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HOW THE CHANGING BANKRUPTCY LAWS HAVE AFFECTED LABOR RELATIONS**

1. USE OF FEDERAL BANKRUPTCY LAWS TO ABOGATE LABOR CONTRACTS

Brownstein, Ronald, “Going bankrupt — Is it just a way to get out of labor contracts?” National Journal (Government Research Corporation, 1730 M St., N.W., Washington, DC 20036), November 12, 1983. pp. 2353-2355.

The passage of the 1978 Bankruptcy Reform Act marked the first time in 40 years that Congress modified the bankruptcy laws. The changes were designed to encourage firms to reorganize and stay in business (under Chapter 11) rather than liquidate (under Chapter 7). Companies no longer have to claim insolvency before reorganizing, and management can now more easily retain control of the reorganizing firm. The result has been a dramatic increase in the number of business bankruptcies, with the proportion of bankrupts seeking to reorganize rather than liquidate rising from 16 to 29 percent. At the same time, several companies have filed for bankruptcy apparently for the sole reason of rejecting their labor contracts. This article presents an overview of the situation and examines the cases of Continental Airlines, the San Jose Unified School District and Wilson Foods Corporation. Some of the issues that have confronted Congress and the courts include: 1) how dire a bankrupt company's financial situation must be before it can abrogate a collective bargaining agreement; 2) whether a firm can unilaterally initiate contract changes; 3) whether the two sides must first reach a bargaining impasse before a court can reject a labor agreement; 4) whether the debtor is required to bargain after a contract is rejected in bankruptcy court.


Citing the recent bankruptcy declarations of several corporations, the author claims that firms are using the Bankruptcy Code as a weapon in labor-management confrontations and as a way to avoid certain social responsibilities. He notes that the controversy over the proper use of bankruptcy has divided the legal and business communities, and presents each side of the debate. Martin also briefly describes the significance of the Bildisco case, which decided the legality of abrogating labor contracts that threaten financial stability.


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This short article analyzes the trend toward giving unions a larger role in the division of a company's assets once it declares bankruptcy. Both the pros and cons of this development are cited: Unions may become more sensitive to employer problems and more willing to make contract concessions, but their interests may conflict with those of other creditors. In addition to striving to maintain the original work force, unions are using their growing influence to try to guarantee the payment of pension plans.


Continental Airlines shutdown and filed for bankruptcy in September 1983, but resumed operations just 56 hours later. Francisco A. Lorenzo, Continental’s chairman, says in this article that the airline was able to resume operations because he deliberately filed — and slashed wages — before the firm’s financial situation had become hopeless. However, machinists, pilots and flight attendants went on strike, and union leaders complained that he had declared bankruptcy in bad faith. This article examines Lorenzo himself and the events surrounding the declaration of bankruptcy in an industry that has become quite cost-conscious after deregulation. Lorenzo predicts that the competitive environment will compel unions to temper their wage demands.

2. NLRB v. BILDISCO AND BILDISCO


Speaking at the May 1984 meeting of the Industrial Relations Research Association, Lunnie, of the National Association of Manufacturers, and Oswald, of the AFL-CIO, debate the merits of the Bildisco ruling and of upcoming congressional legislation. In NLRB vs. Bildisco & Bildisco, handed down in February 1984, the court ruled, 5-4, that a debtor-in-possession does not commit an unfair labor practice if he unilaterally modifies the terms of an existing union contract after a bankruptcy petition has been filed, but before a bankruptcy court has authorized the rejection of the agreement. Lunnie, who supports the Supreme Court’s decision, notes that the “balancing of equities” test adopted by the court provides the flexibility necessary to rehabilitate the debtor. Oswald, on the other hand, stresses the “basic distinction between collective bargaining contracts and basic commercial contracts for utilities, materials and supplies.” In the June 1984 edition of this journal, Robert W. Kilroy notes that the court has made it more difficult for employers to reject collective bargaining agreements (In “Re Bildisco: New hurdles for the rejection of a collective bargaining agreement in bankruptcy.” *Labor Law Journal*. June 1984. pp. 368-373).


This short report explains the Supreme Court decision that dealt a major blow to organized labor. In addition to citing excerpts from the Court’s Bildisco ruling, the full text of which is included in this edition of the *Daily Labor Report*, this article notes organized labor’s outrage over the decision.
"Unionists are alarmed by high court ruling in a bankruptcy filing."
The Bildisco decision has altered the "equation of labor management relations," according to this newspaper account written a few days after the ruling was announced. Citing the views of labor, management and legal experts, the article notes that the Supreme Court ruling sanctions the use of bankruptcy filing as a means of avoiding union contracts. While some observers fear that many troubled companies will now take advantage of the opportunity to declare bankruptcy, others contend that the cost of Chapter 11 is too great.

Speaking at a Center for the Study of American Business conference before the February 1984 Supreme Court decision, O'Connor describes in detail the facts of the NLRB vs. Bildisco & Bildisco case and outlines the two issues that confronted the court: 1) whether compliance with the bargaining requirements of Section 8(d) of the National Labor Relations Act, which obligates a firm to notify the union of its intent to terminate a labor contract sixty days before taking such action, is necessary before a bankruptcy court can reject a labor contract; 2) whether rejection of the labor contract is subject to the same standard as the rejection of a commercial contract. O'Connor refutes the claims that a "labor contract is somehow sacrosanct," but maintains that management must serve the sixty-day notice to the union before it can reject the collective bargaining agreement.

The author attempts to determine the current status of labor's and management's contractual obligation to proceed to arbitration once a bankruptcy petition has been filed, a question left unanswered by both the Bildisco ruling and the 1984 Bankruptcy Amendments. His review of judicial precedent, especially the Supreme Court's 1976 Bohack decision, leads him to conclude that the parties will be allowed to pursue arbitration if the bankruptcy court has not rejected the debtor's collective bargaining agreement. However, it is unclear whether or not the courts will permit arbitration after a contract has been abrogated. Berger urges the bankruptcy courts to allow all contractual disputes arising under collective bargaining agreements to proceed to arbitration.

Representatives of both labor and management express qualified approval in this news report of the Bankruptcy Amendments and Federal Judges Act of 1984. Passed overwhelmingly by Congress on June 29, 1984, the compromise bill requires bankruptcy court approval before a debtor can
reject a collective bargaining agreement, which would be allowed only if the union has spurned the debtor's contract modifications "without good cause" and if the balance of equity "clearly favors" rejection of the union contract. However, a debtor can unilaterally implement contract changes if the bankruptcy court fails to act within thirty days.

4. Discussion


Simon, a labor lawyer whose firm is special counsel to the AFL-CIO, argues that labor contracts are fundamentally different from other commercial contracts and thus should not be discarded during bankruptcy proceedings. Claiming that "collective bargaining is the linchpin of our economic system," he asserts that companies such as Continental Airlines and Wilson Foods that do not show negative balance sheets have been abusing the bankruptcy code by filing for the express purpose of abrogating labor contracts. This is a dangerous development, according to Simon: "By allowing the bankruptcy court to vitiate labor contracts, we are creating an environment for the survival of the least fit."


Leaving control of the firm in the hands of management after it has filed under Chapter 11 is a fundamental problem with the bankruptcy laws, according to the author. "Putting the debtor-in-possession in the shoes of a trustee in bankruptcy is the same thing as putting the fox in charge of the chicken house," he contends. The conflict arises from the two objectives of bankruptcy law — equality between creditors and the opportunity for a fresh start for the debtor. Loiseaux maintains that firms can thus abrogate labor contracts, but maintains that strict standards must be established for such action. Moreover, once a labor contract is rejected by a debtor-in-possession, the firm is still obligated to bargain in good faith with labor representatives.


This article identifies the conflict between the Bankruptcy Reform Act of 1978 and the Norris-La Guardia Act. The bankruptcy code provides debtor protection through an automatic stay that eliminates financial pressures until the bankruptcy court approves an arrangement that treats all creditors fairly. The labor act, on the other hand, generally forbids federal courts from issuing injunctions in labor disputes. The author argues that the conflict should be resolved by treating labor like any other creditor, and that bankruptcy courts should thus be allowed to enjoin the collective activity of the union under the automatic stay provision.