received "but for" closure. Either remedy is equally inconsistent with bankruptcy court authorization of facility closure. The threat of either remedy being imposed could significantly retard the development of a workable reorganization plan.

The presence of such a threat suggests that the NLRA duty to bargain over major operational changes, to the extent that it exists at all, should be abrogated when the employer is in Chapter 11 reorganization. Legitimate interests of the employees and union could be better served through bankruptcy law itself. The union may already be involved in making decisions about the change, either as a member of the creditors' committee[78] or, more properly, as a "party in interest" with a right to be heard on the reorganization plan.[79] If not, then the bankruptcy court should make a *Bildisco*-like accommodation of labor and bankruptcy law interests by requiring, as a condition of plan approval, that the debtor-in-possession first notify and "bargain" with the union over the matter. This requirement would serve the same objectives as section 8(a)(5), but without involving the NLRA's technical labor law nuances or the NLRB's time-consuming and ultimately futile processes.[80]

The third area in which an NLRA bargaining duty may conflict with the exigencies of bankruptcy involves so-called "effects bargaining." Even if a particular management decision is not itself a mandatory subject of bargaining, the employer still has the duty to bargain with the union over the decision's effect on

77. National Family Opinion, Inc., 246 N.L.R.B. 521, 521 (1979).

78. *In re* Altair Airlines, Inc., 727 F.2d 88 (3d Cir. 1984).

79. *See* Haggard, *Creditor's Committees*, *supra* note 8.

80. Section 8(a)(3) discrimination charges growing out of the change should be dealt with in the manner suggested in *supra* note 66.

employees.[81] "Effects bargaining" usually encompasses such matters as severance pay, letters of reference, preferential hiring at other facilities owned by the employer, and payments into a pension fund. What, then, of "effects bargaining" when the decision to close or relocate a plant is made by a debtor-in-possession or a bankruptcy trustee?

The Seventh Circuit was confronted with this issue in *Yorke v. NLRB*.[82] There, the Seeburg Corporation filed under Chapter 11, and Nathan Yorke was eventually appointed as trustee. Yorke decided it was necessary to terminate operations completely, and obtained bankruptcy court authorization to do so. Yorke did not know that the seven employees who remained on the payroll were represented by a union, but discovered this fact when he received a letter from the union demanding a meeting to "discuss the decision and effects that your action has on our bargaining unit employees."[83] Yorke's reply was apparently not satisfactory, and the union filed unfair labor practice charges. A complaint was filed which claimed that Yorke's "failure to give notice that he was terminating operations and his subsequent failure to bargain over the effects of that decision [violated] . . . §§ 8(a)(5) and 8(a)(1) of the [NLRA]."[84] The board ultimately found that Yorke had violated the NLRA,[85] issued a bargaining order, and "requir[ed] the Trustee to pay the seven employees their normal daily wage from five days after the board's decision until agreement or impasse over effects bargaining," provided the total was "not less than an amount equivalent to two weeks pay and not greater than an amount the employees would have received had they worked until the time they found alternative employment."[86]

In reviewing the board's decision, the court of appeals began with the proposition that "a Trustee in Bankruptcy, like any

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81. First National Maintenance Corp. v. NLRB, 452 U.S. 666, 681-82 (1981).

82. 709 F.2d 1138 (7th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984).

83. *Id.* at 1141.

84. *Id.* at 1142.

85. *Id.*; *see also* Burgmeyer Bros. Inc., 254 N.L.R.B. 1027, 1028 (1981) ("[A]n employer is not relieved of its obligation to bargain over the effects of its decision to close merely because it has become a debtor-in-possession under the Bankruptcy Act and believes that, as a result thereof, it would be financially unable to meet any of the Union's bargaining demands.").

86. *Yorke*, 709 F.2d at 1144. The award was based on the so-called "Transmarine formula," the remedy the Board normally orders when there has been a failure to engage in effects bargaining. Transmarine Navigation Corp., 170 N.L.R.B. 389 (1968).

other employer, must abide by the labor laws, as long as they prescribe conduct consistent with the duties imposed by the Bankruptcy Code."[87] The court then concluded that bargaining over the effects of a decision to terminate operations was consonant with a trustee's functions under the code. A trustee has responsibility for "preserving the estate," and the court reasoned that a Trustee thus had the power to terminate an operation if necessary. Costs or losses stemming from such actions are "administrative expenses," and the court concluded that "effects bargaining" fell into that category. The court admitted that "[w]hile the Trustee's discretion might be constrained by his need for authorization from the bankruptcy court, that limitation can be taken into account in any bargaining."[88]

The trustee also challenged the backpay order, alleging that it was punitive and unjustified in a bankruptcy context. The court, however, justified the order on two grounds. First, if the trustee had bargained when it was supposed to, the union would have had greater leverage in obtaining concessions than it was going to have when it bargained some three years after plant shutdown; second, such an award would in general create an incentive for good faith bargaining. The court did hold, however, that the two-week minimum should be computed from the date of its decision rather than from the date of the board's decision. The money was to come from the $55,000 the bankruptcy court had set aside for this purpose when it approved the reorganization plan.[89]

The *Yorke* decision drew a sharp dissent from Judge Coffey. He said that the "majority's rote and mechanistic application of principles that may be appropriate in the normal employer-employee relationship ignores the fact that this case arises in the context of a Federal Bankruptcy Chapter XI proceeding."[90] He considered the context important because the trustee or debtor-in-possession does not in fact have the same legal powers as the employer, but is subject to the restrictions of the Bankruptcy Code. Further,

> It is clear that the Trustee was not authorized to bargain with the Union without first receiving the approval of the Court. In

87. *Yorke*, 709 F.2d at 1142.
88. *Id.* at 1143.
89. *Id.* at 1145-46.
90. *Id.* at 1147 (Coffey, J., dissenting).

> light of the fact that "it is well settled bankruptcy law that on important decisions, whatever their character, the Trustee must get the court's approval," bargaining with a Union over the effects of the plant closing (e.g. severance pay, payments into the pension fund, etc.) obviously would entail making "important decisions" affecting the bankrupt corporation. Thus, the Trustee would be engaging in an exercise in futility were he to meet with the Union in an attempt to bargain, as he was without authority to bind the bankrupt corporation absent specific prior approval of the bankruptcy judge. If, on the other hand, the Trustee did purport to bind the bankrupt corporation, he would breach his duty as an officer of the court by acting on "important matters" without prior court approval.[91]

It is clear, however, that Judge Coffey merely objected to the union's precipitous filing of unfair labor practice charges. Rather than construing the trustee's letter as an unequivocal refusal to bargain, he viewed it as an invitation to further negotiations that the union should have accepted. The trustee, or even the union itself, could then appear before the bankruptcy court and seek authorization to bargain. "If the Bankruptcy Court refused to allow the Trustee to bargain, or if the Trustee subsequently failed to bargain in good faith, *then, and only then,* should the Union be permitted to bring an unfair labor practice charge before the NLRB."[92]

Judge Coffey correctly thought that the majority position failed to accommodate adequately the exigencies of bankruptcy. But he did not carry the logic of that premise to its ultimate conclusion, which would entirely abrogate the section 8(a)(5) duty to bargain over the effects of a court-approved change in business operations. Again, Judge Coffey's position is correct not because such bargaining is necessarily burdensome or inconsistent with bankruptcy processes; rather, it is because administrative enforcement of the duty is both futile and harmful from the bankruptcy perspective. *Yorke* is a good example of why the bankruptcy court should have exclusive jurisdiction over virtually all aspects of liquidation of the assets of a business.

In *Yorke,* it was almost three and a half years after termination of the business before the trustee was actually forced to bargain with the union over the effects of termination. Although it is possible that the trustee might have agreed to write letters

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91. *Id.* at 1149 (citation omitted).
92. *Id.* at 1150.

of recommendation or ask the company that purchased the assets to hire some of the displaced employees, it is unlikely that the trustee could have agreed to any kind of financial arrangements with the terminated employees. Assets of the estate had long since been distributed, and money set aside by the court was for satisfaction of the board's backpay order only; it was not available for distribution as part of effects bargaining. As a practical matter, the only result of the mandated effects bargaining was that the trustee and the union agreed to a settlement whereby the seven "discharged" employees were paid $27,500 out of the amount the bankruptcy court had set aside.[93]

The other creditors, however, were obviously disadvantaged by this use of estate assets. Employees received money not because they had earned it, but only because the trustee unwittingly breached an NLRA duty to bargain over the effects of plant closing.[94] That duty, or its equivalent, could have been more effectively imposed as a matter of bankruptcy law through a union's participation on the creditors' committee,[95] or by making such bargaining a condition of court approval of the closing or of the reorganization plan itself. The whole issue and expense of the NLRB proceedings could have been avoided if the NLRA duty to engage in effects bargaining were thus abrogated in favor of a bankruptcy law duty of like effect.

In sum, to the extent that operational changes or effects of operational changes by a debtor-in-possession or trustee require some degree of bargaining with a union, the duty to so bargain should be a matter of bankruptcy law and enforced by imposing the duty as a condition of plan approval. This approach serves the legitimate interests of not only the affected employees, but also of the debtor and its other creditors. Involvement by the

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93. Letter from Narcisse A. Brown, of Schwartz, Cooper, Kolb & Gaynor, attorneys for the trustee, to the author (July 19, 1985).

94. In a somewhat analogous context, the court in Durand v. NLRB, 296 F. Supp. 1049, 1058 (W.D. Ark. 1969), noted that "[t]aking money out of a bankruptcy estate to pay back wages to persons who did not work is certainly of no benefit to the estate or to security interests therein." The court also noted that secured creditors were responsible for neither the rejection of the contract nor the subsequent unfair labor practice, and said that the NLRB backpay award would thus be subordinated to secured claims. *Id.*

95. *See* Division of Advice Memorandum, Cooper-Jarrett, Inc., Case Nos. 6-CA-15414 and 6-CA-15424-2 (Nov. 29, 1982), 10 A.M.D. 20009 (1982). In recommending dismissal of a charge of an alleged breach of duty to bargain over effects of a closing, the memorandum noted that "the Union is the major creditor on the creditors committee in the bankruptcy proceeding and will therefore have a substantial role in the implementation of liquidation . . . ."

NLRB, in contrast, would be a time-consuming and expensive exercise in futility. In the words of Judge Coffey, "[i]t is the height of absurdity for the NLRB to exert a fatal chokehold on Congress's specific intent to allow mortally wounded businesses a chance to make a financial comeback at a time when our basic industries are struggling to survive."[96]

D. *Conflicts Over "Successorship" Doctrines*

Under the NLRA, one business entity can be considered the "successor" of another for at least four different purposes: (1) being fully bound by the terms of the predecessor's collective bargaining agreement,[97] (2) being bound by the contractual duty to arbitrate,[98] (3) having a duty to continue to recognize and bargain with the union as the employees' representative,[99] and (4) being responsible for remedying the predecessor's unfair labor practices.[100]

The NLRA successorship doctrine could conflict with bankruptcy law in several ways. For example, a debtor-in-possession, a trustee, or a receiver under the old law would appear to be a successor for almost all NLRA purposes, and has been so regarded by the board.[101] In contrast, some courts regarded the debtor-in-possession as a "new entity," and thus not responsible for anything that the debtor himself had done.[102] The Supreme Court's rejection of the "new entity" theory in *Bildisco* has apparently put that conflict to rest.[103]

The remaining conflict is between NLRA successorship doctrine and the bankruptcy law theory that, subject to some limi-

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96. *Yorke*, 709 F.2d at 1151 (Coffey, J., dissenting).

97. Crawford Door Sales Co., 226 N.L.R.B. 1144 (1976) (an employer who is a successor in this sense is referred to as an "alter ego").

98. John Wiley & Sons v. Livingston, 376 U.S. 543 (1964).

99. NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972).

100. Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973).

101. *See* Oxford Structures, Ltd., 245 N.L.R.B. 1180 (1979); Jersey Juniors, Inc., 230 N.L.R.B. 329 (1977); *see also In re* Bel Air Chateau Hosp., Inc., 611 F.2d 1248, 1251 (9th Cir. 1979) (holding that "[w]hether a new employer [a federal bankruptcy receiver] is an 'alter ego' or a 'successor' to an earlier employer is a question of substantive federal labor law, the resolution of which is committed to the Board and the courts that review its determinations").

102. *See, e.g.*, Brotherhood of Ry. Clerks v. REA Express, Inc., 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

103. NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) ("For our purposes, it is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition . . . .").

tations, the purchaser of assets at a liquidation sale takes title to property free of all claims.[104] Here, no single resolution is possible. Rather, whether the predecessor's labor law obligations bind a purchaser should turn on the nature of the obligation.

1. The Successor's Duty to Remedy Unfair Labor Practices

Under NLRB law, "one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct."[105] The board has consistently held that a trustee in bankruptcy is the alter ego of the debtor-employer and thus responsible for remedying its unfair labor practices.[106] In *International Technical Products Corp.*, (ITP)[107] the board also applied that doctrine to the purchaser of the physical assets of a bankrupt company. The trustee had obtained bankruptcy court approval to sell the assets "free and clear of all liens and encumbrances"[108] and to transfer all liens to proceeds of the sale. ITP then purchased the assets and continued operations with the same employees and in essentially the same manner as had the bankrupt. The NLRB had previously found the predecessor liable for unfair labor practices, and after the sale the General Counsel initiated backpay proceedings against ITP. The board held that ITP's liability was not extinguished by the bankruptcy court order authorizing the sale free of all liens, claims, and encumbrances. It reasoned that enforcement of a remedial order "rests exclusively with the Board and the appropriate reviewing Federal courts, and not the bankruptcy courts."[109] The board held that allowing the bankruptcy court to effectively nullify a board order by exonerating a successor from liability for backpay would be tantamount to a relinquishment of its

104. 11 U.S.C. § 363(f) (1982); *see* 2 Collier On Bankruptcy ¶ 363.07, at 363-29 to -30 (L. King 15th ed. 1984).

105. Perma Vinyl Corp., 164 N.L.R.B. 968, 969 (1967), *enforced sub nom.* United States Pipe & Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1968). The *Perma Vinyl* test was approved and applied by the Supreme Court in Golden State Bottling Co. v. NLRB, 414 U.S. 168, 171 n.2 (1973).

106. *See* Ohio Container Service, Inc., 277 N.L.R.B. No. 25 n.5 (1985) (holding that these decisions were not overruled by the *Bildisco* decision).

107. 249 N.L.R.B. 1301 (1980).

108. *Id.* at 1302.

109. *Id.* at 1303.

statutory obligation. Moreover, although tbe order in the case apparently involved only financial reimbursement, an order would ordinarily also require an employer to take other kinds of action of a nonmonetary nature; a board order, it argued, thus "cannot be classified or treated simply as a 'lien, claim or encumbrance' within the common usage of those terms,"[110] and the judicial sale did not have the effect of extinguishing ITP's liability.

Member Pennello dissented, arguing that the majority "improperly fail[ed] to interpret [tbe NLRA] in comity with other important Federal objectives,"[111] namely those served by operation of the Bankruptcy Code. He then noted that the purpose of a "free and clear" sale is to enhance the value of assets being sold and thus ensure that proceeds will equal or exceed the amount of liens on the property, so that *all* general unsecured creditors will receive at least something. He also noted that the sale of assets would be more difficult, if the purchaser remained liable for the debtor's backpay obligations. Moreover, Pennello noted that in *Nathanson v. NLRB*,[112] the Supreme Court held that the purposes of the NLRA were adequately served by treating the board, in enforcing a backpay award against a bankrupt entity, like any other unsecured creditor. The board's preference over other creditors was then determined by bankruptcy law whose theme is equality of distribution. Penello concluded that by seeking to recover the full amount of the backpay award from ITP rather than filing a claim against the estate and taking its equal share vis-à-vis other creditors, the board simply attempted an "end run" around the Bankruptcy Act.[113]

It is not surprising that in analogous contexts bankruptcy courts have sided with Penello. *In re New England Fish Co.*[114] involved a backpay claim that arose, not under the NLRA, but under Title VII of the Civil Rights Act of 1964. Title VII, however, has a successorship doctrine virtually identical to the one applied by the NLRB. The trustee and tbe would-be purchaser asked for and received a declaratory judgment that the sale of assets would be clear of any monetary liability growing out of alleged civil rights violations by the debtor. Like Penello, the

110. *Id.* at 1304.
111. *Id.* (Penello, dissenting).
112. 344 U.S. 25 (1952).
113. *Technical Products*, 249 N.L.R.B. at 1307 (Penello, dissenting).
114. 19 Bankr. 323 (Bankr. W.D. Wash. 1982).

court thought that the *Nathanson* requirement that statutory backpay claims be afforded no special priority was controlling, and that allowing certain claimants but not others to recover directly from the purchaser of assets would subvert that requirement. Also like Penello, the court was sensitive to practical consequences. It noted that the purchaser "would not and will not take the business burdened with civil rights litigation. No purchaser would. Such a prospect would chill or render impossible any sale. Those who would suffer from the uncertainty and delay would be creditors, including the [instant] claimants themselves."[115]

Penello and the bankruptcy court were clearly correct. Their approach does not leave employee-victims of unfair labor practices without relief; beneficiaries of NLRB backpay awards have the same rights vis-à-vis assets of the estate or proceeds of the sale thereof as any other general unsecured creditor. Tbe award, thus, does not become a complete nullity due to inapplicability of the successorship doctrine.

That, at least, is true with respect to the backpay aspects of an award. But what of the prospective aspects of an award, such as an order requiring reinstatement of a wrongfully discharged employee? If the original violator is now completely out of business and the purchaser is not regarded as a successor, then as a practical matter the victim is left without any prospective remedies. The district court in *Forde v. Kee-Lox Manufacturing Co.* recognized this problem, but concluded that "[t]his state of affairs is one of the unfortunate yet unavoidable consequences of our bankruptcy system."[116] There is, however, some justification for that result. In order to promote free alienability of the bankrupt's assets, the purchaser must have maximum freedom to select and structure its own work force. This freedom could be significantly curtailed if the purchaser were bound to honor a reinstatement order that covered a substantial number of former

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115. *Id.* at 328-29. In Durand v. NLRB, 296 F. Supp. 1049 (W.D. Ark. 1969), the court noted that the successor's fear of being held liable for the predecessor's unfair labor practices made it unwilling to put tbe plant into operation except on a limited basis, and that the employees allegedly injured by the unfair labor practice were thus injured even further by the threat of successor liability. *See also* Forde v. Kee-Lox Mfg. Co., 437 F. Supp. 631, 633-34 (W.D.N.Y. 1977) ("If the trustee in a liquidation sale is not able to transfer title to the bankrupt's assets free of all claims, including civil rights claims, prospective purchasers may be unwilling to pay a fair price for the property, leaving less to the creditors").

116. 437 F. Supp. 631, 634 (W.D.N.Y. 1977)

employees. Moreover, even under NLRA law, the purchaser of assets is not required to hire all of the predecessor's employees.[117] The purchaser, however, may not discriminatorily refuse to hire these employees either because of union activities or membership or because of a desire to avoid a duty to recognize and bargain with the incumbent union.[118] Thus, in order to avoid giving beneficiaries of an NLRB reinstatement order a "windfall" not enjoyed by other employees, the purchaser should not be bound to honor the reinstatement order *as such.* But beneficiaries of the reinstatement order are entitled to be treated as if they too were active employees on the date of the sale, which means that in making its initial hiring decisions the purchaser has a duty not to discriminate against them on an impermissible basis. In this way, the interests of bankruptcy law in facilitating the sale of assets and the interests of "wronged" employees are both adequately and fairly served.

2. The Successor's Duty to Honor the Collective Bargaining Agreement

Under the successorship doctrine, a purchaser is normally not bound by the terms of the seller's collective bargaining agreement unless the subsequent employer is but a disguised continuation or alter ego of the predecessor employer or "the two enterprises have 'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership."[119] The board has not been quick to find alter ego status in the bankruptcy context or elsewhere.[120] But it is possible that a Chapter 11 reorganization plan may produce a new corporate entity, which would be free of the predecessor's liabilities and contractual obligations as a matter of bankruptcy

117. Howard Johnson Co. v. Detroit Joint Executive Bd., Hotel & Restaurant Employees, 417 U.S. 249, 261 (1974); NLRB v. Burns Int'l Sec. Servs., Inc, 406 U.S. 272, 280 n.5. (1972).

118. Howard Johnson Co. v. Detroit Joint Executive Bd., Hotel & Restaurant Employees, 417 U.S. 249, 262 n.8 (1974); NLRB v. Burns Int'l Sec. Servs., Inc, 406 U.S. 272, 280 n.5. (1972).

119. Crawford Door Sales Co., 226 N.L.R.B. 1144 (1972).

120. *See* Blazer Indus., Inc., 236 N.L.R.B. 103, 110 (1978) (held that it was an arm's length sale, with no evidence of fraud or intent to circumvent the labor statute); Jersey Juniors, Inc., 230 N.L.R.B. 329, 334 (1977) (held that respondent was a "successor" for the purpose of being required to recognize and bargain with the union, but that it was not an "alter ego" for the purpose of being bound by the terms of the predecessor's collective bargaining agreement).

law, but would nevertheless be an alter ego for purposes of labor law.[121] Such an after-the-fact imposition of contract liability should be avoided,[122] and can be only if bankruptcy law is allowed to control.

This is not to say that the bankruptcy court should be oblivious to labor law interests. Rather, when it appears that the Chapter 11 reorganization plan will produce a corporate entity qualifying as an alter ego under labor statutes, the court should either expressly require that the new corporation honor the existing collective bargaining agreement or that the debtor-in-possession use section 1113 procedures for contract rejection before proceeding further with reorganization. Conversely, if the bankruptcy court finds that the new corporate owner is not an alter ego under the labor statutes, that finding should be determinative and not subject to relitigation before the board.

3. The Successor's Duty to Honor the Arbitration Clause of the Old Contract

In *John Wiley & Sons, Inc. v. Livingston*,[123] the Supreme Court held that under certain limited circumstances, while the contract as a whole did not necessarily survive as a matter of statutory law, a successor employer could be bound by the predecessor's contractual duty to arbitrate; the arbitrator would then decide as a matter of contract law whether the successor was

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121. In William B. Allen, 267 N.L.R.B. 700 (1983), *enforced*, 758 F.2d 1145 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 882 (1986), the board held that the named respondent was the alter ego of the original employer, and thus bound to remedy the predecessor's unfair labor practices, recognize and bargain with the union, and honor the collective bargaining agreement. *Id.* at 705. In *Allen*, however, it appears that the employer simply changed names and went through what the ALJ referred to as "a series of chameleonlike corporate metamorphoses," *id.* at 706, and it is not clear how involved the bankruptcy court was, or whether there was any court involvement at all. In Century Printing Co., 242 N.L.R.B. 659 (1979), *enforced per curiam*, 108 L.R.R.M. (BNA) 2279 (3d Cir. 1981), the board applied the alter ego label to the purchaser of assets in a sale approved by the bankruptcy court. Contract survival, however, was not at issue there since the court had previously approved the contract's rejection. *See also* Marquis Printing Corp., 213 N.L.R.B. 394 (1974) (purchaser from assignee for benefit of creditors held to be an alter ego; debtor was not in bankruptcy, however).

122. Comment, *The Unenforceable Successorship Clause: A Departure From National Labor Policy*, 30 UCLA L. Rev. 1249, 1276-77 (1983) ("It would serve no purpose for the courts to rigidly enforce the collective bargaining agreement against the successor employer when to do so would either prevent the transfer of the business altogether (and push the predecessor into bankruptcy) or drive the successor employer into economic collapse.").

123. 376 U.S. 543 (1964).

bound by any other contract provisions. It is not clear how much of *Wiley*, if any, survives the Supreme Court's later and more restrictive interpretations of the successorship doctrine.[124] But if, *as a matter of bankruptcy law*, none of the collective bargaining agreement survives a "free and clear" sale and the purchaser is not otherwise liable for the predecessor's contract breaches, there is simply nothing left to arbitrate. A section 301 action against the purchaser to compel arbitration should, therefore, be dismissed.[125]

4. The Successor's Duty to Recognize and Bargain with the Incumbent Union

The final way in which the successorship doctrine is traditionally used in labor law involves a successor's duty to continue to recognize and bargain with the union that represented the predecessor's employees. The board has held that if the purchaser of assets in a bankruptcy sale otherwise qualifies as a successor in this sense, the duty to recognize and bargain remains intact.[126] That position would seem correct. The right being asserted is in no way analogous to a "claim" against the predecessor for which the purchaser is now being held liable. Such a claim grows out of something the predecessor has done, like agreeing to a contract or discharging an employee in violation of law. The duty to recognize and bargain, in contrast, grows out of the situation at the time the purchaser begins operation.[127] It is not a duty that the purchaser "inherits" from the seller. Rather it is a new and independent duty. Moreover, the only effect that application of the successorship doctrine has here is to raise a presumption that the union continues to enjoy majority status.[128] The presumption would be irrebuttable during the year

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124. *See* Severson & Willcoxon, *Successorship Under* Howard Johnson: *Short Order Justice for Employees*, 64 CALIF. L. REV. 795 (1976); Note, *The Impact of* Howard Johnson *on Labor Obligations of the Successor Employer*, 74 MICH. L. REV. 555 (1976).

125. *See generally* Owens-Illinois, Inc. v. District 65, Retail Store Union, 276 F. Supp. 740 (S.D.N.Y. 1967) (employer's action against union for declaratory judgment).

126. Jersey Juniors, Inc., 230 N.L.R.B. 329, 332-33 (1977); *see* William B. Allen, 267 N.L.R.B. 700 (1983).

127. The determination of "bargaining duty successorship" focuses upon whether there is a substantial continuity in work force, continuity in the employing industry, continuity in the appropriateness of the bargaining unit, and the impact of a hiatus in operations. *See generally* 1 THE DEVELOPING LABOR LAW, *supra* note 51, at 712-35.

128. Ranch-Way, Inc., 203 N.L.R.B. 911, 912 (1973).

following original certification,[129] but after that could be rebutted by a showing of good faith doubt based on "objective considerations."[130] Even if the presumption cannot be rebutted by the successor, its duty is merely to bargain with the union before making changes in wages, hours, and working conditions; the purchaser/successor is not required to obtain the union's actual assent to these changes.[131]

Thus, while a "free and clear" purchaser would undoubtedly prefer that the burden be on the union to reestablish its majority status through an NLRB election, the advantage that gives the purchaser (over having the burden to rebut the presumption of continued majority support) is probably not significant enough to affect a decision about whether to purchase assets. Therefore, application of the successorship doctrine here would not seriously implicate any bankruptcy law interests.

II. Jurisdictional Conflicts—Bankruptcy as the Exclusive and Preemptive Forum

Although it is not unheard of for the NLRB to attempt to prevent a bankruptcy court from exercising its jurisdiction,[132] the matter usually comes up the other way around: the bankruptcy court is asked to forestall NLRB action and bring the case into its own bailiwick. Various mechanical or procedural devices available to the bankruptcy court in its assertion of exclusive or preemptive jurisdiction over NLRB matters and the propriety of their use in any given situation, are discussed below.

A. *Removal*

Removal of actions to bankruptcy courts was authorized for the first time in the Bankruptcy Reform Act of 1978. In relevant part, the removal section currently provides that "[a] party may remove any claim or cause of action in a civil action other than . . . a civil action by a governmental unit to enforce such governmental unit's police or regulatory power . . . ."[133]

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129. Dynamic Mach. Co., 221 N.L.R.B. 1140, 1142 (1975), *enforced*, 552 F.2d 1195 (7th Cir. 1977).

130. Virginia Sportswear, Inc., 226 N.L.R.B. 1296, 1301 (1976).

131. Ranch-Way, Inc., 203 N.L.R.B. 911, 912-13 (1972).

132. *See, e.g., In re* Unit Parts Co., 9 Bankr. 386 (Bankr. W.D. Okla. 1981).

133. 28 U.S.C.A. § 1452(a) (West Supp. 1985). The statute further provides that removal shall be "to the district court for the district where such civil action is pending." This position is consistent with the jurisdictional section itself, which vests jurisdiction

In *In re Adams Delivery Service, Inc.*,[134] a bankruptcy judge used the removal section to remove from the NLRB determination of a backpay award for an employee whom the board had previously found was unlawfully discharged. A bankruptcy appellate panel of the Ninth Circuit held that removal was improper for two reasons.

First, the panel noted that the removal section is limited to "civil actions," that "the concept of a civil action is inseparable from a court proceeding," that "with respect to backpay liquidation proceedings the NLRB is not acting as a court,"[135] and that removal was therefore improper. Second, the court held that removal was improper because it fell within the exception for actions by a governmental unit to enforce its regulatory power. The court construed the relevant language of the removal section *in pari materia* with the similarly worded exception to the automatic stay provision, which it noted had been found to apply to NLRB proceedings.[136]

Construing the "police or regulatory power" exception of the removal statute by reference to similarly worded exceptions to the automatic stay provision would, at first blush, appear to be a reasonable approach for the bankruptcy court to have taken. While the automatic stay provision cases that the court relied on seem to support its position, the problem with the court's approach is that this area of bankruptcy law is confused and unclear.[137] The certainty and consistency that the court was

over bankruptcy matters in the federal district court; the bankruptcy court is nowhere mentioned in the jurisdictional sections. Section 157(a), however, allows the district court to refer bankruptcy matters "to the bankruptcy judges for the district." *Id.* § 157(a). In practice, apparently, the district court automatically refers all matters affecting the bankrupt or its estate to the bankruptcy judge within the district. *See generally* B. WEINTRAUB & A. RESNICK, BANKRUPTCY LAW MANUAL ¶ 6.03, § 6-8; ¶ 6.03A, § 6-13 & 14 (Cumulative Supp. No. 2 1984); Developments, *Jurisdiction: A New System for the Bankruptcy Courts*, 2 BANKR. DEV. J. 1, 9, 13 (1985). It has been suggested that matters coming before the district court by removal would probably be handled in the same fashion. 1 COLLIER ON BANKRUPTCY ¶ 3.01, at 3-54 (L. King 15th ed. 1985); D. COWANS, BANKRUPTCY LAW AND PRACTICE § 1.4 (1985). However, once the unfair labor practice claim was before the bankruptcy judge, it would still be subject to section 157(d), which requires the district judge, on timely motion by any party, to withdraw from the bankruptcy court "a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C.A. § 157(d) (West Supp. 1985). The NLRA is certainly such a law.

134. 24 Bankr. 589 (Bankr. 9th Cir. 1982).

135. *Id.* at 592.

136. *Id.* at 593; *see also In re* Unit Parts Co., 9 Bankr. 386, 391 (W.D. Okla. 1981).

137. *See infra* text accompanying notes 145-58.

striving for in taking the approach was, therefore, more illusory than real.

The court's construction of the term "civil action" is also open to question. As a general rule, removal jurisdiction should be equated with original jurisdiction, removal jurisdiction being narrower only if the statute specifically provides.[138] Given that rule, the court should have construed the bankruptcy removal statute by reference to the bankruptcy jurisdictional statute.[139] Since a good argument can be made that an unfair labor practice proceeding, particularly one that merely liquidates a backpay award as in *Adams,* is a "civil proceeding" for section 1334(b) jurisdictional purposes,[140] it should similarly qualify as a "civil action" for section 1452 removal purposes.

Finally, it should be noted that the two grounds on which the court relied in disallowing removal are mutually inconsistent. Enforcement of a "governmental unit's police or regulatory power," which the court held applicable to an NLRB proceeding to liquidate a backpay award, is specifically characterized as a "civil action" by the removal section itself. The language of the removal section is thus contrary to the court's holding that the term does not encompass such administrative proceedings.

B. *The Automatic Stay Provision*

Section 362(a) of the code provides that the filing of a petition in bankruptcy

> operates as a stay, applicable to all entities, of . . . the commencement or continuation, including the issuance or employment of process, of a judicial, *administrative,* or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . .[141]

Section 362(a)(2) similarly stays "the enforcement, against the debtor or against property of the estate, of a judgment obtained

138. C. WRIGHT, THE LAW OF FEDERAL COURTS 210, 214 (4th ed. 1983). The bankruptcy removal statute lists two such exceptions: "a proceeding before the United States Tax Court" and "a civil action by a governmental unit to enforce such governmental unit's police or regulatory power." 28 U.S.C.A. § 1452(a) (West Supp. 1985).

139. 28 U.S.C.A. § 1334(b) (West Supp. 1985).

140. *See infra* text accompanying notes 197-206.

141. 11 U.S.C. § 362(a) (1982) (emphasis added).

before the commencement of the case under this title."[142] This language would certainly seem to cover unfair labor practice proceedings, which are administrative in nature, and any attempt by the board to enforce backpay orders or other monetary remedies.

The automatic stay provision, however, is subject to several exceptions. The stay in subsection (a)(1) does not apply to "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's *police or regulatory power*."[143] Furthermore, the subsection (a)(2) stay does not apply to "the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's *police or regulatory power*."[144] Regardless of which exception applies, the critical question is whether the NLRB (including the general counsel and its staff) is acting within its "police or regulatory power" when it processes unfair labor practices, makes backpay determinations, and conducts representation proceedings and elections.

This is not an easy question to answer. To be sure, all the NLRB functions listed represent actions to "enforce [its] regulatory powers." But, in the broad sense, the same is true of any administrative agency action. Read literally, therefore, the exception is as broad as the rule; what subsection (a) "gives," by mandating a stay, subsections (b)(4) and (b)(5) "take away." But that is a silly and erroneous way to interpret statutes. Rather, one must assume that something qualifies as an administrative proceeding under subsection (a) but is not an action to enforce the agency's police or regulatory power under subsection (b) exceptions.

The courts have not had an easy time identifying this middle ground even in non-NLRA contexts.[145] The analysis inevitably proceeds from legislative history. For example, legislative history of the operative provisions of section 362 suggests that this section was intended to have very broad scope. It states that

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142. *Id.* § 362(a)(2).

143. *Id.* § 362(b)(4) (emphasis added).

144. *Id.* § 362(b)(5) (emphasis added).

145. For a thorough discussion of the controlling precedent, see *In re* Rath Packing Co., 35 Bankr. 615 (Bankr. N.D. Iowa 1983); Donovan v. TMC Indus., 20 Bankr. 997 (Bankr. N.D. Ga. 1982); Hennigan, *Accomodating Regulatory Enforcement and Bankruptcy Protection*, 59 AM. BANKR. L.J. 1, 9-38 (1985).

"*[a]ll proceedings* are stayed, including arbitration, *license revocation, administrative,* and judicial proceedings."[146] However, description of the exception's scope is equally broad:

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. *Paragraph (5) makes clear that the exception extends to permit an injunction . . . and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment.* Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.[147]

The other bit of legislative history relevant to this issue involves observations of Congressman Don Edwards:

> This section [364(b)(4)] is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.[148]

Several sets of distinctions may be drawn from the legislative history. For example, the proper distinction may be between regulation of conduct, on the one hand, and recovery of monetary amounts, on the other.[149] Under this view, if the unfair la-

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146. H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977) (emphasis added).

147. *Id.* at 343 (emphasis added).

148. 124 Cong. Rec. H11089 (1978) (statement of Rep. Edwards), *reprinted in* 1978 U.S. Code & Ad. News 6436, 6444-45.

149. Dicta in the recent Supreme Court case of Ohio v. Kovacs, 105 S. Ct. 705, 709 (1985), suggests that this may be a reasonable distinction. The Sixth Circuit in an earlier but related case had held that the automatic stay applied to the state's attempt to recover monetary damages for a violation of a state environmental law. Ohio v. Kovacs, 681 F.2d 454 (6th Cir. 1982), *vacated and remanded,* 459 U.S. 1167 (1983) (to consider the question of mootness). With respect to this decision, the Supreme Court said that "[i]n that court's view, while § 362(b) allowed governmental units to continue to enforce police powers through mandatory injunctions, it denied them the power to collect money in their enforcement efforts." 105 S. Ct. at 707 n.2. In slightly less clear terms, the Court itself then stated that "[t]he automatic stay provision does not apply to suits to enforce

bor practice proceeding merely may result in a cease-and-desist or "affirmative action" order against the offending employer, it would be within the exception to the automatic stay; but if backpay is possible, the stay remains operative.

Alternatively, the distinction may be between agency actions that primarily affect the health, safety, and welfare of the public, in contrast to administrative proceedings where the object is merely to achieve some pecuniary benefit on behalf of private claimants. The bankruptcy court in *In re Theobold Industries*[150] was apparently operating on this theory. The exact nature of the alleged unfair labor practice in that case was unclear, but it somehow related to the employer's claim that it was no longer bound by the collective bargaining agreement. In any event, the general counsel of the NLRB was seeking an order compelling the payment of $25,910.74 for vacation pay, severance pay, clothing allowance, and interest. The court rejected the contention that the NLRB proceeding was "somehow relate[d] to the protection of the public health and safety, and thus [fell] within the contemplation of a restrictively construed § 362(b)(4) exception . . . ."[151] Rather, the court determined that "the claims asserted by the N.L.R.B. in behalf of the union are essentially monetary in nature, impacting directly and ineluctably on the assets of the estate."[152]

A third possible distinction, and one that the legislative history reflects most clearly, is between administrative proceedings that *fix* the amount of recovery and administrative attempts to *enforce* collection of such amounts outside the bankruptcy process.[153] This was the approach taken by the bankruptcy court in *In re D.M. Barber, Inc.*[154] The court believed that the board would not and legally could not independently enforce its money

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the regulatory statutes of the State, but the enforcement of such a judgment by seeking money from the bankrupt . . . is another matter." *Id.* at 711 n.11.

150. 16 Bankr. 537 (Bankr. D.N.J. 1981).

151. *Id.* at 539.

152. *Id.* at 538. *But see* EEOC v. Rath Packing Co., 40 Fair Empl. Prac. Cas. (BNA) 580 (8th Cir. 1986) (court held that even though the ultimate objective of the EEOC proceedings was to achieve some pecuniary benefit for private claimants, the Commission's enforcement of Title VII of the Civil Rights Act of 1964 was primarily a vindication of public rather than private interests, and that the exception thus applied); EEOC v. Sambo's Restaurants, Inc., 34 Fair Empl. Prac. Cas. (BNA) 1451 (S.D. Tex. 1982).

153. This is suggested by the italicized language of the legislative history. *See supra* note 147 and accompanying text.

154. 13 Bankr. 962 (Bankr. N.D. Tex. 1981).

judgments against the employer,[155] and thus saw "no reason to grant a discretionary stay to prohibit the Board from liquidating its claim against the debtor for purposes of filing a claim in the bankruptcy estate."[156] The court also reserved the right "to determine the extent to which any such proof of claim should be allowed and the priority treatment accorded it under the distribution hierarchy set forth in the Bankruptcy Code."[157]

The court, in short, allowed the board to fix the amount of the award, but would have applied provisions of the automatic stay to any attempt by the board to independently enforce its award.[158] But since the board has apparently been content to file its claims in bankruptcy court rather than seek enforcement through normal channels,[159] this distinction—if indeed it is the controlling one—is more or less moot.

The debate over the applicability of the automatic stay pro-

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155. *Id.* at 965 n.1.

156. *Id.* at 965; *see also* NLRB v. Evans Plumbing Co., 639 F.2d 291, 293 (5th Cir. 1981); *In re* Nicholas, Inc., 55 Bankr. 212 (Bankr. D.N.J. 1985).

157. *Valverde,* 13 Bankr. at 965. The court in *In re* Tucson Yellow Cab Co., 27 Bankr. 621 (Bankr. 9th Cir. 1983), similarly held that the NLRB had exclusive jurisdiction to determine the amount of money the debtor owed employees as a result of its unfair labor practice, but reserved to the bankruptcy court the right to examine allowability and priority of these claims. *Id.* at 623; *see also* EEOC v. Rath Packing Co., 40 Fair Empl. Prac. Cas. (BNA) 580 (8th Cir. 1986); General Highway Express, Inc. v. Teamsters Local 20, 118 L.R.R.M. (BNA) 3402 (Bankr. N.D. Ohio 1985); *In re* Daryl Indus., 74 Lab. Cas. (CCH) ¶ 10,126 (Bankr. S.D. Fla. 1973).

158. *Accord In re* Shippers Interstate Serv., 618 F.2d 9 (7th Cir. 1980); *In re* Bel Air Chateau Hosp., 611 F.2d 1248 (9th Cir. 1979). These cases suggest that the stay might apply if administrative proceedings "threaten the assets" of the estate. *In re* Shippers Interstata Serv., 618 F.2d 9, 13 (7th Cir. 1980); *In re* Bel Air Chateau Hosp., 611 F.2d 1248, 1251 (9th Cir. 1979). This is also one test used by courts in evaluating the propriety of a discretionary injunction. *See infra* text accompanying notes 177-78. In that regard it has been suggested that this "threat" would arise only if the board attempted to enforce a backpay award outside the bankruptcy process. *See infra* text accompanying note 181. Indirectly, therefore, these cases may be cited in support of the distinction between fixing and enforcing monetary awards, as the basis for deciding when the exception applies and when the stay itself applies.

159. *But see* NLRB v. Deena Artware, Inc., 251 F.2d 183 (6th Cir. 1958). The board here filed a motion with the court of appeals for discovery proceedings for the ultimate purpose of enforcing monetary awards in favor of employees who had been discriminated against by the debtor. The court held that supervision of discovery was part and parcel of collection of the award, and thus something that should be handled by a court of original jurisdiction, presumably the bankruptcy court. *Id.* at 186. The court also suggested, however, that enforcement of an award by a court of appeals through exercise of contempt power might present a different situation. *Id.* at 185. Although the court of appeals would have jurisdiction to issue a contempt citation for nonpayment, an action by the NLRB to enforce an award in that way would appear to "threaten the assets" of the estate, and would thus be subject to a bankruptcy court injunction.

vision may not be as important as it seems. Even if the stay provision applies, the Bankruptcy Code gives the bankruptcy court broad discretion to lift, modify, or condition a stay "for cause."[160] Conversely, notwithstanding the inapplicability of stay provisions, a bankruptcy court still has the power under section 105 to issue injunctions.[161] While this approach shifts the burden from the administrative agency seeking relief from the stay to the party seeking an injunction against that agency, the test would probably be about the same.[162]

C. *Section 105 Injunctions Against the NLRB*

Since its inception, the bankruptcy court has been regarded as a court of equity with inherent power to protect its processes and property by injunctive decree.[163] Section 105(a) codifies this power, providing that "the bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[164] Finally, the power of the bankruptcy court to issue an injunction is unaffected if the conduct to be enjoined otherwise falls within an exception to the automatic stay. The legislative history states that "[t]he effect of an exception is not to make the action immune from injunction. . . . By excepting an act or action from the automatic stay, the [Code] simply requires that the trustee move the court into action . . . ."[165] Under what circumstances, then, would it be appropriate for the bankruptcy court to enjoin an NLRB proceeding?

1. *The Limitations Imposed by the Norris-LaGuardia Act*

The 1932 Norris-LaGuardia Act provides that "[n]o court of the United States shall have jurisdiction to issue any . . . injunction in any case involving or growing out of a labor dispute,"

160. 11 U.S.C. § 362(d)(1) (1982).

161. 11 U.S.C. § 105(a) (Supp. II 1984).

162. Compare cases cited *supra* note 158 (using a "threaten the assets of the estate" test for determining when the automatic stay applies) with the case cited *infra* note 168 (using the same test to determine when an injunction should be issued); *see also In re* Atlantic Int'l Corp., 101 L.R.R.M. (BNA) 2128, 2129 (D. Md. 1979).

163. *Ex parte* Baldwin, 291 U.S. 610, 615 (1934); *Ex parte* Christy, 44 U.S. (3 How.) 292, 312 (1845).

164. 11 U.S.C. § 105(a) (Supp. II 1984).

165. H.R. Rep. No. 595, 95th Cong., 1st Sess. 342 (1977).

except in those cases provided for in the statute.[166] The act further defines "labor dispute" very broadly, as including "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating . . . terms or conditions of employment . . . ."[167]

In *In re Rath Packing Co.*,[168] the company sought an injunction to bar the union and the NLRB from continuing an unfair labor practice proceeding on a charge alleging that the company had illegally circumvented the union in negotiating a wage deferral agreement. The bankruptcy court denied the injunction, in part because of the Norris-LaGuardia Act. First it determined, probably correctly, that a bankruptcy court was a "court of the United States" for purposes of the Norris-LaGuardia Act. Second, it determined that the unfair labor practice charge involved a controversy concerning "representation of persons" in negotiations changing "terms and conditions of employment" (the wage deferral), and that the case thus involved a "labor dispute" for purposes of the Norris-LaGuardia Act. Having thus brought the controversy within the purview of that act, the court then concluded that the statutory standing requirements were not satisfied, specifically the requirement that the person seeking injunctive relief show "irreparable injury." The court regarded as inadequate the company's reference to "the expense and inconvenience of litigating before the Board" and the effect that a potential award of monetary damages might have on potential purchasers of Rath assets.[169]

The court's analysis was simplistic at best. To begin with, its treatment of the "irreparable injury" issue seemed to ignore that the plaintiff was not simply another party trying to avoid the expense and inconvenience of litigation, but a debtor-in-possession attempting to salvage assets of the estate, not only for the debtor's benefit but also for the benefit of creditors.[170] But that is a mere quibble.

More troublesome is the court's literal and thus overly broad interpretation of the term "labor dispute." Although couched in jurisdictional terms, the Norris-LaGuardia Act had a

166. 29 U.S.C. § 104 (1982).
167. 29 U.S.C. § 113(c) (1982).
168. 38 Bankr. 552 (Bankr. N.D. Iowa 1984).
169. *Id.* at 558-63 & n.6.
170. *See* Durand v NLRB, 296 F. Supp. 1049, 1054, (W.D. Ark. 1969).

substantive purpose:[171] to remove from the proscriptions of federal antitrust law all attempts by labor unionists to achieve legitimate ends by peaceful purposes. Congress had tried to do this through a substantive enactment, the Clayton Act,[172] but had been frustrated by the Supreme Court.[173] Therefore Congress took a jurisdictional approach; it gave a broad definition to the term "labor dispute," and generally denied federal courts power to issue injunctions or assess damages in matters arising out of such disputes.

The substantive purpose of the Norris-LaGuardia Act, to provide federal immunity to strikes and other forms of "peaceful" concerted activity, must be taken into account when construing the term "labor dispute" since existence of such a dispute is what triggers the applicability of the act. Adjudication of unfair labor practice claims by the NLRB is far removed from anything Congress intended to cover when it enacted the Norris-LaGuardia Act, and it would be nonsensical to apply the act to those proceedings simply because they can be construed as falling within the literal definition of a "labor dispute." The problem lies in accommodating the provisions of the Bankruptcy Code with those of the NLRA; that is difficult enough. There is no need to complicate matters further by forcing into the equation a statute designed to deal with different problems at another time in the history of industrial relations.

Finally, even if an injunction against the NLRB were within the literal prohibitions of the Norris-LaGuardia Act, specific reference to "administrative" proceedings in the automatic stay provisions without any exception for the NLRB, and the even broader grant of injunctive power in section 105(a) of the Bankruptcy Code should be construed as a *pro tanto* repeal.[174] The *Rath* court expressly declined to pass on that issue,[175] holding that the automatic stay did not apply and an injunction would be inappropriate anyway.

Rath is the only decision to consider the applicability of the Norris-LaGuardia Act in bankruptcy proceedings. Apparently, all other courts have simply assumed[176]—correctly so—that in

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171. *See generally* Haggard, *Norris-LaGuardia*, *supra* note 8, at 705-06.
172. 29 U.S.C. §§ 52, 53 (1982).
173. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).
174. *See generally* Haggard, *Norris-LaGuardia*, *supra* note 8.
175. *Rath*, 38 Bankr. at 560.
176. The court in *In re* Brada Miller Freight Systems, 16 Bankr. 1002 (N.D. Ala.

an appropriate case that act imposes no obstacles to a bankruptcy court injunction against an NLRB proceeding.

2. *The Proper Test for Granting Injunctive Relief*

In evaluating the propriety of a bankruptcy court injunction, one must necessarily begin with the Supreme Court's decision in *Nathanson v. NLRB.*[177] The narrow issue in that case was whether the bankruptcy court or the NLRB was the proper forum for liquidation of backpay awards pursuant to a board finding that the employer had committed unfair labor practices. But in resolving that issue, the Court articulated what has become the controlling principle in the relationship between bankruptcy courts and the NLRB. The Court noted that

> [t]he 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.[178]

From this case has emerged a general presumption against bankruptcy court interference with NLRB proceedings, although that principle is subject to several possible exceptions.

The first and most commonly recognized exception allows the bankruptcy court to issue a stay if administrative or regulatory proceedings "threaten the assets of the estate."[179] No case really explains what this means,[180] and apparently no injunction

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1981), was asked to enjoin any interference with the debtor's business (including strikes) and the continuance of unfair labor practice proceedings. The court, after extensive analysis, held that the Norris-LaGuardia Act precluded the requested strike injunction. The injunction against the NLRB proceedings was also denied, but solely on the grounds that those proceedings posed no threat to assets of the estate; the Norris-LaGuardia Act was not even given passing mention as to this issue, which seems to suggest that the court thought that the act did not need to be considered.

177. 344 U.S. 25 (1952).

178. *Id.* at 30 (citations omitted).

179. *See, e.g., In re* Shippers Interstate Serv., 618 F.2d 9, 13 (7th Cir. 1980); *In re* Bel Air Chateau Hosp., 611 F.2d 1248, 1251 (9th Cir. 1979); *In re* Brada Miller Freight Systems, 16 Bankr. 1002, 1013 (N.D. Ala. 1981); Gen. Highway Express, Inc. v. Teamsters Local 20, 118 L.R.R.M. (BNA) 3402, 3406 (Bankr. N.D. Ohio 1985).

180. The court in *In re* Tucson Yellow Cab, 27 Bankr. 621, 623-24 (Bankr. 9th Cir. 1983) adopted the "threatened assets" test, but admitted that there is little or no authority available to instruct us when an action of NLRB represents an enjoinable threat." The court did hold, however, that the mere possibility that backpay claims

has ever been issued on a finding that assets were threatened. One leading labor law text suggests that an NLRB action might threaten assets of the estate only if the board attempted to enforce a monetary award outside normal channels of hankruptcy.[181] But apparently the board has never done that. Conceivably, a board order requiring a debtor-employer to reopen a plant or facility could also threaten assets of the estate, but a case involving those facts has not yet arisen.

Second, some courts have suggested that an exception allowing an injunction against the NLRB may be more appropriate in a total liquidation than in a mere reorganization.[182] The theory is that disappearance of the employing entity renders moot any remedial order requiring the now defunct employer to cease-and-desist from coercion or domination, bargain with the union, reinstate employees, or post notices of compliance.[183] Since it would be an exercise in futility and a drain on assets to force the estate to participate in such proceedings, an injunction would appear proper. Again, however, no injunction has ever been issued on that basis.

The third exception, though not clearly recognized as such, focuses not so much on threats to assets of the estate as it does on threats to the bankruptcy process itself. This exception is perhaps what the district court in *In re Airport Iron & Metal, Inc.* had in mind when it held that an injunction against the

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might have priority was not sufficient to constitute an enjoinable "threat" against the estate. Similarly, in *In re* GHR Energy Corp., 33 Bankr. 449 (Bankr. D. Mass. 1983), the court held that the "cloud" on the bankrupt's assets created by continuance of unfair labor proceedings and the threat of liability flowing therefrom, which the debtor said would deter potential purchasers of assets, still did not constitute a "threat" to assets of the estate in the sense of justifying an injunction. Finally, the court in *In re* Nicholas Inc, 55 Bankr. at 212, 218 (Bankr. D. N.J. 1985), held that litigation expenses did not constitute a "threat" to assets of the estate, especially since the amount was neither substantiated nor related to total assets of the estate.

181. 2 THE DEVELOPING LABOR LAW, *supra* note 51, at 1598.

182. *See In re* Shippers Interstate Service, Inc., 618 F.2d 9 (7th Cir. 1980). *GHR Energy Corp.* construed that as meaning a literal "liquidation" (the extinguishment of the business as a going concern) rather than just a "liquidation" (sale) in the Chapter 7 sense. In the latter situation the court felt that the purchaser of assets might still be liable to remedy the predecessor's unfair labor practices. *In re* GHR Energy Corp., 33 Bankr. 449, 450 n.4 (Bankr. D. Mass. 1983); *see also In re* Seeburg Corp., 11 Bankr. 121, 123 (N.D. Ill. 1980) (the possibility of successorship liability caused the court to evaluate the injunction issue from the perspective of a reorganization rather than a liquidation, even though it was a Chapter 7 proceeding). *But see supra* notes 105-17 and accompanying text.

183. *In re* Shippers Interstate Service, Inc., 618 F.2d 9, 12 & n.3 (7th Cir. 1980); D.M. Barber, Inc. v. Valverde, 13 Bankr. 962, 965 (Bankr. N.D. Tex. 1981).

NLRB was not appropriate "as long as the administration of the debtor's estate is not being embarrassed or delayed, to the point of threatened or impending irreparable injury."[184] This "threatened process" test was more clearly articulated in a recent article by attorney Peter A. Jackson.[185]

Drawing from the language of section 105(a) itself, which empowers the bankruptcy court to issue all orders "necessary or appropriate to carry out the provisions of this title,"[186] he argues that the provisions in question "constitute a process aimed at protecting the reorganization potential of an ailing business. Thus, an injunction may be justified when an NLRB action threatens the orderly processing of a promising reorganization effort."[187] He then suggests that the three most common threats to a reorganization effort potentially posed by an NLRB proceeding are delay, expense, and duplication of effort.[188] Jackson makes a compelling case for the "threatened process" test, and argues that it is a reasonable alternative to, if not a complete substitute for, the more common "threatened assets" and "liquidation versus reorganization" tests.

3. *Application of the Test*

One can assume that all NLRB unfair labor practice proceedings, if participated in by the trustee or debtor-in-possession, are going to impose substantial administrative expenses on the estate. In addition, the NLRB processes will probably take much longer than a normal Chapter 11 reorganization or Chapter 7 liquidation, thus either delaying bankruptcy proceedings or tying up funds that could otherwise be distributed to creditors or used in revitalizing the debtor.[189] It would thus seem that ab-

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184. 90 L.R.R.M. (BNA) 3108, 3111 (S.D.N.Y. 1974).

185. Jackson, *Bankruptcy Courts and the NLRB: A Clash of Jurisdiction Over Unfair Labor Practices*, 1 BANKR. DEV. J. 27 (1984).

186. 11 U.S.C. § 105(a) (Supp. II 1984).

187. Jackson, *supra* note 185, at 37.

188. A duplication of effort would occur only if the board were allowed to continue to adjudicate an issue even after the bankruptcy court had asserted jurisdiction over it. *See In re* Unit Parts Co., 9 Bankr. 386 (W.D. Okla. 1981) (court assumed jurisdiction over the unfair labor practice, but refused to enjoin the NLRB).

189. *See* Durand v. NLRB, 296 F. Supp. 1049, 1054 (W.D. Ark. 1969). The debtor in *In re* Nicholas, Inc., 55 Bankr. 212, 217 (Bankr. D.N.J. 1985), claimed that it would cost between $25,000 and $50,000 to litigate the unfair labor practice charge, including an appeal, but this figure was unsubstantiated.

sent compelling considerations to the contrary, an injunction would almost always be appropriate.

The most obvious instance in which these "compelling considerations" are *not* present is an NLRB charge against the debtor-in-possession based on conduct which, *because of the preemptive effect of the bankruptcy laws,* cannot as a matter of law be considered an unfair labor practice at all. Here, substantive law is dispositive of jurisdiction, providing what is undoubtedly the cleanest and thus the best resolution of the conflict.

NLRB v. Superior Forwarding, Inc. is a recent example of this resolution.[190] In that case, the debtor-in-possession sought to enjoin the NLRB from prosecuting unfair labor practice charges that the debtor claimed arose out of its unilateral modification and ultimate rejection of a collective bargaining agreement, conduct that it argued was declared by the Supreme Court in *Bildisco* not to be an unfair labor practice. The NLRB responded that the unfair labor practice charges pertained to the debtor's failure to bargain in good faith over a new contract, a duty which survived *Bildisco.*[191] The Eighth Circuit, however, held that this question was for the bankruptcy court to decide, and that an injunction would be appropriate if the board was acting outside its authority and the proceedings would threaten assets of the estate.

The same approach should be followed with respect to the effect of section 1113 provisions. For example, when a debtor-in-possession follows section 1113 procedures for contract rejection, it clearly has immunity from any section 8(d) liability, and an attempt by the NLRB to process a section 8(d) and 8(a)(5) unfair labor practice charge should be enjoined. While the preemptive quality of section 1113 may not be so clear in other situations, that determination can be more quickly and authoritatively made through bankruptcy processes than through NLRB processes.[192]

The NLRB proceeding next most likely to be enjoined by a bankruptcy court is a backpay liquidation proceeding. After the

190. 762 F.2d 695 (8th Cir. 1985); *see also In re* San Juan Hotel Corp., 111 L.R.R.M. (BNA) 2877 (D.P.R. 1982).

191. *Cf.* El San Juan Hotel, NLRB Dec. (CCH) ¶ 17,063 (1985) (board dismissed complaint alleging section 8(a)(5) and 8(d) violations that fell squarely within the *Bildisco* holding). The court in *In re* Nicholas, Inc., 55 Bankr. at 216-17, construed *Superior Forwarding* as applying only to *Bildisco*-type issues, and not to unfair labor practices that are independent of the collective bargaining agreement.

192. *See Superior Forwarding,* 762 F.2d at 700.

NLRB decides an unfair labor practice case and all appeals, if any, have been exhausted, the agency conducts a separate hearing to determine the amount of backpay to which each employee is entitled.[193] As the Supreme Court recognized in *Nathanson v NLRB*, "[t]he bankruptcy court normally supervises the liquidation of claims."[194] Section 502(c) of the code expressly grants the court that power; indeed, it *requires* the court to estimate "any contingent or unliquidated claim, the fixing or liquidation of which . . . would unduly delay the closing of the case."[195] Notwithstanding the desirability of having backpay determinations made by someone with labor law expertise and a familiarity with the controlling substantive law,[196] it would seem that the section 502 mandate should apply to NLRA claims.

This position is consistent with *Nathanson*, which merely required that the bankruptcy court give the NLRB a "reasonable time"[197] to liquidate the claim. Presumably, a reasonable time would be determined by the exigencies of the bankruptcy process, which vary from case to case. Moreover, as the court noted in *In re Wilson Foods Corp.*, "[c]ounsel for the Board has stated that it expedites proceedings upon request. We assume the Board will be mindful of the harm that can befall an estate in reorganization proceedings due to unreasonable delay, and will seek to accommodate itself to the bankruptcy process . . . ."[198] The alternative is for the bankruptcy court to either set aside an amount that it thinks will be sufficient to cover the claims or to enjoin further NLRB proceedings and liquidate the claims itself.[199]

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193. *See generally* K. McGuiness, How To Take a Case Before The National Labor Relations Board § 18-6, at 319 (4th ed. 1976).

194. 344 U.S. 25, 30 (1952).

195. 11 U.S.C. § 502(c) (Supp. II 1984).

196. The computation of the amount due may not be a simple matter. It may require, in addition to the projection of earnings which the employee would have enjoyed had he not been discharged and the computation of actual interim earnings, the determination whether the employee wilfully incurred losses, whether the back pay period should be terminated because of offers of reinstatement or the withdrawal of the employee from the labor market, whether the employee received equivalent employment, and the like. Congress made the relation of remedy to policy an administrative matter, subject to limited judicial review, and chose the Board as its agent for the purpose.

Nathanson v. NLRB, 344 U.S. 25, 29-30 (1952) (citations omitted).

197. *Id.* at 30.

198. 31 Bankr. 269, 271 (Bankr. W.D. Okla. 1983).

199. This approach is supported by the existence of an exception to the automatic stay for "the enforcement of a judgment, *other than a money judgment*, obtained in an

A hearing on the unfair labor practice complaint may be a third type of NLRB proceeding subject to an injunction. The principal bankruptcy law interest at stake here is expeditious resolution of the controversy. If monetary relief is going to be awarded (pursuant to the bifurcated procedure discussed above), it should be awarded quickly. It is one thing for the NLRB to expedite liquidation of damages proceedings so that it can file its claims in the bankruptcy court. It would be quite another for the board to expedite its entire unfair labor practice proceedings—from the trial by an administrative law judge through review by the board itself. Indeed, since board orders are not "self-enforcing," in a technical sense the "process" on the merits is not complete until the board's order has been approved by a federal court of appeals. At that point there is still the liquidation proceeding. For an alleged unfair labor practice occurring just prior to or during bankruptcy proceedings, this process would be far too long.

On the other hand, an injunction against these proceedings seems almost unthinkable. If an injunction is issued, one of three things can happen to employee claims: they are either permanently lost, they will have to be heard by the NLRB after the bankruptcy proceedings are over, or they will have to be heard by the bankruptcy court itself. None of these alternatives is fully tenable. The first would simply mean that a bankrupt employer or a trustee is no longer answerable for its labor law violations, a result so extreme as to be rejected as obviously inconsistent with congressional intent.[200] The second alternative, however, would have a similar effect since confirmation of a plan would discharge monetary claims thus leaving nothing for the NLRB to adjudicate.[201] Finally, the third alternative poses enormous legal and practical problems.

On the legal side, it is debatable whether the bankruptcy court would even have jurisdiction to hear an unfair labor practice claim. Section 1334(b) provides that "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a *court* or

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action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power . . . ." 11 U.S.C. § 362(b)(5) (1982) (emphasis added).

200. The National Labor Relations Act expressly includes within its definition of "person" "trustees in [bankruptcy], or receivers." 29 U.S.C. § 152(1) (1982).

201. *See* Jackson, *supra* note 185, at 40. Of course, the court could always set aside an amount sufficient to cover the potential liability, but tying up assets of the estate in this fashion is generally undesirable.

courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all *civil proceedings* arising under title 11, or arising in or related to cases under title 11."[202] Construing this section's similarly worded predecessor,[203] the court in *NLRB v. Brada Miller Freight Systems*[204] apparently felt that the word "court" in the introductory clause modified the term "civil proceeding" in the following clause. It thus concluded that "[o]n its face, the provision is not applicable to NLRB proceedings, for the NLRB is not a 'court,' within the plain meaning of tbe statute."[205]

While there is some merit to that argument, the conclusion that the bankruptcy court lacks jurisdiction over unfair labor practice claims may be countered on several grounds. The legislative history, for example, states that the term "proceeding here is used in its broadest sense, and would encompass what are now called contested matters, adversary proceedings, and plenary actions . . . ."[206] The history thus suggests that the focus should be on the nature of the controversy, not the specific forum in which Congress originally contemplated its adjudication. In short, if the controversy between the debtor and a claimant is adversarial in nature, and thus suitable for judicial resolution, then its adjudication should be regarded as involving a "civil proceeding." It should not make any difference that in the nonbankruptcy context the controversy would be resolved by an agency *acting in its quasi-judicial capacity* rather than by a court. Moreover, the intended breadth of the term "proceedings" is simply a manifestation of the more generalized intent "to bring all litigation within the umbrella of the bankruptcy court, irrespective of Congressional statements to the contrary in the context of certain specialized litigation."[207] In other words, as the court in *In re Unit Parts Co.* stated, "[b]y conscious design, Congress endowed the Bankruptcy Court with *wide* lati-

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202. 28 U.S.C.A. § 1334(b) (West Supp. 1985) (emphasis added).

203. 28 U.S.C. § 1471 (1982).

204. 16 Bankr. 1002 (Bankr. N.D. Ala. 1981), *vacated and remanded on other grounds*, 702 F.2d 890 (11th Cir. 1983).

205. *Id.* at 1009; *see also In re* Adams Delivery Serv., 24 Bankr. 589 (Bankr. 9th Cir. 1982). *Contra In re* Theobald Indus., Inc., 16 Bankr. 537, 538 (Bankr. D.N.J. 1981) (treats the adjudication of claims arising under the NLRA as "civil proceedings" for purposes of bankruptcy court jurisdiction).

206. S. REP. No. 989, 95th Cong., 2d Sess. 153 (1978).

207. *In re* Unit Parts Co., 9 Bankr. 386, 389 (W.D. Okla. 1981).

tude to deal with all money problems touching the financially threatened."[208]

The legislative history of section 157(d), though not conclusive, also suggests the possibility of bankruptcy court jurisdiction over unfair labor practices. Section 157(d) requires the district court, on motion, to withdraw from the bankruptcy court any proceeding that involves a consideration of both bankruptcy law and any other law "regulating organizations or activities affecting interstate commerce."[209] The legislative history states that this includes "cases involving the National Labor Relations Act."[210] Although direct judicial enforcement of the NLRA is provided for in a few narrow instances,[211] the act is most often thought of in terms of its unfair labor practice provisions, which are enforced through the quasi-judicial administrative processes of the NLRB. Withdrawal of an NLRA case from the bankruptcy court to the district court under section 157(d), however, necessarily presupposes proper jurisdiction of that case under section 1334.

Finally, even if an unfair labor practice proceeding does not fall within the literal language of section 1334, bankruptcy court jurisdiction can nevertheless be implied from the other sections of the Bankruptcy Code. The Court in *Nathanson*, for example, assumed that the bankruptcy court bad the power to liquidate a claim arising under the NLRA, although it went on to hold that the court should normally defer to the NLRB.[212] The court in *Unit Parts* relied on section 502(c) to support its assertion of jurisdiction;[213] it noted that section 502(c) *requires* the bankruptcy court to estimate the amount of a contingent or unliquidated claim, when actual liquidation (by the NLRB in its unfair labor practice and backpay determination proceedings) "would unduly delay the closing of the case."[214] This requirement, if applicable to NLRA-based claims (and there is no reason to sug-

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208. *Id.*

209. 28 U.S.C.A. § 157(d) (West Supp. 1985).

210. 130 CONG. REC. H1850 (daily ed. Mar. 21, 1984) (statement of Rep. Kastenmeier).

211. 29 U.S.C. §§ 160(j), 160(l), 161(2), 178, 185, 186(e), 187(b) (1982).

212. The Court said that "the bankruptcy court *normally* should stay its hand pending an administrative decision," Natbanson v. NLRB, 344 U.S. 25, 30 (1952) (emphasis added), a grant of discretion which presupposes the bankruptcy court's jurisdiction to try the claim itself.

213. *Unit Parts*, 9 Bankr. at 390.

214. 11 U.S.C. § 502(c)(1) (1982).

gest that it is not), again presupposes that the threshold problem of jurisdiction under section 1334 has been crossed. Peter Jackson similarly argues that "the bankruptcy court's labor claim adjudication power can best be seen as an extension of its claim jurisdiction and injunctive power that is necessary to avoid discharge of labor claims."[215]

In sum, while the jurisdictional issue is a difficult one, it can be resolved. However, even assuming solution of the jurisdictional issue, there would still be enormous practical problems involved in litigating an unfair labor practice action in bankruptcy court. The NLRA forms and procedures—to say nothing of the complex relationship between the administrative law judge who hears the case, the board that finally decides it, and the court of appeals that reviews it on a limited basis[216]—would all have to be jettisoned if the unfair labor practice charge were heard by the bankruptcy judge and treated like any other civil dispute. Such a radical change in procedures would undoubtedly affect the substantive result.

However, the greater practical difficulty lies in the substantive law itself. The NLRA is a complex statute with its own arcane terminology and a vast body of interpretative precedent. The enforcement scheme of this statute places primary enforcement responsibility on the administrative agency whose administrative law judges and board members supposedly have the expertise necessary for proper and consistent application of the law.[217] Judicial involvement normally comes only at the end of the process by way of limited federal appellate court review. It would be unrealistic to ask a bankruptcy court judge, who will usually have absolutely no prior experience with the complexities of labor law, to suddenly assume a role as the primary adjudicator of an unfair labor practice charge.

Moreover, while the purpose of giving section 1334 a broad reading is to insure that all the money claims against a debtor are consolidated and resolved in a single forum,[218] that purpose

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215. Jackson, *supra* note 185, at 43.

216. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). This restriction on elections presumably applies to other substantiel corporate changes besides a fluctuating work force.

217. Referring to bankruptcy and labor law, Durand v. NLRB, 296 F. Supp. 1049, 1055 (W.D. Ark. 1969), recognized that "[e]ach of those fields of law is a specialized one, and persons having day to day familiarity with one field may have little familiarity with or expertise in the other."

218. *See supra* note 207 and accompanying text.

would not be served by the exercise of bankruptcy court jurisdiction over unfair labor practice claims. Such claims obviously fall under the mandatory withdrawal provisions of section 157(d).[219] And if someone other than the bankruptcy court is going to hear the claim anyway, it is undoubtedly better for the NLRB to hear it than the district court.

Therefore, the bankruptcy court should exercise jurisdiction (assuming that it even has jurisdiction) over an unfair labor practice charge only in the most extreme and compelling of situations.[220] If the interests of bankruptcy law can be substantially satisfied in any other way, then that alternative ought to be pursued. Occasionally, the board may be able to deal with the problem by simply expediting its processes. Or, if the amount at stake is not extremely large, the bankruptcy court may simply set that amount aside to cover any potential liability by the debtor-in-possession and then proceed with confirmation of the plan. The board can then proceed at its own pace with the unfair labor practice charge. But the more probable, and possibly the most desirable, resolution of this conflict will often be through the avoidance of any formal adjudication. The debtor-in-possession, the union, and the general counsel of the NLRB all have a strong incentive to settle the dispute.[221] Although the interests of the other creditors may be compromised to some extent, the bankruptcy court should approve any settlement that appears reasonable.

A representation election proceeding is the last type of NLRB proceeding that may be subject to a bankruptcy court injunction. Under section 9 of the NLRA, upon petition and a showing of support for the union by at least thirty percent of the employees in an appropriate bargaining unit, the NLRB is empowered to conduct an election among these employees to deter-

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219. *See supra* note 133.

220. *Unit Parts*, while holding that a bankruptcy court had jurisdiction over NLRA claims, nevertheless conceded that "[m]any instances may arise wherein the Bankruptcy Courts will do well to abstain from pre-empting claim determinations by administrative bodies possessing special expertise where such neither delays, complicates nor clouds rehabilitation prospects . . . ." 9 Bankr. at 391. The court in *In re* Nicholas, Inc., 55 Bankr. 212, 216 (Bankr. D.N.J. 1985), stated that "[g]iven the inescapable weight of the authorities in support of the Board's exclusive jurisdiction, it is incumbent upon the debtor to demonstrate a cognizable reason for this court to override the presumptive jurisdiction of the N.L.R.B." The debtor was unable to do so in that case.

221. This approach was urged upon the parties in *Durand*, 296 F. Supp. at 1054, but apparently without success.

mine if they desire union representation.[222] NLRB elections are often hotly contested and may involve considerable time and expense on the employer's part. Although there is no direct conflict between section 9's authorization of elections and any specific provision of the Bankruptcy Code, the reorganization period "is undoubtedly an inauspicious time to introduce into the affairs of the debtor any . . . industrial or economic instability."[223] Moreover, the election and its consequences may precipitate secondary or indirect conflicts. For example, during the pendency of an NLRB election, an employer is normally precluded from making changes which either improve or worsen wages, hours, or working conditions, if the purpose is to affect the election's outcome.[224] As a practical matter, any changes in the dynamic status quo will be deemed objectionable unless the employer can establish some justification unrelated to pendency of the election.[225] However, during a reorganization the debtor-in-possession will often need to make changes in wages, hours, and working conditions. Saddling a debtor-in-possession with a duty not to make these changes unless it can satisfy a burden of justifying them before the NLRB will significantly inhibit any reorganization effort. Furthermore, if the union wins the election, a duty will arise on the part of the employer (through the debtor-in-possession or trustee) to recognize and bargain with this union over all matters involving wages, hours, and working conditions. This duty will then bring to a head the issues discussed earlier and all the complications that flow from them. Finally, a successful union election coupled with a subsequent sale of the facility will require the resolution of some of the difficult "successor" issues also discussed earlier.

While various bankruptcy law interests would be jeopardized by an NLRB election, the labor law interests in holding one are not especially strong. The board itself has recognized the impropriety of holding an election if the work force is fluctuating.[226] A Chapter 11 reorganization would certainly seem to qualify in that regard.[227]

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222. 29 U.S.C. § 159(e) (1982).

223. *In re* American Buslines, Inc., 151 F. Supp. 877, 887 (D. Neb. 1957).

224. NLRB v. Exchange Parts Co., 375 U.S. 405, 408-09 (1964).

225. *See* American Sunroof Corp., 248 N.L.R.B. 748 (1980).

226. *See* K-P Hydraulics Co., 219 N.L.R.B. 138 (1975).

227. *But see* Coastal Plywood & Timber Co., 102 N.L.R.B. 300 (1953), in which the Board noted:

> There is no certainty that the Employer's operations will cease or change. Nor

Under the "threatened process" test, an NLRB election proceeding would seem to be the very kind of administrative action that a bankruptcy court should have discretion to enjoin. After the dust has cleared from the Chapter 11 reorganization, employees can make a more intelligent choice about whether they want to have a union represent them in the future. The courts, however, have been reluctant to issue such injunctions.

In *In re American Buslines, Inc.*,[228] the district court held that representation questions were within the exclusive jurisdiction of the NLRA and nothing in the Bankruptcy Act empowered it to enjoin election proceedings. More importantly, however, the court indicated that even if it had the power, it would not exercise it in this case. The trustee sought an injunction against a proceeding which involved a claim by the Brotherhood of Railroad Trainmen that it represented certain of the debtor's employees. Many of the debtor's employees, however, were already represented by two locals of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America with which the debtor had a collective bargaining agreement. Yet another union claimed to represent other of the debtor's employees. In spite of these facts, the court was unconvinced that the NLRB proceedings posed any threat of injury to the estate. It regarded the controversy essentially as being between several competing unions concerning who was entitled to represent which employees, and it noted "in theory at least, that problem is not the concern of the employer."[229] The court recognized that the trustee would be required to bargain with whomever the employees selected, but observed that "[i]t may not be assumed at the present time that these negotiations will either result in injury to the trust or even be rendered more onerous by the yet undeterminable identity of the employees' negotiators."[230]

The more recent case of *In re Continental Airlines Corp.*[231] reached essentially the same result. The Teamsters Union had

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does the record disclose that any definite plans have yet been completed for closing or selling the Employer's plant. Accordingly, in the absence of evidence that the Employer will necessarily terminate its operations in the immediate future, we shall process the present [election] petition.

Id. at 300 n.1 (citations omitted).

228. 151 F. Supp. 877 (D. Neb. 1957).

229. *Id.* at 887.

230. *Id.*

231. 50 Bankr. 342 (S.D. Tex. 1985).

originally been certified by the National Mediation Board (NMB) as the collective bargaining representative of all office, clerical, fleet service, and passenger service employees of Texas International Airlines (TIA). When TIA merged with Continental Airlines, the new company refused to recognize the union or to honor the collective bargaining agreement. After the Fifth Circuit upheld the company's refusal to bargain, the union filed an application with the NMB to divide the Continental workforce into three separate units, a division which Continental opposed. The board, however, approved an election in the units requested. Later, Continental filed under Chapter 11 of the Bankruptcy Code, and the bankruptcy court specifically stayed the election pursuant to the automatic stay provision.

On appeal to the district court, the union argued that the election was not a "proceeding against the debtor" under section 362(a)(1) of the automatic stay provisions, and that specific enforcement of the section against the NMB was thus inappropriate. The court found five different reasons for agreeing with the union on that point: (1) Continental's alleged lack of any legitimate interest in the representation proceeding; (2) Congress's intent that the debtor-in-possession continue to be subject to the Railway Labor Act; (3) prior cases giving a narrow construction to actions "against the debtor's property;" (4) the fact that neither purpose of the automatic stay (giving the debtor a breathing spell *from his creditors* and providing equality of distribution among all the creditors) would be served by its application in this instance; and (5) the analogous *American Buslines* case.[232]

The district court then addressed the propriety of the stay from the perspective of section 105 of the Bankruptcy Code, which it admitted went beyond what is literally prohibited by the automatic stay provisions. The court focused on some legislative history which indicated that, when enjoining administrative agencies under section 105, bankruptcy courts should be most careful in "protecting the legitimate interests of the State."[233] It concluded that these state interests would be unduly jeopardized by even a *delay* in the NMB election.

That analysis, however, is fatally flawed. Although Congress presumably believed that election mechanisms of the RLA and

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232. *Id.* at 350-57.

233. *Id.* at 358 (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 6135 (1977)).

the NLRA would in the long run promote industrial peace and thus serve the public interest,[234] Congress never suggested that this interest extends to any particular election. Indeed, administrative agencies were given a rather wide range of discretion to decide when, if at all, an election should be held. The public interest is remote; therefore, the court should have balanced this interest with the public's far more immediate and compelling interest in the successful reorganization of a major air carrier. The issue in the *Continental* case thus should have been whether the election would have significantly affected, interfered with, or threatened the Chapter 11 reorganization effort. Although the court stated in this context that "these NMB proceedings inflict little or no harm upon Continental,"[235] its conclusion in that regard seems to have been dictated more by devotion to the primacy of labor laws than by any realistic evaluation of the effect an immediate election would have on a Chapter 11 employer.

III. Conclusion

The conflict between bankruptcy and labor law has not been resolved by *Bildisco* and the section 1113 congressional response. Rather, the issues are now made increasingly complex. However, unless the Supreme Court again declares the Bankruptcy Code unconstitutional, it is unlikely that Congress will tinker further with the statute.[236] And if its politically expedient, stumbling, and inarticulate response to *Bildisco* is any indication of how it might deal with a full range of bankruptcy and labor law conflicts, then it should perhaps leave well enough alone. This means, of course, that courts will be required to work through these problems on an issue-by-issue basis. Given the complexity of the issues and the differences of opinion that will undoubtedly exist at the lower court level, it will take years of litigation and numerous Supreme Court decisions before any coherent system of bankruptcy and labor law can be expected to emerge.

In sum, the prospects are not bright. Many will see these

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234. Professor Richard Epstein's appraisal is a more realistic one. He observes that "[t]he present system of labor law is an elaborate form of special interest legislation that benefits some workers at the expense of other workers and society at large." N.Y. Times, July 21, 1985, § 3, at 2, col. 6.

235. *Continental,* 50 Bankr. at 358.

236. *See* Memorandum from Congressman Rodino (July 30, 1984); Norton Bankr. L. Adviser, Feb. 1985, at 11.

problems as evidence that the regulatory state is collapsing under its own weight. Perhaps it is. To be sure, market forces—as well as the economic interests of debtors, creditors, employers, employees, and unions—cannot and will not long be held in bondage by legal processes as complex and burdensome as those reflected by the current bankruptcy and labor law interface. Unless the law intends to trivialize itself out of the picture entirely, radical reform is going to be necessary—from some source.