No. 14-4807

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITE HERE LOCAL 54,

Appellant,

v.

TRUMP ENTERTAINMENT RESORTS, INC.

Appellee

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE URGING REVERSAL IN SUPPORT OF APPELLANT UNITE HERE LOCAL 54

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STATEMENT OF AMICUS

The National Labor Relations Board (NLRB)[1] is an independent federal agency created by Congress to enforce and administer the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq., which regulates labor relations between most private-sector employers in the United States, their employees, and the authorized representatives of their employees. Among other things, the NLRA proscribes certain conduct by employers and by labor organizations as unfair labor practices, and empowers the NLRB with exclusive jurisdiction to prevent and remedy the commission of such unfair labor practices. *See Amalgamated Util. Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264-265 (1940). The NLRB also regularly participates in bankruptcy proceedings, as the sole and exclusive party entitled to assert and litigate proofs of claim in bankruptcy based upon violations of the NLRA. *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952).

This *amicus* brief is intended to provide the Court with the NLRB's experience and historical perspective on collective bargaining

[1] In this brief, references to "the NLRB" refer to the agency as a whole. "The Board" refers to the appointed five-member statutory body known as the National Labor Relations Board.

under the NLRA, the relevant statutory meaning and usage of certain terms raised by this case, and the NLRA underpinnings incorporated in the legislative history and purpose of 11 U.S.C. § 1113. The NLRB has a significant interest in the Court's disposition of this case because the decision below—which set aside NLRA-imposed terms and conditions of employment applicable, absent impasse, during post-contract periods—displaces the Board's primary authority to decide and enforce these statutory rights.

ARGUMENT

The sole issue in this case is whether a Bankruptcy Court may, under Section 1113(c) of the Bankruptcy Code (the Code), 11 U.S.C. § 1113(c) , authorize trustees and debtors-in-possession[2] to reject purely statutory bargaining obligations arising from the NLRA. As we explain below, under the NLRA, collective bargaining agreements do not continue in effect after termination by the parties; only statutory rights under the NLRA apply at that point. In interpreting § 1113(c) to authorize the "rejection" of purely statutory duties under the NLRA, the

[2] The term "debtor" is used below as shorthand for "trustee or debtor-in-possession."

Bankruptcy Court's decision below contravenes the Board's longstanding interpretation of applicable NLRA law,[3] the plain language of the Bankruptcy Code, and the manifest Congressional intent behind both statutes.

I. The Statutory Duty to Bargain in Good Faith Under the NLRA

Since 1935, the NLRA has governed collective bargaining in most private sector industries in the United States.[4] In the preamble to the NLRA, Congress declared in sweeping terms that:

> It is . . . the policy of the United States to eliminate . . . obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

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[3] "Familiar principles of judicial deference to an administrative agency apply to the NLRB's interpretation of the NLRA. *See Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996). Therefore, the NLRB's construction of the NLRA will be upheld if it is 'reasonably defensible.' *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)." *Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001)

[4] Collective bargaining in the railroad and airline industries is separately regulated by a different agency, the National Mediation Board (the NMB), under the Railway Labor Act of 1926 (the RLA), 46 U.S.C. § 151 *et. seq*.

In so doing, Congress defined and proscribed certain acts as "unfair labor practices." 29 U.S.C. § 158. With respect to bargaining obligations, once a union is either certified by the NLRB as the exclusive bargaining representative of the employees or voluntarily recognized by the employer as the majority representative, the NLRA makes it an unfair labor practice for the parties to fail to "bargain collectively" in good faith concerning wages, hours, and other terms and conditions of employment for those employees. 29 U.S.C. § 158(a)(5), (b)(3). Section 8(d) of the NLRA defines this obligation by explicitly requiring that parties to a bargaining relationship "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement" and "execut[e] . . . a written contract [i.e. a collective bargaining agreement] incorporating any agreement reached." 29 U.S.C. § 158(d).

To enforce the NLRA's statutory rights and obligations, Congress created and "empowered" the Board "to prevent any person from engaging in any unfair labor practice," declaring that "[t]his power shall not be affected by any other means of adjustment or prevention that has

been or may be established by agreement, law or otherwise. . . ." 29 U.S.C. § 160(a).

A. When No Contract is in Place, the NLRA Generally Prohibits an Employer from Making Unilateral Changes to Terms and Conditions of Employment Absent Impasse

At the point when a union wins a representation election, or is initially recognized, it typically has no contractual relationship with an employer. Rather, on request, the parties are obligated to meet and bargain over the terms of an initial contract. The same holds true after a contract has been terminated by either party; on request, the parties are obligated to meet and bargain over the terms of a new contract. Meanwhile, the employer's business must go on, and an obvious question is what terms of employment will control during these interim periods.

As defined by the Board, with the approval of the Supreme Court, the answer is that the employer's preexisting terms and conditions of employment—i.e. the most recent "status quo"—must be held constant until the employer and union reach an agreement or impasse. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *see also Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 233 (3d Cir. 2001) ("When parties are engaged in

negotiations for an initial collective-bargaining agreement, the prohibition against unilateral changes continues unless and until an overall impasse has been reached on bargaining for the agreement as a whole."). This prohibition on making unilateral changes to existing terms and conditions of employment applies regardless of whether the parties are bargaining for an initial contract or, as here, "an existing agreement has expired and negotiations on a new one have yet to be completed." *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 198 (1991) (citing *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.,* 484 U.S. 539, 544, n. 6 (1988)).

This obligation derives from the NLRA's statutory purpose to encourage the "practice and procedure" of collective bargaining. 29 U.S.C. § 151. As explained by the Supreme Court long ago, "unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." *May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945), *aff'g* 53 NLRB 1366, 1370-71 (1943). "An employer's unilateral change in conditions of employment

under negotiation is . . . a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *Katz*, 369 U.S. at 743.

While an employer and union are required to make every good-faith effort to reach a contract, the NLRA's statutory bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). Nor is the Board empowered to establish or mandate particular contract terms or agreements. This reflects the "basic theme of the [NLRA] that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. . . . [I]t was never intended that the Government would . . . step in, become a party to the negotiations and impose its own views of a desirable settlement." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-04 (1970).

A necessary corollary to this principle is that collective bargaining negotiations sometimes reach an "impasse," i.e. a point where the parties are deadlocked on one or more issues and continued negotiations for a final contract appear futile. When such an impasse is

reached, the employer is entitled to act unilaterally and to implement those changes contained in its final offer to the union. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 238 (1996). The employer does not have to obtain Board or court pre-approval; it may simply declare impasse and make the designated changes. *See generally Saunders House v. NLRB*, 719 F.2d 683, 686-87 (3d Cir. 1983) (defining and explaining impasse under the NLRA).

The lawful imposition of these unilateral changes after impasse does not create a new contract, but simply changes the now-current status quo. Even after the unilateral imposition of terms following impasse, the parties "remain obligated to continue their bargaining relationship and attempt to negotiate an agreement in good faith." *McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1390 (1996). "[I]n almost all cases [impasse] is eventually broken, through either a change of mind or the application of economic force." *Charles D. Bonanno Linen Serv., Inc.*, 243 NLRB 1093, 1093-94 (1979), *aff'd* 454 U.S. 404, 412 (1982).

B. Parties to NLRA Collective Bargaining Agreements May Refuse to Bargain About Midterm Modifications

Once negotiations have concluded with the adoption of a contract, the rules of the game change. Section 8(d) of the NLRA states that neither party to a collective bargaining agreement "shall terminate or modify such contract" before its expiration date absent the consent of the other. 29 U.S.C. § 158(d). Parties have a private right of action to enforce the terms of a collective bargaining agreement under Section 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185. During the term of the contract, the parties have an absolute right to reject, and even to refuse to negotiate over, contract modifications. *Conn. Power Co.*, 271 NLRB 766, 767 (1984). In this context, "[n]either a claim of economic necessity nor a lack of subjective bad-faith intent, even if proven, constitutes an adequate defense to an allegation that an employer has violated Section 8(a)(5) of the [NLRA] by failing to abide by provisions of a collective-bargaining agreement." *Waddell Eng'g Co.*, 305 NLRB 279, 282 (1991) (footnote omitted).

Every contract under the NLRA, however, may be terminated. Most contracts will have stated expiration dates. Under Section 8(d) of the NLRA, a party must provide notice of its intention to terminate to

its contract partner 60 days prior to the contract's expiration date, and to appropriate mediation agencies 30 days after such notice. 29 U.S.C. 158(d).[5] "In the event such [a] contract contains no expiration date," notification of intent to terminate must be given "sixty days prior to the time it is proposed to make such termination or modification." 29 U.S.C. § 158(d)(1).

C. Under the NLRA, Collective Bargaining Agreements Do Not Survive or "Continue in Effect" After Termination

The parties' private rights of action end with the termination of the contract. At that point, neither employers nor unions may assert any "contractual" prohibition against the other's post-expiration conduct, neither can hold the other accountable for any current contract obligations, and neither can successfully sue the other for breach of contract rights.[6]

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[5] The NLRB does not provide mediation services, although parties engaging in NLRA collective bargaining may request assistance from the Federal Mediation and Conciliation Service (FMCS), an agency independent of the NLRB whose statutory purpose is "to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation." 29 U.S.C. § 173(a). Under 29 U.S.C. § 158(d), notice must be provided to both the FMCS and any applicable state mediation agency.

[6] A narrow exception to this rule permits parties to enforce contract rights that were fixed *before* expiration but remain unsatisfied (for

Thus, in *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 551-53 (1988), the Supreme Court definitively ruled that contract rights *do not survive expiration* of a collective bargaining agreement and that the parties to an expired collective bargaining agreement cannot bring a private suit to enforce its written terms. *Id.* at 544 n.6. Accord *M & G Polymers USA, LLC v. Tackett*, No. 13-1010, 2015 WL 303218, at *10 (U.S. Jan. 26, 2015)("the Court of Appeals failed to consider the traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'") Concomitantly, the Court made it clear that *only* the NLRB may enforce an employer's obligation to maintain the status quo terms and conditions of employment in the post-contract-termination period, because the obligation to maintain those terms pending a new contract or bargaining impasse stems solely from the NLRA. *Advanced Lightweight*, 484 U.S. at 544 n.6.

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example, grievances over contract violations which allegedly occurred during the term of the now-expired contract). *Nolde Bros., Inc. v. Bakery Workers*, 430 U.S. 243, 250-55 (1974). Additionally, "a collective-bargaining agreement [may] provid[e] in explicit terms that certain benefits continue after the agreement's expiration." *M & G Polymers USA, LLC v. Tackett*, 2015 WL 303218, at *10 (insertions in original).

The Supreme Court reaffirmed these holdings in *Litton Financial Printing Division v. NLRB*, instructing that:

> [A]n expired contract has by its own terms released all parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied. Although after expiration most terms and conditions of employment are not subject to change, in order to protect the statutory right to bargain, those terms and conditions *no longer have force by virtue of contract*. . . . Under [*Katz*, 369 U.S. at 743] terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; *they are imposed by law*. . . .

501 U.S. 190, 206-07 (1991) (emphasis added).

This distinction between contractual duties and statutory duties has been recognized by bankruptcy courts since § 1113(c) of the Bankruptcy Code was first enacted. Indeed, even before *Advanced Lightweight* issued, the bankruptcy court in *In re Sullivan Motor Delivery, Inc.*, 56 B.R. 28 (E.D. Wis. 1985), observed that the duties of parties during the period after expiration of a collective bargaining agreement constitute "an area of labor law reserved exclusively for the expertise of the National Labor Relations Board . . . in order to maintain stability in bargaining relationships" and over which a bankruptcy court lacks authority. *Id.* at 30; *see also In re San Rafael Baking Co.*, 219 B.R. 860, 866 (9th Cir. B.A.P. 1998) (relying on *Litton*

and *Advanced Lightweight* to conclude that an expired collective bargaining agreement has no legal force in a bankruptcy court, and abrogating *In re Hoffman Bros. Packing Co.*, 173 B.R. 177, 184 (9th Cir. BAP 1994), which had implied in dicta that § 1113 could be used to "reject" statutory duties under the NLRA).

In sum, it is settled law that NLRA collective bargaining agreements do not survive their expiration dates and that nothing in the NLRA or the statutory obligations it imposes, extends or resuscitates an agreement that has been terminated in accordance with its terms and the provisions of Section 8(d).[7]

II. 11 U.S.C. § 1113 Was Enacted to Cure a Conflict Between The NLRA and the Bankruptcy Code in the Treatment of Extant Contracts, Not Statutory Duties

Two principles should be evident when it comes to defining "good faith bargaining" under the NLRA. First, parties cannot be forced to agree to particular contract terms by judicial or Board fiat. Second,

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[7] In this respect, the NLRA stands in stark contrast to the RLA, which "abhors a contractual vacuum." *Air Line Pilots Ass'n, Int'l v. UAL Corp.*, 897 F.2d 1394, 1398 (7th Cir. 1990). Under the RLA, contracts themselves remain viable by operation of law even *after* their notional expiration date. *See, e.g., Manning v. Am. Airlines, Inc.*, 329 F.2d 32, 34 (2d Cir. 1964) ("The effect of § 6 [of the RLA] is to prolong agreements subject to its provisions regardless of what they say as to termination.").

where parties *have* agreed to a contract, they are obligated to comply in full. The latter principle, however, is in tension with bankruptcy principles, which generally favor a "fresh start" for debtors, and specifically permits debtors to "reject," and thereby breach, extant contracts that would otherwise bind the debtor's actions going forward. The present § 1113 represents Congress's resolution of this specific tension.

A. 11 U.S.C. § 365 Empowers Debtors to Reorganize by Permitting Debtors to Avoid Extant (but not Expired) Contractual Obligations

The Bankruptcy Code from its inception has empowered debtors to reduce their existing contractual obligations to monetary breach-of-contract claims. Section 365(a) of the Bankruptcy Code thus allows a Chapter 11 debtor, with court approval, to "reject" contracts and leases. 11 U.S.C. § 365(a). Rejection "constitutes a breach of such contract or lease." 11 U.S.C. § 365(g)(1). Courts defer to a debtor's decision to reject a contract absent a showing of bad faith or abuse of discretion. *See, e.g., Sharon Steel Corp. v. Nat'l Fuel Gas Distr. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989). Rejection is an effective tool for reorganizing businesses since it allows the debtor to escape continued compliance with

unfavorable contracts, and any resulting breach-of-contract damages will be converted to an unsecured prepetition claim. 11 U.S.C. § 365(g)(1) (breach is deemed to occur immediately before the date of the petition).

But the power to reject a contract under § 365 has never been applied to *expired* contracts. Rather, the settled rule is that expired contracts cannot be rejected under § 365 since "[i]f the contract or lease has expired by its own terms or has been terminated prior to the commencement of the bankruptcy case, then there is nothing left for the trustee to reject or assume." *Gloria Mfg. Corp. v. ILGWU*, 734 F.2d 1020, 1022 (4th Cir. 1984)) (citing 2 COLLIER ON BANKRUPTCY ¶ 365.02 (15th ed. 1981)); *see also In re Pesce Baking Co., Inc.*, 43 B.R. 949, 957 (Bankr. N.D. Ohio 1984) ("once the agreement expires of its own terms, the debtor's application to reject it becomes moot"); *In re Cont'l Properties, Inc.*, 15 B.R. 732, 736 (Bankr. D. Haw. 1981) (expired contract "cannot be assumed or rejected by the Debtor").

Accordingly, prior to the enactment of § 1113 of the Bankruptcy Code, an inherent statutory tension existed between federal labor law and bankruptcy law with respect to the treatment of *extant* contractual

obligations: the NLRA prohibited early termination of contracts, while the Bankruptcy Code affirmatively permitted it. By contrast, no such conflict existed where there was no extant contract: it was understood that a debtor could not seek to "reject" an expired contract and nothing in the Bankruptcy Code otherwise permitted rejection of the debtor's NLRA obligation to bargain to a good-faith impasse before making unilateral changes.

B. 11 U.S.C. § 1113 was Enacted to Overturn *NLRB v. Bildisco & Bildisco* and Limit Debtors' Powers to Reject Collective Bargaining Agreements

The conflict between Section 8(d) of the NLRA and 11 U.S.C. § 365 came to a head before the Supreme Court in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). In that case, the Court resolved a split of authority regarding the appropriate standard to be applied when a debtor requested "rejection" of a collective bargaining agreement under 11 U.S.C. § 365(a). The Supreme Court in *Bildisco* declined to adopt the strict standard for rejection that had been articulated by the Second Circuit,[8] concluding instead that the "Bankruptcy Court should permit

[8] *Brotherhood of Ry., Airline & S.S. Clerks v. REA Express, Inc.*, 523 F.2d 164, 169 (2d Cir. 1975)(holding that under § 365 it was incumbent

rejection of a collective-bargaining agreement . . . if the debtor can show that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract." 465 U.S. at 526. Effectively, *Bildisco* established a new standard for rejection of collective bargaining agreements that was higher than the business judgment rule generally applied by courts to reject other executory contracts under § 365, but far easier for debtors to satisfy than the Second Circuit's failure-of-reorganization test. *Id.*[9]

The aftermath of *Bildisco* has been described in considerable detail in this Court's decision in *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am.,* 791 F.2d 1074, 1081-84, 1086-89 (3d Cir. 1986). Briefly, the *Bildisco* decision created an immediate storm of protest from labor organizations. Labor organizations sought to convince Congress to overrule *Bildisco. Wheeling-Pittsburgh,* 791 F.2d at 1086.

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on the debtor to prove that reorganization would fail unless the court allowed the rejection of its collective bargaining agreement).

[9] A majority of the Court in *Bildisco* also went on to hold that a debtor's unilateral changes to contract terms prior to court-authorized rejection did not constitute an unfair labor practice. *Id.* at 528-34.

Congress responded rapidly. Less than a month after the Supreme Court handed down its decision in *Bildisco,* the House passed a bill prohibiting unilateral modification of a collective bargaining agreement prior to court approval and adopting the Second Circuit's more stringent *REA Express* test as the standard to be applied for rejection of labor contracts. *See id.* at 1086. The House bill then met opposition in the Senate, where two different amendments were introduced to clarify the circumstances under which collective bargaining agreements may be rejected.

Senator Thurmond, Chairman of the Senate Judiciary Committee, first introduced an amendment based on recommendations from the National Bankruptcy Conference.[10] The Thurmond Amendment contained two provisions of particular relevance here. Paragraph 2 of

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[10] 130 CONG. REC. S6126 (daily ed. May 21, 1984) (text of proposed amendment No. 3083, by Sen. Thurmond and Sen. Heflin, to HR 5174). *See also* 130 CONG. REC. S6083 (daily ed. May 21, 1984) (statement of Sen. Thurmond) (explaining that the National Bankruptcy Conference provided the language for the collective bargaining agreement provisions in his amendment). The National Bankruptcy Conference is "a voluntary organization composed of persons interested in the improvement of the bankruptcy laws of the United States and their administration." Home Page, http://www.nationalbankruptcyconference.org/index.cfm (last visited January 28, 2015).

the amendment *automatically* would have deemed any collective bargaining agreement "not to be in effect" thirty days after the filing of a motion to reject the agreement, unless the court, after a preliminary hearing, specifically ordered that it be "continued in effect" pending a final decision on the motion. *Id.* The agreement also was not to be "continued in effect" if "there [was] a reasonable likelihood that the trustee [would] prevail . . ." *Id.* Paragraph 3 contained a provision for interim relief "during a period when the collective bargaining agreement continues in effect." *Id.*

In response, Senator Packwood introduced a separate amendment, developed with the backing of labor leaders, that mandated a more demanding procedure and rejection standard. 130 CONG. REC. S6281 (daily ed. May 22, 1984) (text of proposed amendment No. 3112, by Sen. Packwood, to HR 5174); *see also Wheeling-Pittsburgh Steel*, 791 F.2d at 1083, 1086 (discussing Packwood amendment). The Packwood Amendment required that the debtor "make a proposal" to the union for "minimum modifications . . . that would permit the reorganization," provide the union with relevant information, "meet at reasonable times" with the union, and "negotiate in good faith" on the proposal. The court

could grant rejection only if it found that an appropriate proposal had been made, the union had unjustifiably rejected it, and the balance of the equities "clearly favored" rejection. *Id.*

The Senate, unable to agree on either amendment, passed a bankruptcy bill devoid of any provision addressing the collective bargaining agreement issue, thus leaving it to a House-Senate conference committee to work out any deal regarding the rejection of labor contracts in Chapter 11 proceedings. *Wheeling-Pittsburgh Steel,* 791 F.2d at 1083. After less than two days of consideration in the conference committee, the conferees struck an agreement to include the language currently reflected in § 1113. This final legislation was sent back and passed by both houses of Congress on June 29, 1984 and signed into law by the President on July 10, 1984. Bill D. Bensinger, *Modification of Collective Bargaining Agreements: Does a Breach Bar Rejection,* 13 AM. BANKR. INST. L. REV. 809, 816 (2005).

Side-by-side comparison reveals that the final language of § 1113 represents a compromise between various positions taken as the issue made its way through Congress. The bulk of the enacted law, and in particular § 1113(c) —the provision at issue in this case— "was based

on the substance of Senator Packwood's proposal." *Wheeling-Pittsburgh*, 791 F.2d at 1087. But the law's emergency, interim-relief section, 11U.S.C. § 1113(e), was taken nearly verbatim from paragraph 3 of the Thurmond Amendment, including its distinctive "continues in effect" phrasing.

III. The Plain Language of § 1113 Does Not Permit Bankruptcy Courts to Authorize "Rejection" of Statutory Duties

The statutory construction question to be answered in this case may be summarized as follows: when Congress enacted § 1113, prohibiting bankruptcy courts from authorizing "rejection of a collective bargaining agreement" except under narrowly defined circumstances, did it intend *sub silentio* to create a new—labor-law specific—exception to the traditional rule that expired contracts cannot be "rejected"? So framed, the answer is self-evident: it did not. Both text and history unequivocally establish that Congress intended § 1113 to narrow the impact of *Bildisco's* interpretation of § 365, by limiting, not expanding, debtors' powers under the latter section.

"Where the meaning of a statute, in context, is clear, the analysis need go no further." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The Union has ably shown how the opinion below departs from the

plain meaning of the text of § 1113. Union Br. at 10-30. We add only a few interpretive observations.

"It is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012) (internal quotations omitted).[11] Moreover, and crucially:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.

Midlantic Nat. Bank v. New Jersey Dept. of Envtl. Prot., 474 U.S. 494, 501 (1986) (citations and internal quotation omitted).

Section 1113(c), by its terms, only applies to "rejection" of "collective bargaining agreements." The term "collective bargaining agreement" is not defined by the Bankruptcy Code. But, as seen, it is a

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[11] *See also ICC v. Parker*, 326 U.S. 60, 65 (1945) (term "public convenience and necessity," not defined in Motor Carrier Act of 1935, presumptively incorporated interpretations of same term under Transportation Act of 1920).

longstanding term of art within the context of the NLRA. 29 U.S.C. § 158(d). Under *Cooper*, the preexisting NLRA definition should control the interpretation given to this same term in § 1113. This result is particularly apt when one considers that § 1113 was intended to address the impact of *Bildisco* on NLRA agreements. As discussed, *supra*, a collective bargaining agreement under the NLRA does not survive the delineated expiration date after a timely request is made by either party to terminate the agreement. 29 U.S.C. § 158(d); *cf. Litton*, 501 U.S. at 200; *Advanced Lightweight*, 484 U.S. at 551-53.

The statutory terms "reject" and "rejection," by contrast, are *bankruptcy* terms of art, borrowed directly from 11 U.S.C. § 365. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 521-23 (1984) (referencing § 365 "rejection"). When Congress enacted § 1113, it was settled law that expired contracts, including collective bargaining agreements, could not be "rejected" under § 365. *Gloria Mfg. Corp.*, 734 F.2d at 1022. The same reading perforce applies when interpreting the same word in § 1113. *In re Depew*, 115 B.R. 965, 969 (Bankr. N.D. Ind. 1989) ("Title 11's various provisions should not be viewed in isolation. . . . The meaning given to any one portion must be consistent with the

remaining provisions of the Bankruptcy Code."). Under *Midlantic*, 474 U.S. at 501, the absence of specific evidence that Congress wanted to alter the traditional § 365 meaning of "reject" when enacting § 1113 furthers the inference that it did *not* intend to do so.

The court below focused little discussion on the terms actually contained within § 1113(c), the statutory provision at issue here, choosing instead to focus on the language of § 1113(e), the interim relief provision that is not in issue. More particularly, the court chose to analyze the language in § 1113(e) referencing the period when "the collective bargaining agreement continues in effect." This is curious, to say the least, since the phrase "continues in effect" is nowhere used in § 1113(c).[12] In any event, the court's analysis of that phrase is premised on inaccurate assumptions.

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[12] The bankruptcy judge essentially read that phrase into Section 1113(c) because, in his view, it would have been "absurd" for Congress to have allowed Section 1113(e) to cover expired contracts, but not Section 1113(c). App. A24. This does not satisfy the applicable canon which permits a court to ignore a statutory provisions actual text *only* in the rare cases where "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).

According to the court below, "'continues in effect' references a term of art regularly used in labor law to refer to the employer's post-expiration *status quo* obligations." App. A23. This particular assertion, first made in *In re Karykeion, Inc.*, 435 B.R. 663, 675 (Bankr. C.D. Cal. 2010), is demonstrably incorrect.

The phrase "continues in effect" was, like "rejection," a term of art *from bankruptcy* with an established meaning as of 1984. Contracts were referred to by courts in bankruptcy cases as "remaining in effect" or "continuing in effect" during the period of time after a bankruptcy petition was filed but before the estate had assumed or rejected it.[13] Ultimately, the phrase "continues in effect" traces back to the Collier's treatise, which at least as early as 1963 had stated that "[t]he failure to assume affirmatively an executory contract does not result at any time in a rejection of the contract. Whether the debtor is in possession, or

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[13] *See In re Whitcomb & Keller Mortg. Co.,* 715 F.2d 375, 378 (7th Cir. 1983) (stating that executory contract "remained in effect" after bankruptcy petition was filed until the debtor-in-possession made its decision to assume or reject the contract). *See also Bildisco*, 465 U.S. at 546 n.13 (Brennan, J., dissenting) (stating that "It is noteworthy that courts considering bankruptcy cases often refer to executory contracts as remaining 'in effect' unless or until they are rejected" and citing numerous cases to that effect).

whether there is a receiver or trustee, the contract can be rejected only by affirmative action . . . Unless so rejected, *the contract continues in effect.*" 8 COLLIER ON BANKRUPTCY ¶ 3.15(6) (14th ed.)), quoted in *Smith v. Hill,* 317 F.2d 539, 542 n.6 (9th Cir. 1963).

As earlier explained, the reference in § 1113(e) to "the period when the collective bargaining agreement continues in effect" came from the proffered Thurmond Amendments, which elsewhere proposed that an extant contract, by court order, could be "continued in effect" pending a final decision on a rejection motion. See § II-B, above. In context—and given that the Thurmond Amendment was drafted by bankruptcy experts—this bankruptcy-specific usage was intentional.

The *Karykeion* court's citation to *Litton* to support the position that NLRA contracts "continue in effect" after their expiration is similarly erroneous. *Litton* used that phrase solely to refer to what happens to terms and conditions of employment—not the contract—after that contract expires. Indeed, the principal holding of *Litton* was to affirm the Board's conclusion that a key term of employment, an expired contract's grievance-arbitration clause, did *not* "continue in effect" after contract expiration. 501 U.S. at 200. Moreover, the *Litton*

decision explicitly rejects the notion that "postexpiration terms and conditions of employment which coincide with the contractual terms can be said to arise under an expired contract, merely because the contract would have applied to those matters had it not expired." *Id.* at 206. In the post- contract period, "the obligation not to make unilateral changes is rooted not in the contract but in preservation of terms and conditions of employment" imposed solely by the NLRA. *Id.* at 207 (internal quotation marks removed). In sum, contrary to the court's assumption, there is no NLRA interpretation that permits contracts to "continue in effect" post-termination absent explicit agreement by the parties. 29 U.S.C. § 158(d).[14]

[14] Language in one administrative law judge's decision, issued several years *after* § 1113's enactment, *Accurate Die Casting Co.*, 292 NLRB 982, 987-88 (1989), has been cited at times to claim that expired NLRA contracts "continue in effect" after their expiration. The Board itself did not discuss this part of the administrative law judge's opinion in finding that the employer unlawfully made unilateral changes to terms and conditions of employment after declaring bankruptcy. The underlying administrative law judge decision speculates that the employer might have avoided liability by filing a § 1113 motion advancing the same theory as the Appellees here, but this speculation was mere dicta, unrelated to the actual outcome of the decision and carrying no precedential weight. *E.g. E.S.P. Concrete Pumping*, 327 NLRB 711, 712 (1999).

Recall, too, that the obligation to maintain current terms and conditions of employment is precisely the same whether parties are between contracts or negotiating a first contract. If § 1113(c) applies in the post-contract termination period, thereby allowing debtors to reject and unilaterally change a statutorily imposed status quo, then logically it could be argued that a debtor should be able to employ § 1113(c) to reject its statutory obligations during first contract negotiations, before the parties have ever entered into an agreement but at a time when it is similarly constrained from making such unilateral changes. Not surprisingly, no court has ever suggested that § 1113's text can be interpreted to reach this far.

IV. Legislative History and Policy Counsel Against Expanding § 1113 Beyond What Would Otherwise Have been Available Under § 365.

Congress enacted § 1113 "to preclude employers from using bankruptcy law as an offensive weapon in labor relations." *In re Roth American, Inc.*, 975 F.2d 949, 956 (3d Cir. 1992). The general consensus

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More to the point, given the Supreme Court's subsequent decisions in *Advanced Lightweight* and *Litton*, the judge's reasoning (whether dicta or holding) has no continued viability. Those cases hold that NLRA collective bargaining agreements hold no legal force after their expiration dates. Both the Board and this Court are bound by those precedents.

of the conference committee members who drafted the final text of § 1113 was that the substance of the Packwood amendment—which is to say, the position of organized labor—had been adopted. *Wheeling-Pittsburgh*, 791 F.2d at 1087. A bipartisan mix of contemporary legislators, and numerous courts, have stated that § 1113 was meant to encourage collective bargaining outside of bankruptcy.[15] Expanding the power of debtors to manipulate the *statutory* collective bargaining process through the filing of motions *inside* bankruptcy court could hardly be said to foster the parties' independent collective bargaining. And, as shown, nothing in the language or legislative history of § 1113

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15 *E.g.,* 130 CONG. REC. S8892 (daily ed. June 29, 1984) (statement of Sen. Hatch) (indicating that 1113's process requires "good faith efforts to confer in an effort to reach an agreement"); 130 CONG. REC. S8898 (daily ed. June 29, 1984) (statement of Sen. Packwood) (stating that 1113's provisions "place[ ] the primary focus on the private collective bargaining process and not in the courts"); *In re Maxwell Newspapers*, 981 F.2d 85, 90 (2d Cir. 1992) (statute's "entire thrust" is to "ensure that well informed and good faith negotiations occur in the marketplace, not as part of the judicial process"); *In re Mile Hi Metal Systems., Inc.,* 51 B.R. 509, 510 (Bankr. D. Colo. 1985) ("[o]ne of the primary purposes of [Section 1113] was to emphasize the private collective bargaining process in an effort to avoid recourse to the bankruptcy court"), *rev'd on other grounds*, 67 B.R. 114 (D. Colo.1986), *vacated on other grounds*, 899 F.2d 887 (10th Cir. 1990).

suggests that it was intended to intrude on statutory legal obligations arising solely under the NLRA and not by contract.

The opinion below asserts that a failure to apply § 1113 to expired contracts would prevent reorganizations because the "complex and time consuming process overseen by [the Board]" is simply too inflexible for Congress to have possibly intended for debtors to be subjected to it. In the court's words, "both Congress and the Supreme Court in *Bildisco* recognized the need for an expedited process by which debtors could restructure labor obligations in bankruptcy." App. A26. Otherwise, the the court opined, unions would have "the power to hold up a debtor's bankruptcy case until the union's demands were met . . ." App. A29.

It is well settled that such "disputable considerations of convenience" alone are insufficient grounds for exempting debtors from nonbankruptcy law. *Midlantic*, 474 U.S. at 501 (citing *Swarts v. Hammer,* 194 U.S. 441, 444 (1904), and *Palmer v. Massachusetts,* 308 U.S. 79, 85 (1939)). No doubt most parties would find reorganization simpler if courts could grant them indulgences from other laws; but the Bankruptcy Code does not permit this. Instead, it is perfectly clear that

the NLRB, in particular, may enforce the NLRA against bankrupt companies.[16]

Moreover, the judge's analysis is flawed even on its own terms. The NLRA, as interpreted by the Board, already provides the "expedited process" the court below deemed necessary. Where an employer is faced with exigent circumstances beyond its control during the period when it is negotiating an agreement, it may provide the union notice of the exigency and an opportunity to bargain over related matters. *RBE Electronics*, 320 NLRB 80, 81-82 (1995). If the union does not respond, it waives its right to bargain over those issues. If the union agrees to bargain, such bargaining "need not be protracted"—impasse or agreement over those individual terms may be reached swiftly and changes thereby implemented. *Id.* Indeed, the Board's "economic exigency" doctrine is in some ways *more* expedient to employers than § 1113 since the NLRA does not require a company to affirmatively prove the necessity of unilateral changes to an outside party before the

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[16] 11 U.S.C. § 362(b)(4); *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 44 (3d Cir. 1942) (en banc); *NLRB v. Edward Cooper Painting*, 804 F.2d 934, 943 (6th Cir. 1986); *NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981) (per curiam).

changes can be made—those changes are reviewed (if at all) only after the fact.

Thus, in situations like this one, debtors already have access to effective tools under the NLRA to compel unions to come to the table and bargain in good faith when no contracts are in place. Yet, as Appellees and the court below would have it, § 1113 should be rewritten by judicial interpretation to extend its reach beyond rejection of collective bargaining agreements in order to permit debtors to evade what are solely statutory bargaining obligations under the NLRA. Whatever the merits of this viewpoint, it is Congress—not the courts—to whom attempts to expand the statutory authority of bankruptcy courts over non-contractual, NLRA collective bargaining obligations should be addressed.

CONCLUSION

Longstanding NLRA law establishes that collective bargaining agreements do not continue in effect after termination by the parties. Bankruptcy courts lack authority to "reject" what are solely statutory bargaining obligations under the NLRA. The language of 11 U.S.C. § 1113 does not permit the reading that Appellees assign to it; the

drafting history of that section shows that Congress never intended that reading; and the purpose of that section is flatly inconsistent with that reading.

This Court should find in favor of the Appellant and reverse the judgment below.

Respectfully submitted,

Dated: January 29, 2015

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National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITE HERE LOCAL 54	*	
	*	
Appellant	*	No. 14-4807
	*	
v.	*	
	*	
TRUMP ENTERTAINMENT RESORTS, INC.	*	
	*	
Appellee	*	
	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief contains 6,807 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007. I further certify that the text of the electronic brief is identical to the text in the paper copies. I further certify that a Symantec Endpoint Protection virus check has been run on the file and no virus was detected.

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Dated at Washington, D.C.
this 29th day of January
2015

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITE HERE LOCAL 54	*	
	*	
Appellant	*	No. 14-4807
	*	
v.	*	
	*	
TRUMP ENTERTAINMENT RESORTS, INC.	*	
	*	
Appellee	*	
	*	

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2015, I electronically filed a true and correct copy of the foregoing Brief Of The National Labor Relations Board As Amicus Curiae Urging Reversal In Support of Appellant Unite Here Local 54 with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF System. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that I have caused to be mailed the foregoing document by United States first-class mail, postage prepaid, to the following non-CM/ECF participants:

United States Trustee
United States Department of Justice
Office of the Trustee
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Dated at Washington, D.C.
this 29th day of January 2015

s/ Diana Orantes Embree
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11 U.S.C. §365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

…

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

11 U.S.C. §1113. Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to

accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

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

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

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to

implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

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

29 U.S.C. §151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination

of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

§158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

. . .

> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or

Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . .

(1) in paragraph (5), as redesignated by inserting "a request made for" before "additional";

(2) in paragraph (7), as redesignated by striking out "and" after the semicolon and inserting in lieu thereof "or"; and

(3) in paragraph (8), as redesignated by inserting "other than completion of payments under the plan" after "in the plan".

SEC. 535. (a) Section 1322(a)(2) of title 11 of the United States Code is amended by inserting a comma after "payments".

(b) Section 1322(b) of title 11 of the United States Code is amended—

(1) in paragraph (2), by inserting ", or leave unaffected the rights of holders of any class of claims" before the semicolon;

(2) in paragraph (4), by inserting "other" after "claim or any";

(3) in paragraph (7), by—

(A) inserting "subject to section 365 of this title," before "provide";

(B) striking out "or rejection" and inserting in lieu thereof ", rejection, or assignment"; and

(C) striking out "under section 365 of this title" and inserting in lieu thereof "under such section"; and

(4) in paragraph (8), by striking out "any".

SEC. 536. Section 1323(c) of title 11 of the United States Code is amended by striking out "the plan as modified, unless the modification provides for a change in the rights of such holder from what such rights were under the plan before modification, and" and inserting in lieu thereof "such plan as modified, unless".

SEC. 537. Section 1324 of title 11 of the United States Code is amended by striking out "the" the second place it appears.

SEC. 538. Section 1325(a)(1) of title 11 of the United States Code is amended by inserting "the" before "other".

SEC. 539. Section 1326(b)(2) of title 11 of the United States Code as amended by section 318 is amended by inserting "of this title" after "1302(d)".

SEC. 540. (a) Section 1328(a)(2) of title 11 of the United States Code is amended to read as follows:

"(2) of a kind specified in section 523(a) of this title.".

(b) Section 1328(e) of title 11 of the United States Code is amended—

(1) in paragraph (1), by inserting "by the debtor" after "obtained"; and

(2) in paragraph (2), by striking out "knowledge of such fraud came to the requesting party" and inserting in lieu thereof "the requesting party did not know of such fraud until".

SEC. 541. Section 1329(a) of title 11 of the United States Code is amended—

(1) by inserting "of the plan" after "confirmation";

(2) by striking out "a plan" and inserting in lieu thereof "such plan"; and

(3) in paragraph (3), by striking out the comma.

SEC. 542. Section 15102 of title 11 of the United States Code is amended by striking out "chapter" the first place it appears and inserting in lieu thereof "title".

SEC. 543. Section 15103(f) of title 11 of the United States Code is amended by—

(1) striking out "704 (8)";

(2) inserting "1106(a)(1), 1108," after "1105"; and

(3) inserting "1302(b)(1), 1302(b)(3)," after "1302(a),".

SEC. 544. Section 15322(b)(1) of title 11 of the United States Code is amended by—

(1) inserting "required to be" after "bond" the first place it appears;

(2) striking out "(2)"; and

(3) inserting "of this title" before the semicolon.

SEC. 545. Section 15324 of title 11 of the United States Code is amended by inserting a comma after "a trustee".

SEC. 546. Section 15330 of title 11 of the United States Code is amended by adding at the end thereof the following: "The notice required under section 330 of this title shall be given to the United States trustee.".

SEC. 547. (a) Section 15701(a) of title 11 of the United States Code is amended by striking out "trustees established".

(b) Section 15701(b) of title 11 of the United States Code is amended by striking out "such persons" and inserting in lieu thereof "the members of such panel".

SEC. 548. (a) Section 15703(a) of title 11 of the United States Code is amended by striking out "specified in section 15701(a) of this title. Sections 701(b) and 701(c) of this title apply to such interim trustee." and by inserting in lieu thereof "and subject to the provisions of sections 701 and 15701 of this title.".

(b) Section 15703(b) of title 11 of the United States Code is amended by striking out "truste" and inserting in lieu thereof "trustee".

SEC. 549. Section 15704 of title 11 of the United States Code is amended to read as follows:

"§15704. Duties of trustee

"The trustee shall—

"(1) if the business of the debtor is authorized to be operated, file with the United States trustee periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements; and

"(2) make and file interim reports, as circumstances justify, on the condition of the estate with the United States trustee and make and file a final report and account of the administration of the estate with the United States trustee and the court.".

SEC. 550. Section 151102(b) of title 11 of the United States Code is amended by striking out "interest of" and inserting in lieu thereof "interest,".

SEC. 551. (a) Chapter 15 of title 11 of the United States Code is amended by inserting after section 151105 the following new sections:

"§ 151106. Duties of trustee and examiner

"(a) A trustee shall perform the duties specified in sections 704(2), 704(4), 704(6), and 15704 of this title.

"(b) A trustee shall transmit a copy or a summary of any statement filed under section 1106(a)(4)(A) of this title to any creditors' committee, to any indenture trustee, to the Untied States trustee, and to any other entity as the court designates.

"§ 151108. Authorization to operate business

"Unless the court, upon the request of a party in interest or the Untied States trustee and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business.".

(b) The table of sections for chapter 15 of title 11 of the United States Code is amended by inserting after the item relating to section 151105 the following new items:

"151106. Duties of trustee and examiner.
"151108. Authorization to operate business.".

SEC. 552. (a) Section 151302(a) of title 11 of the United States Code is amended by inserting ", or shall appoint a disinterested person to serve," after "The United States trustee shall serve".

(b) Section 151302(b) of title 11 of the Untied States Code is amended to read as follows:

"(b) The trustee shall—

"(1) perform the duties specified in sections 704(2), 704(4), 704(6), and 15704 of this title; and

(2) dispose of, pursuant to regulations issued by the Attorney General, moneys received or to be received in a case under chapter XIII of the Bankruptcy Act.".

Subtitle J—Collective Bargaining Agreements

SEC. 561. Section 365 of title 11, United States Code, is amended by inserting after subsection (k) the following new subsection:

"(1) In a case under chapter 9, 11, or 13 of this title—

"(1) The trustee, after notice and a hearing, may assume or reject a collective bargaining agreement which has been made by the debtor under the authority of title II of the Railway Labor Act, the National Labor Relations Act, or other applicable law. A collective bargaining agreement shall be rejected under this section upon the request of the trustee if the court finds that reasonable efforts to negotiate a change in the contractual terms have been made by the debtor or by the trustee and are not likely to produce a prompt and feasible alternative to rejection, that the inability to reach an agreement threatens to impede the success of the debtor's reorganization under chapter 11 of this title or adjustment of debts under chapter 9 or 13 of this title, that the agreement is burdensome to the estate, and that in considering the needs of the debtor, the employees covered by the agreement, and other parties in interest, the equities balance in favor of the rejection of the agreement.

"(2) Thirty days after a request by the trustee under paragraph (1) of this subsection, the collective bargaining agreement shall be deemed not to be in effect pending a final hearing and determination under paragraph (1) unless the court, after notice and a hearing, orders the agreement continued in effect pending such final hearing and determination. A hearing under this paragraph may be a preliminary hearing, or may be consolidated with the final hearing under paragraph (1). If the hearing under this paragraph is a preliminary hearing—

"(A) the court shall order that such agreement shall not be continued in effect if there is a reasonable liklihood that the trustee will prevail at the final hearing under such paragraph (1); and

"(B) the final hearing shall be commenced within thirty days after such preliminary hearing.

"(3) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in the case of a municipality to the continuation of necessary services, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee.".

SEC. 562. The amendments made by this subtitle shall apply in cases commenced under title 11 of the United States Code on and after the date of enactment of this subtitle.

Subtitle K—Supplemental Amendments

SEC. 571. Section 926 of title 11 of the United States Code is amended by—

(1) inserting "(a)" before "If"; and

(2) adding at the end thereof the following:

"(b) A transfer of property of the debtor to or for the benefit of any holder of a bond or note, on account of such bond or note, may not be avoided under section 547 of this title.".

insert in lieu thereof "reputation within the legal profession".

HELMS AMENDMENT NO. 3110

Mr. HELMS proposed an amendment to amendment No. 3086 proposed by him to the bill H.R. 5174, supra; as follows:

This amendment shall become effective July 4, 1984.

HELMS (AND OTHERS) AMENDMENT NO. 3111

Mr. HELMS (for himself, Mr. LAXALT, Mr. JEPSEN, Mr. GRASSLEY, Mr. SYMMS, Mr. EAST, Mr. DENTON, and Mr. GOLDWATER) proposed an amendment to amendment No. 3086 proposed by him to the bill H.R. 5174, supra; as follows:

In view of the language proposed to be inserted by amendment 3086, insert the following:

SEC. . Section 316(b)(2)(C) of the Federal Election Campaign Act is amended by inserting before the period ": *Provided*, That all contributions, gifts, or payments for such activities are made freely and voluntarily, and are unrelated to dues, fees, or other moneys required as a condition of employment".

SEC. . Section 316(b)(3) of the Federal Election Campaign Act is amended by—

(1) striking out "and" at the end of subparagraph (B);

(2) striking out the period at the end of subparagraph (C) and inserting "; and"; and

(3) adding after subparagraph (C) the following:

"(D) to use any fees, dues, or assessments paid to any organization as a condition of employment, or money or anything of value secured by physical force, job discrimination, of financial reprisal for (i) registration or get-out-the-vote campaigns, (ii) campaign materials or partisan political activities used in connection with any broadcasting, direct mail, newspaper, magazine, billboard, telephone banks, or any similar type of political communication or advertising, (iii) establishing, administering, or soliciting contributions to a separate segregated fund, or (iv) any other expenditure in connection with any election to any political office or in connection with any primary election or political convention or caucus held to select candidates for any political office.".

SEC. . This amendment shall become effective July 4, 1984.

PACKWOOD (AND OTHERS) AMENDMENT NO. 3112

Mr. PACKWOOD (for himself, Mr. DECONCINI, Mr. KENNEDY, and Mr. MITCHELL) proposed an amendment to amendment No. 3083 proposed by Mr. THURMOND, (and Mr. HEFLIN) to the bill H.R. 5174, supra; as follows:

Beginning on page 116, line 5, strike out through Page 117 line 25 and insert in lieu thereof the following:

SUBTITLE J.—COLLECTIVE BARGAINING AGREEMENTS

SEC. . (a) Title 11 of the United States Code is amended by adding after section 1112 the following new section:

"§ 1113. Rejection of collective bargaining agreements

"(a) The debtor in possession, or the trustee (hereinafter in this section 'trustee' shall include a debtor in possession), if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may reject or assume a collective bargaining agreement under this title only after the court approves such rejection or assumption of such agreement.

"(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the trustee shall—

"(A) make a proposal, based on the most complete and reliable information available, to the authorized representative of the employees covered by such agreement, providing for the minimum modifications in such employees benefits and protections that would permit the reorganization, taking into account the best estimate of the sacrifices expected to be made by all classes of creditors and other affected parties to the reorganization; and

"(B) provide, subject to subsection (d)(3), the representatives with the information necessary to evaluate such proposal.

"(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

"(c) The court shall approve an application for rejection of a collective bargaining agreement ony if the court finds that—

"(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

"(2) the authorized representative has refused to accept such proposal and under the circumstances such refusal was unjustified; and

"(3) the balance of the equities clearly favors rejection of such agreement.

"(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than twenty-one days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

"(2) The court shall rule upon such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice the court may extend such time for a period not exceeding fifteen days, or for additional periods of time to which the trustee and representative agree.

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

"(e) No provision of this title shall be construed to permit a debtor in possession or a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement before approval or rejection of such contract under this section.".

(b) The table of sections for chapter 11 of title 11, United States Code, is amended by inserting after the item relating to section 1112 the following new item:

"1113. Rejection of collective bargaining agreements.".

(c) The amendments made by this section shall become effective upon the date of enactment of this Act.

TARIFF TREATMENT OF CERTAIN ARTICLES

DURENBERGER (AND BOSCHWITZ) AMENDMENT NO. 3113

(Ordered to lie on the table.)

Mr. DURENBERGER (for himself and Mr. BOSCHWITZ) submitted an amendment intended to be proposed by them to the bill (H.R. 3398) to change the tariff treatment with respect to certain articles, and for other purposes; as follows:

On page 23, between lines 6 and 7, insert the following:

SEC. 119. WALLEYED PIKE.

Part 3 of schedule 1 is amended—

(1) by redesignating item 110.15 as item 110.18,

(2) by inserting after item 110.10 the following new items with a superior heading having the same indentation as "Sea herring, smelts" in item 110.10:

"110.12	Walleyed pike: Whole; or processed by removal of heads, viscera, fins, or any combination thereof, but not otherwise processed.	Lb	$3 per lb	$3.01 per lb.
110.13	Scaled (whether or not heads, viscera, fins, or any combination thereof have been removed), but not otherwise processed: In bulk or in immediate containers weighing with their contents over 15 lbs each.	Lb	$3 per lb	$4.25 per lb.
110.14	Other	Lb	$3 per lb. + 6 percent ad val.	$3.00 per lb. +25 percent ad val.
110.15	Skinned and boned, whether or not divided into pieces, and frozen into blocks each weighing over 10 lbs.; imported to be minced, ground, or cut into pieces of uniform weights and dimensions.	Lb	$3 per lb	$4.25 per lb.
110.16	Otherwise processed (whether or not heads, viscera, fins, scales, or any combination thereof have been removed)	Lb	$3 per lb	$3.025 per lb.".

(3) by inserting after item 111.15 the following new item having the same indentation as "Shark fins" in item 111.15:

"111.16	Walleyed pike	Lb	$3.01 per lb.	$4.25 per lb.".

(4) by inserting after item 111.48 the following new items with a superior heading having the same indentation as "Salmon" in item 111.48:

are compensated at the GS-18 level. These positions are, however, "equivalent positions" within the definition of the senior Executive service and the incumbents of these positions have responsibilities equivalent to senior Executive service personnel. Thus, we have added this amendment to allow the salaries of these positions to be brought into line with those in the senior Executive service.

Title II of this substitute amendment, as I indicated earlier, contains the so-called "omnibus judgeship" positions recommended by the Judicial Conference and authorized in S. 1013 and in earlier versions of the Kastenmeier-Kindness bill and amendment. Provisions in title II would authorize 61 district court positions and 24 circuit court positions, as provided by the Senate in S. 1013. These additional judgeships are necessary to handle existing caseloads and are not directly related to the bankruptcy court issues. These new article III judges will, of course, be very useful in handling the additional burden placed on the district courts in the bankruptcy area. Certainly handling bankruptcy appeals will contribute to the district court workload. The need for these new judgeships has been carefully and fully documented, both in the committee report on S. 1013 and in the floor debate on the Senate bill on April 27 of last year.

Title III of the Senate substitute contains all of the substantive amendments to the Bankruptcy Code. Subtitles A and B pertain to consumer credit and to grain elevator bankruptcies respectively and are essentially the same as the House-passed provisions. It is my understanding that the House provisions are basically acceptable to the Senate proponents of these measures.

Subtitles C through I contain the remaining substantive provisions passed by the Senate in S. 1013. These provisions were not included in the House bill. They do, however, have broad support in the Senate and were therefore included in this substitute amendment. These provisions are as follows:

Subtitle C—Leasehold Management Amendments.

Subtitle D—Amendments to Title 11, Section 523 Relating to Discharge of Debts Incurred by Persons Driving While Intoxicated.

Subtitle E—Referee's Salary and Expense Fund.

Subtitle F—Amendments Regarding Repurchase Agreements.

Subtitle G—Amendments to Title 11, Section 365 to Provide Adequate Protection for Timeshare Consumers.

Subtitle H—Bankruptcy Oversight.

Subtitle I—Technical Amendments to Title 11.

Subtitle J of title III pertains to rejection of collective bargaining agreements in a chapter 11 reorganization proceeding. It addresses the more controversial 5 to 4 portion of the decision of the Supreme Court in NLRB against Bildisco & Bildisco. It would not alter the standard for rejection established by the Court in that decision. Subtitle J was not a part of S. 1013 as originally passed by the Senate. The House bill contains language on rejection of collective bargaining agreements; but, in the view of many Senators, it goes too far.

Before I discuss subtitle J in greater depth, I would like to briefly comment on the two additional subtitles of title III. Subtitle K contains certain supplemental amendments not previously passed by the Senate in S. 1013. These amendments, which I understand are basically noncontroversial, pertain to the Durrett issue, to the twist cap issue, and to municipal bonds in bankruptcy proceedings. The twist cap and Durrett provisions were included at the request of Senator DOLE. The municipal bond amendments were included at the request of Senator HEFLIN and other Senators. The basic purpose of the municipal bond amendments is to provide assurances to the bond market that, in providing necessary financing to municipalities, the pledge of revenues for payment on such obligations will not be terminated and that any payment to bondholders will not be forced to be repaid. The municipal bond amendments are supported by the National League of Cities, the U.S. Conference of Mayors, and the Municipal Finance Officers Association.

Subtitle L contains certain miscellaneous amendments pertaining to severability and the effective date of title III. Section 581 is a standard severability clause. Section 582 states that, except as otherwise provided in title III, the amendments made by title III will take effect 3 months after date of enactment and shall not apply to pending cases.

On February 22, 1984, the U.S. Supreme Court decided the case of NLRB against Bildisco & Bildisco, and in so doing, upheld the right of a debtor-in-possession to reject a collective bargaining agreement in a chapter 11 reorganization case. The Court adopted the standard set by the Third Circuit Court of Appeals and rejected the standard which had prevailed in the Second Circuit under the case of Brotherhood of Railway Employees against REA Express, Inc. The test in the REA Express case essentially required the debtor to be facing liquidation before he could reject his collective bargaining agreements. Unfortunately, the House bill not only adopted the REA Express standard, but even went beyond it in the opinion of many.

I should point out to my colleagues that the Supreme Court rejected REA Express and adopted the Bildisco standard by a unanimous 9-0 vote. Yet, approximately 1 month after that decision, the House, without benefit of hearings on or study of this complex area of bankruptcy law, passed a bill which completely overturns the Supreme Court's decision. Numerous Members of the House, during the debate on H.R. 5174, pointed out the danger in moving so quickly on legislation to overturn a unanimous Supreme Court decision without hearings or careful study. I share that concern, and my initial reaction was not to include any language in this bill on that point. Organized labor is asking this Congress to change a Court decision which in my view is practical, within the policy of the Federal bankruptcy laws, and fair to both companies and employees facing a chapter 11 reorganization. In the interests of prompt passage of a critically needed bankruptcy bill, I have been urged by many to include language addressing the 5 to 4 portion of the Bildisco decision.

Mr. President, this has been an extremely difficult issue to try to resolve. Because of the labor issue, we have had to twice extend the transition period of the 1978 Bankruptcy Act. During the period of time afforded by these extensions, members of the Judiciary Committee, and Senator HATCH in particular, have made every effort to reach a fair and acceptable compromise. We have not been able to achieve such a compromise, initially because both the business community and organized labor did not wish to do so. In recent days, however, the business community, albeit reluctantly, has agreed to a reasonable middle ground. That reasonable compromise is contained in the Senate substitute now before you. Organized labor continues to demand unreasonable, unfair, and unworkable changes in the Bankruptcy Code which would seriously jeopardize timely and effective relief for financially troubled businesses under chapter 11. The rehabilitative purpose of chapter 11 is simply too important to allow it to be undermined by organized labor's unreasonable demands in an election year.

Mr. President, the language contained in subtitle J of title III is neither the creature of business nor of labor.

I want to repeat that. The language contained in subtitle J of title III is neither the creature of business nor of labor. It was not drafted or amended in any way by business or labor. This language was provided to the committee as a suggested compromise by the National Bankruptcy Conference (NBC), an organization composed of representatives of different groups who are interested in the administration of bankruptcy law. Its membership is composed of bankruptcy judges, full-time professors of law, and practicing attorneys who specialize in bankruptcy law. The Conference has over 70 members from all areas of the country.

When the NBC draft was first presented to representatives of business and labor, neither found it acceptable. Quite frankly, I thought their reaction indicated that the NBC language might represent a reasonable compro-

the key individuals who worked diligently to reach a fair and equitable resolution to this difficult problem. Teamsters' Union President Jackie Presser deserves special credit in this regard for his tireless defense of the workingman. By the same token, I would express appreciation to Bob Thompson at the U.S. Chamber for his great contributions to this debate. AFL-CIO President Lane Kirkland and representatives of the National Association of Manufacturers and many others deserve commendation for their efforts to reach a fair resolution of the difficult problem of deciding how to save a financially distressed business.

The conference committee set up a careful procedure to ensure that the interests of the struggling business, its union employees, and all other creditors of the business are balanced equitably and fairly. Of course, when a business is failing, no resolution is completely satisfactory. Often drastic measures are necessary to save the hemorrhaging company, including rejection of the businesses labor contract. In the Bildisco case, the Supreme Court unanimously established a healthy compromise with regard to chapter 11 reorganizations that involve a labor union. The Court did not accede to the wishes of business parties that labor contracts, like commercial contracts, should be subject to rejection whenever the business judged such action necessary. Nor did the Court accede to the wishes of labor parties that collective bargaining agreements should only be rejected under the test established by the REA Express case of the second circuit. The unanimous Court decided that the REA Express test was "fundamentally at odds" with the policies of flexibility and equity built into chapter 11. Instead the Court decided that the court reviewing bankruptcy should balance all the equities, including the interests of all affected parties, before determining whether rejection should be allowed. The conference's compromise adheres to the spirit of this unanimous Supreme Court opinion. At each step of the process set up by this bill, the parties and the court must carefully balance and preserve, to the extent possible, the legitimate and reasonable interests of all affected parties in such a manner as to assure the success of the reorganization.

The conference version of H.R. 5174 sets up a procedure to ensure that all parties' interests are balanced as carefully as possible in light of the difficult circumstances. The first step of the process should take place before the failing business ever appears in court to seek rejection of its labor agreement. The business must make an offer to its employees' union representatives that strives to both preserve the collective bargaining agreement and permit a successful reorganization. That offer should make "those necessary modifications" in the contract as "are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all the affected parties are treated fairly and equitably." The intent of this provision is to allow the business to make whatever changes in the collective bargaining agreement are reasonably necessary to ensure the likelihood of a successful reorganization. The provision emphasizes that the inevitable balancing that will go into this attempt to save both the business and the labor contract must reasonably assure the fair and equitable treatment of all those affected by the reorganization effort. This fair and equitable treatment language was intended by the conference to ensure that the type of balancing of all the equities that takes place when the court finally rules on rejection also takes place during these preliminary negotiations. The conference also discussed at length its intent that this provision not become an attempt to devise an entire reorganization plan at a premature stage. We were all aware of the impossibility of even identifying all the creditors and their interests at this early stage of the reorganization effort. Accordingly, this proposal by the business which offers what is necessary to save the business and assure fair and equitable balancing of all the interests should not be construed to require a detailed accounting of how the difficult burden of reorganization is to be distributed amongst competing parties. Moreover the term "affected parties" is meant to include those parties with a contractual, legal, or financialtie to the debtor that would make it one of the logical parties to the equities balancing that must proceed as the court administers a reorganization. This and all other provisions in this labor part of the bill must be read in the context of the needs of the reorganization process. This provision is intended merely to require some reasonable consideration of various interests that should be considered in reorganizing.

The first step of this process will of 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 in an effort to reach an agreement between the business and its union employees which will both preserve the labor contract with modifications and save the business. Of course, a distressed business will often find no way to rehabilitate the business without completely rejecting the labor contract. Complete rejection may, in cases of severe financial distress, be the only proposal that a business may make to effect reorganization. The good faith nature of these negotiations will require that the employees' union representative be given an opportunity to review and accept or reject the business proposal. In the spirit of good faith that should permeate these negotiations, however, the unions must not reject the business offer without good cause. This opportunity to accept or reject the proposal should be assessed in light of the essentiality of swift and fair resolution of the initial phases of the reorganization. Accordingly, rejection of a proposal should only happen if the cause for rejection is good enough to risk the damage to the business as well as its creditors and employees that delay or protracted negotiations could produce.

This is perhaps the place to discuss an important provision adopted by the conference to address the need for some interim unilateral action by the business. Thus, if it is essential to the continuation of the business or if irreparable damage might occur, the court may authorize the business to make whatever alterations in the labor contract which will avoid those harms. This process may become necessary during the negotiations prior to the debtor's filing an application for rejection or during the period when the court is considering the application or any other time "when the collective bargaining agreement continues in effect." This is an important aspect of the balancing process which the court must undertake when reviewing these sensitive reorganization cases involving a labor union contract. Chapter 11's overriding purpose is to take whatever steps are expedient to preserve the failing business for the benefit of all if possible. This provision gives the courts the flexibility to carry out that purpose as long as the labor contract remains in effect.

After the good faith negotiation process or if such process is not progressing to settlement of differences, the reorganizing business may find that it still has need to file an application to reject the labor contract. At that point, the court, in compliance with fair time limits set out by the conference version of this bill, holds a hearing and rules on the rejection application. That ruling is to be governed by the standard that the "balance of the equities clearly favors" rejection. This again harkens back to the Bildisco decision. The Supreme Court explicitly required this standard for assessment of the merits of the a rejection application. The word "clearly" is merely intended to assure that rejection is not warranted where the equities balance exactly equally on each side. This is what The Supreme Court meant when it discussed the sensitivity of these matters. Of course, the equities will almost always balance in favor one resolution or another. In such cases, the court will surely rule in accordance with the tilt of the balance.

The conference agreement also emphasizes the need for expedition in traversing this entire process. Accordingly, it provided an incentive for ad-

negotiations, particularly over the difficult labor provisions contained in the bill.

Several weeks ago, I offered an amendment to the bankruptcy bill to address the controversy over the rejection of labor contracts in bankruptcy. This amendment, which was developed with the cooperation of labor leaders, was designed to reverse the Supreme Court's Bildisco decision. The Bildisco decision upheld the right of a company to unilaterally cancel a union contract. The amendment I offered would have prevented companies from unilaterally rejecting union contracts, and forced management and labor to negotiate in good faith over proposed contract changes. This amendment was vigorously opposed by those who did not want to give labor contracts adequate protection in bankruptcy.

Mr. President, the agreement reached by the Conferees on the labor provisions in the bill brings to an end the effort to assure that labor contracts, which are negotiated in good faith, are properly protected. I am pleased that the approach contained in the amendment I offered was, for the most part, adopted by the conferees.

While I am concerned by the inclusion in the bill of certain controversial provisions, I feel that these emergency relief provisions will have only limited and secondary consequences and application. Specifically, I include in this category: First, allowing the debtor to make unilateral changes if the judge fails to rule on the rejection application within 30 days; second, authorizing the court to approve interim relief; and third, deleting the effective date. On balance, I think the bill should stimulate collective bargaining and limit the number of cases when a judge will have to authorize the rejection of a labor contract.

Mr. President, at this time I would like to describe for the record my understanding of the labor bankruptcy provisions adopted by the conference committee.

Under the conference language, before a debtor in possession, or a trustee, may apply to the court for rejection of its labor contract, it must make a proposal to the union which, first, "provides for those necessary modifications in the employee benefits and protections that are necessary to permit the reorganization of the debtor and," second, "assures that all creditors, the debtor and other affected parties are treated fairly and equitably." As to the first requirement, similar to the proposal which I had made, only modifications which are necessary to a successful reorganization may be proposed. Therefore, the debtor will not be able to exploit the bankruptcy procedure to rid itself of unwanted features of the labor agreement that have no relation to its financial condition and its reorganization and which earlier were agreed to by the debtor. The word "necessary" inserted twice into this provision clearly emphasizes this required aspect of the proposal which the debtor must offer and guarantees the sincerity of the debtor's good faith in seeking contract changes.

The second requirement of the proposal—that it assure fair and equitable treatment for all creditors, the debtor and other affected parties—also is similar to language in my proposed amendment. This language guarantees that the focus for cost cutting must not be directed exclusively at unionized workers. Rather the burden of sacrifices in the reorganization process will be spread among all affected parties. This consideration is desirable since experience shows that when workers know that they alone are not bearing the sole brunt of the sacrifices, they will agree to shoulder their fair share and in some instances without the necessity for a formal contract rejection.

This language should not be difficult to apply. In fact, at least one bankruptcy court has already applied this kind of analysis in a case in Rhode Island. There the court found that the labor agreement should be rejected, and that absent rejection, the company would have to shut down. But the court refused to permit rejection unless the debtor showed that it had reduced topheavy management salaries, disposed of six out of seven company cars, utilized the remaining one just for business purposes, canceled gasoline credit cards, and reduced health, welfare, and pension contributions for management personnel proportionately with the reduced contributions for unionized employees. This case was called *In re Blue Ribbon Transportation Co.*, 113 L.R.R.M. 3505 (D.R.I. 1983). As I see it, this approach is eminently fair and will not be impossible to implement. The debtor will already have been required to analyze its obligations to all affected parties. After the petition in bankruptcy is filed, the debtor is obligated to submit immediately a list of creditors, a schedule of assets and liabilities, and a statement of financial affairs. Therefore, the debtor will have a basis upon which to determine the fair and equitable treatment of all parties.

After the proposal is made, and until a hearing on the motion to reject, the parties must bargain in good faith. This provision places the primary focus on the private collective-bargaining process and not in the courts. The amendments then provide that the court may approve the rejection of the agreement if the debtor has made a proposal as discussed above, the union has rejected it without good cause, and the balance of the equities clearly favors rejection. The "without good cause" language provides an incentive or pressure on the debtor to negotiate in good faith. In practical terms, this language imposes no barrier to rejection if the debtor's proposal has contained only the specified "necessary" modifications. Thus, the language serves to prohibit any bad faith conduct by an employer, while at the same time protecting the employer from a Union's rejection of the proposal without good cause.

The amendments also provide that the trustee may seek the court's permission for interim changes in the labor agreement pending its ruling on the rejection application. The court may only grant the interim relief after notice and a hearing and only if essential to the continuation of the debtor's business. This provision essentially requires the court to apply the test used by the Second Circuit Court of Appeals in the *REA Express* case, 523 F2d 164, cert. denied, 423 U.S. 1017 (1975).

The amendments also prohibit the trustee from unilaterally altering or terminating the labor agreement prior to compliance with the provisions of the section. This provision encourages the collective bargaining process, so basic to federal labor policy. The provision overrules the 5-4 portion of the Supreme Court's Bildisco decision and means that the labor contract is enforceable and binding on both parties until a court-approved rejection or modification. There is a limited exception contained in section 1113(d)(2). Where the court wrongly fails to decide the rejection application in the prescribed time, the trustee may terminate or alter any contract provisions pending the ruling of the court. Obviously if the court ultimately refuses to approve rejection of the contract, then the trustee will have to pay back any wages or benefits withheld unilaterally and unpaid wages and benefits will be treated as costs of administration. In addition, if the trustee makes any such unilateral changes, than the Union is also free to engage in strike activity since its no-strike obligation would no longer be binding.

Mr. KENNEDY. Mr. President, as the sponsor of the Senate bill which mirrored the labor provisions contained in the House passed bankruptcy amendments and an original cosponsor of the Packwood amendment I am gratified with the results of the conference and pleased that I was able to participate in fashioning the conference language on the status of collective bargaining agreements during chapter 11 reorganizations.

The conference agreement parallels the Packwood amendment and achieves the aim of that amendment and of my own bill dealing with this subject—S. 2462—to overturn the Bildisco decision which had given the trustee all but unlimited discretionary power to repudiate labor contracts and to substitute a rule of law that encourages the parties to solve their mutual problems through the collective bargaining process.

I would have preferred that the subsections permitting unilateral action by the trustee when the court does not issue a timely ruling and providing for