

The Burger Court Opinion Writing Database

NLRB v. Bildisco & Bildisco

465 U.S. 513 (1984)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 16, 1983

Re: No. 82-818) NLRB v. Bildisco and Bildisco
No. 82-852) Local 408, International Brotherhood
of Teamsters v. NLRB

Dear Bill:

I join.

Regards,



Justice Rehnquist

Copies to the Conference

74
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

October 17, 1983

No. 82-818

NLRB v. Bildisco & Bildisco

No. 82-852

Local 408, International
Brotherhood of Teamsters v. NLRB

Dear Byron, Thurgood and Harry,

We four are in dissent in this one.
I will try my hand at a dissent.

Sincerely,



Justice White

Justice Marshall

Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

November 9, 1983

No. 82-818

NLRB v. Bildisco & Bildisco

No. 82-852

Local 408, International
Brotherhood of Teamsters v. NLRB

Dear Bill,

While I agree with much of your analysis, I still have problems, particularly with Part II-B and Part III. I expect I shall attempt a dissent, at least to that extent.

Sincerely,



Justice Rehnquist

Copies to the Conference

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To: The Chief Justice
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

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W. J. Brennan
Please see file
4/11/84

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 82-818 AND 82-852

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

82-818 *v.*
BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION,
ET AL.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, ETC., PETITIONER

82-852 *v.*
NATIONAL LABOR RELATIONS BOARD ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[February —, 1984]

JUSTICE BRENNAN, concurring in part and dissenting in part.

The Court holds that under § 365 of the Bankruptcy Code,¹ a Bankruptcy Court should permit a debtor in possession² to reject a collective-bargaining agreement upon a showing that

¹Section 365 provides in pertinent part: "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." 11 U. S. C. § 365.

²Under section 1101 of the Bankruptcy Code, 11 U. S. C. § 1101, the debtor in possession is the debtor in any case in which "no person has qualified and is serving as a trustee." 1 A. Herzog & L. King, Bankruptcy Code § 1102, at 452 (1983). Section 1107 provides that "[s]ubject to . . . such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights . . . and powers" of a reorganization trustee other than the right to compensation. These powers include "the power to operate the debtor's business unless the court orders otherwise." 5 L. King, Collier on Bankruptcy ¶ 1101.01, 1101-2 (15th ed. 1983).

stylistic changes and
changes pp 1, 7, 9, 13, 16, 18

To: The Chief Justice
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 82-818 AND 82-852

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

82-818 v.
BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION,
ET AL.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, ETC., PETITIONER

82-852 v.
NATIONAL LABOR RELATIONS BOARD ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[February —, 1984]

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE
MARSHALL, and JUSTICE BLACKMUN join, concurring in part
and dissenting in part.

The Court holds that under § 365 of the Bankruptcy Code,¹
a Bankruptcy Court should permit a debtor in possession² to
reject a collective-bargaining agreement upon a showing that

¹Section 365 provides in pertinent part: "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." 11 U. S. C. § 365.

²Under section 1101 of the Bankruptcy Code, 11 U. S. C. § 1101, the debtor in possession is the debtor in any case in which "no person has qualified and is serving as a trustee." 1 A. Herzog & L. King, Bankruptcy Code § 1102, at 452 (1983). Section 1107 provides that "[s]ubject to . . . such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights . . . and powers" of a reorganization trustee other than the right to compensation. These powers include "the power to operate the debtor's business unless the court orders otherwise." 5 L. King, Collier on Bankruptcy ¶ 1101.01, 1101-2 (15th ed. 1983).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

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SUPREME COURT U.S.
JUSTICE MARSHALL

November 14, 1983

'83 NOV 14 P1:25

Re: 82-818 and 82-852 -
NLRB v. Bildisco and Bildisco
Local 408, Int'l Brotherhood of Teamsters v. NLRB

Dear Bill,

I shall await the dissent in these cases.

Sincerely,



Justice Rehnquist
Copies to the Conference
cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 14, 1984

Re: 82-818 and 82-852 -

NLRB v. Bildisco; and Local 408, Int'l
Brotherhood of Teamsters v. NLRB

Dear Bill,

I join your opinion concurring in part
and dissenting in part.

Sincerely,



Justice Brennan

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 9, 1983

Re: Nos. 82-818 and 852-NLRB v. Bildisco and
Bildisco ; and Local 408, International
Brotherhood of Teamsters v. NLRB

Dear Bill:

I await the dissent.

Sincerely,



T.M.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 13, 1984

Re: Nos. 82-818 and 852-NLRB v. Bildisco and
Bildisco, Debtor-in-Possession and Local
408, International Brotherhood of Teamsters v.
National Labor Relations Board

Dear Bill:

Please join me in your concurring opinion.

Sincerely,

T. M.
T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 11, 1983

Re: No. 82-818) NLRB v. Bildisco and Bildisco
No. 82-852) Local 408, International Brotherhood
of Teamsters v. NLRB

Dear Bill:

I probably could go along with portions of your opinion, but I am troubled by other portions. I have some doubt whether the statutes in question are able to carry the load you ascribe to them. I therefore shall await further writing.

Sincerely,



Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 10, 1984

Re: No. 82-818) NLRB v. Bildisco and Bildisco
No. 82-852) Local 408, International Brotherhood
v. National Labor Relations Board

Dear Bill:

I am joining Bill Brennan's opinion for these cases
and thereby am joining Parts I and II of your opinion.

Sincerely,



Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 10, 1984

Re: No. 82-818) NLRB v. Bildisco and Bildisco
No. 82-852) Local 408, International Brotherhood
v. National Labor Relations Board

Dear Bill:

Please join me in your opinion concurring in part and dissenting in part. My clerk has discussed with your clerk two very minor suggestions. I am sure they will be able to work them out.

Sincerely,



Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 10, 1983

82-818 NLRB v. Bildisco

Dear Bill:

Please join me.

Sincerely,

Lewis

Justice Rehnquist

lfp/ss

cc: The Conference

December 15, 1983

82-818 and 82-852 NLRB v. Bildisco & Bildisco

Dear Bill:

The changes suggested in your letter of December 11 are acceptable to me.

Sincerely,

Justice Rehnquist

lfp/ss

cc: The Chief Justice
Justice O'Connor

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: NOV 8

Recirculated: _____

WFR
I am not the dissent
74

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 82-818 AND 82-852

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

82-818

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION,
ET AL.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, ETC., PETITIONER

82-852

v.

NATIONAL LABOR RELATIONS BOARD ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[November —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Two important and related questions are presented by these petitions for certiorari: (1) under what conditions can a Bankruptcy Court permit a debtor-in-possession to reject a collective-bargaining agreement; (2) may the National Labor Relations Board find a debtor-in-possession guilty of an unfair labor practice for unilaterally terminating or modifying a collective-bargaining agreement before rejection of that agreement has been approved by the Bankruptcy Court. We decide that the language "executory contract" in 11 U. S. C. §365 of the Bankruptcy Code includes within it collective-bargaining agreements subject to the National Labor Relations Act, and that the Bankruptcy Court may approve rejection of such contracts by the debtor-in-possession upon an appropriate showing. We also decide that a debtor-in-possession does not commit an unfair labor practice when, after the filing of a bankruptcy petition but before court-

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Stylistic Changes
pp. 16, 17, 18, 19

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 82-818 AND 82-852

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

82-818

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION,
ET AL.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, ETC., PETITIONER

82-852

v.

NATIONAL LABOR RELATIONS BOARD ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[November —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Two important and related questions are presented by these petitions for certiorari: (1) under what conditions can a Bankruptcy Court permit a debtor-in-possession to reject a collective-bargaining agreement; (2) may the National Labor Relations Board find a debtor-in-possession guilty of an unfair labor practice for unilaterally terminating or modifying a collective-bargaining agreement before rejection of that agreement has been approved by the Bankruptcy Court. We decide that the language "executory contract" in 11 U. S. C. § 365 of the Bankruptcy Code includes within it collective-bargaining agreements subject to the National Labor Relations Act, and that the Bankruptcy Court may approve rejection of such contracts by the debtor-in-possession upon an appropriate showing. We also decide that a debtor-in-possession does not commit an unfair labor practice when, after the filing of a bankruptcy petition but before court-

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

RECEIVED
SUPREME COURT U.S.
JUSTICE MARSHALL

'83 NOV 18 A9:49

November 17, 1983

Re: Nos. 82-818 & 82-852 NLRB v. Bildisco & Bildisco

Dear John:

I have read, but not yet fully digested, your 11-page tome of November 16th. At this point I think I know how Francis Scott Key must have felt on that early morning in Baltimore Harbor when he wrote the second verse of The Star-Spangled Banner:

"On the shore, dimly seen through the mists of the deep,
Where the foe's haughty host in dread silence reposes,
What is that which the breeze, o'er the towering steep,
As it fitfully blows, half conceals, half discloses?"

I think that my purposes would be better served, and perhaps yours would be too, if you could translate the three criticisms of Part II of the presently circulating draft into concrete suggestions. For what it is worth, and based on my present understanding of the contents of your letter, I have the following reactions:

(1) I was very leery in my draft of saying anything more about the Bankruptcy Code in general than I thought was absolutely necessary to decide this case. I do not feel that I am qualified to make any sort of an exegesis on the meaning of the Bankruptcy Code, and I didn't think that the briefs afforded us all that much help if we were inclined to make the effort. If you could make specific suggestions in connection with your first point, I think I would be better able to deal with them.

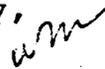
(2) Subject to further thinking about the matter, I am receptive to the idea of re-tailoring Part II-B of the

opinion to make it rest to a greater degree on the analysis contained in Part III.

(3) I think I would have great difficulty responding to some of the concerns which you express in pages 6-11 of your letter. On page 9 you state that "I am inclined to believe that the Bankruptcy Court should be required to make a finding of fact that it is more likely than not that an affirmance of the contract would prevent the successful rehabilitation of the debtor." That seems to me to be a paraphrase of the REA Express standard which I thought was unanimously rejected by the Conference discussion of this case.

If, on the other hand, you wish the standards to be applied by the Bankruptcy Court to be fleshed out to a greater degree, I would be glad to consider any specific suggestions. I agree with you that the Bankruptcy Code "does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization." Page 11 of your letter. I also agree with your observation that the "Bankruptcy Court should have great latitude to consider any type of evidence relevant" to equities which relate to the success of the reorganization. I would be happy to consider language which would translate these ideas into the opinion.

Sincerely,



Justice Stevens
cc: The Conference

Dear Bill,

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

The changes suggested
in your letter of Dec 11th are
acceptable to me.

Sincerely, December 13, 1983

Only
CC to
CQ & SO'c

Re: Nos. 82-818 & 82-852 NLRB V. Bildisco & Bildisco

Dear Chief, Lewis, and Sandra:

I have been negotiating with John Stevens for considerable time in order to produce a fifth vote in my Bildisco opinion. I have agreed to make the following changes in the currently circulating draft, and he has agreed to join it if I do. Because they are a good deal more than "stylistic," I submit them to the three of you who have already joined, in hopes that you will have no objection to them, before recirculating the opinion in its entirety. I think John's idea was to put a little more "meat" on the bones, and I think the revisions which he and I have agreed on are constructive. The revisions consist of the following:

(1) The first two sentences on p. 11 will be deleted. Part II-B will be modified, and instead of appearing as a separate sub-part will now be incorporated in Part III of the opinion. The modification will now appear on p. 18 before the second paragraph, and will read as follows:

"The Union, but not the Board, also insists that the debtor-in-possession must comply with the mid-term contract modification procedures set forth in §8(d) of the NLRA, 29 U.S.C. §158(d). See ante, at n. 5. Because the collective bargaining agreement is not an enforceable contract within the meaning of §8(d), it follows that the debtor-in-possession need not comply with the provisions of §8(d) prior to seeking the Bankruptcy Court's permission to reject the agreement.

Section 8(d) applies when contractual obligations are repudiated by the unilateral actions of a party to the collective bargaining

These changes strengthen the opinion.

WHR

agreement. We have recognized that Congress's central purpose in enacting §8(d) was to regulate the modification of collective-bargaining agreements and to facilitate agreement in place of economic warfare. Allied Chemical & Alkali v. Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 187 (1971); see also H.R. Rep. No. 510, 80th Cong., 1st Sess., p. 34 (1947) (Report of the Conference). In a Chapter 11 case, however, the 'modification' in the agreement has been accomplished not by the employer's unilateral action, but rather by operation of law. Since the filing of a petition in bankruptcy under Chapter 11 makes the contract unenforceable, §8(d) procedures have no application to the employer's unilateral rejection of an already unenforceable contract. Indeed, even the Board concedes that the cumbersome and rigid procedures of §8(d) need not be imported into bankruptcy proceedings. Brief of NLRB, at 41.

The Union maintains, as a fall-back position, that even if §8(d) procedures do not apply fully, the debtor-in-possession should be required to "bargain to impasse" prior to seeking rejection from the Bankruptcy Court. We interpret this contention to mean that the debtor-in-possession should not be permitted to seek rejection unless the duty to bargain has been excused because further negotiations would be fruitless, a standard little different from that imposed on all employers subject to the NLRA. See NLRB v. American National Insurance Co., 343 U.S. 395, 404 (1952); Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967); enforced, 395 F.2d 622 (CA DC 1968). Our rejection of the need for full compliance with §8(d) procedures of necessity means that any corresponding duty to bargain to impasse under §8(a)(5) and §8(d) before seeking rejection must also be subordinated to the exigencies of bankruptcy. Whether impasse has been reached generally is a judgment call for the Board to make; imposing such a requirement as a condition precedent to rejection of the labor contract will simply divert the Bankruptcy Court from its customary area of expertise into a field in which it presumably has little or none." ✓

(2) The following paragraph will replace the second paragraph of the current circulating draft:

"We agree with the Court of Appeals below, and with the Court of Appeals for the Eleventh Circuit in a related case, In re Brada-Miller Freight System, Inc., 702 F. 2d 929 (1983), that the Bankruptcy Court should permit rejection of a collective bargaining agreement under §365(a) of the Bankruptcy Code 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. The standard which we think Congress intended is a higher one than that of the 'business judgment' rule, but a lesser one than that embodied in the REA Express opinion of the Court of Appeals for the Second Circuit.

Before acting on a petition to modify or reject a collective-bargaining agreement, however, the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. The NLRA requires no less. Not only is the debtor-in-possession under a duty to bargain with the union under §8(a)(5) of the NLRA, 29 U.S.C. §158(a)(5), see post, at 18-19, but the national labor policies of avoiding labor strife and encouraging collective bargaining, id., §1, 29 U.S.C. §151, generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference. See, e. g., Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974); NLRB v. Burns Security Services, 406 U.S. 272, 282-294 (1972). The Bankruptcy Court need step into this process only if the parties' inability to reach an agreement threatens to impede the success of the debtor's reorganization. If the parties are unable to agree, a decision on the rejection of the collective bargaining agreement may become necessary to the reorganization process. At such a point, action by the Bankruptcy Court is required, while the policies of the Labor Act have been adequately served since reasonable efforts to reach agreement have been made. That court need

not determine that the parties have bargained to impasse or make any other determination outside the field of its expertise. See post, at 18.

Since the policy of Chapter 11 is to permit successful rehabilitation of debtors, rejection should not be permitted without a finding that that policy would be served by such action. The Bankruptcy Court must make a reasoned finding on the record why it has determined that rejection should be permitted. Determining what would constitute a successful rehabilitation involves balancing the interests of the affected parties-- the debtor, creditors, and employees. The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees. In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardship each may face.

The Bankruptcy Court is a court of equity, and in making this determination it is in a very real sense balancing the equities, as the Court of Appeals suggested. Nevertheless, the Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities. The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization. The Bankruptcy Court's inquiry is of necessity speculative and it must have great latitude to consider any type of evidence relevant to this issue."

Sincerely



The Chief Justice
Justice Powell
Justice O'Connor

pp. 10-12, 17-18

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

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From: Justice Rehnquist

'83 DEC 16 12:43

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 82-818 AND 82-852

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

82-818 v.
BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION,
ET AL.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, ETC., PETITIONER

82-852 v.
NATIONAL LABOR RELATIONS BOARD ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[January —, 1984]

JUSTICE REHNQUIST delivered the opinion of the Court.

Two important and related questions are presented by these petitions for certiorari: (1) under what conditions can a Bankruptcy Court permit a debtor-in-possession to reject a collective-bargaining agreement; (2) may the National Labor Relations Board find a debtor-in-possession guilty of an unfair labor practice for unilaterally terminating or modifying a collective-bargaining agreement before rejection of that agreement has been approved by the Bankruptcy Court. We decide that the language "executory contract" in 11 U. S. C. § 365 of the Bankruptcy Code includes within it collective-bargaining agreements subject to the National Labor Relations Act, and that the Bankruptcy Court may approve rejection of such contracts by the debtor-in-possession upon an appropriate showing. We also decide that a debtor-in-possession does not commit an unfair labor practice when, after the filing of a bankruptcy petition but before court-

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Pg 13, 14, 16, 18, 19

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

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JUN 1984

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'84 FEB 17 A10:40

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 82-818 AND 82-852

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

82-818

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION,
ET AL.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, ETC., PETITIONER

82-852

v.

NATIONAL LABOR RELATIONS BOARD ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[February —, 1984]

JUSTICE REHNQUIST delivered the opinion of the Court.

Two important and related questions are presented by these petitions for certiorari: (1) under what conditions can a Bankruptcy Court permit a debtor-in-possession to reject a collective-bargaining agreement; (2) may the National Labor Relations Board find a debtor-in-possession guilty of an unfair labor practice for unilaterally terminating or modifying a collective-bargaining agreement before rejection of that agreement has been approved by the Bankruptcy Court. We decide that the language "executory contract" in 11 U. S. C. § 365 of the Bankruptcy Code includes within it collective-bargaining agreements subject to the National Labor Relations Act, and that the Bankruptcy Court may approve rejection of such contracts by the debtor-in-possession upon an appropriate showing. We also decide that a debtor-in-possession does not commit an unfair labor practice when, after the filing of a bankruptcy petition but before court-

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

RECEIVED
SUPREME COURT U.S.
JUSTICE

November 16, 1983 NOV 18 A9:49

Re: 82-818 -- National Labor Relations Board v.
Bildisco and Bildisco;
82-852 -- Local 408, International
Brotherhood of Teamsters v.
National Labor Relations Board

Dear Bill:

Although I agree with Parts I and III of your draft opinion, there are three portions of Part II that concern me.

First, on page 11 the draft opinion indicates that the demanding REA Express¹ standard for rejection of collective bargaining agreements is inconsistent with the chapter 11 policy of treating all classes of creditors equitably. The opinion states that utilizing a more demanding standard for rejecting collective bargaining agreements under 11 U.S.C. §365(a) (1976 ed., Supp. V) than for other types of executory contracts would violate the obligations to treat all classes of creditors fairly and equitably under id., §§1122(a) and 1129(b), and to treat all creditors within a class equally under id., §1123(a)(4). I disagree.

The Bankruptcy Code defines a class of creditors as creditors with substantially similar claims: "[A] plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." Id., §1122(a). It seems to me that a collective bargaining agreement is not

¹Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc., 523 F.2d 164 (2d Cir.), cert. denied, 423 U.S. 1017 (1975).

"substantially similar" to any other type of executory contract, in light of the unique function of collective bargaining agreements, and their unique value as tools of national labor policy². Indeed, the uniqueness of collective bargaining agreements was one point on which REA Express and Kevin Steel, the two cases cited in the House Report on the Bankruptcy Reform Act, agreed. Nothing in any of the sections requiring equity within and between classes of creditors requires that a collective bargaining agreement be treated the same as other types of executory contracts.

In fact, I question whether these provisions have any application at all to executory contracts. Section 1123(b)(2) provides that "a plan may . . . subject to section 365 of this title, provide for the assumption or rejection of any executory contract or unexpired lease of the debtor not previously rejected under section 365 of this title" Thus the plan may provide for different treatment of executory contracts than it does the classes of claims, since the plan may provide for acceptance or rejection of such contracts, an option not given to the debtor with respect to other types of claims.

Moreover, the sections cited in the opinion concern equitable treatment of "claims."³ "Claim" is a defined term:

²See, e.g., John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550 (1964). The opinion acknowledges the unique nature of collective bargaining agreements at page 9.

³See id., §§1122(a) ("a plan may place a claim or interest in a particular class"), 1123(a)(4) (plan must "provide the same treatment for each claim or interest of a particular class"), 1129(b)(1) (plan must be "fair and equitable, with respect to each class of claims or interests"), 1129(b)(2)(A) (fairness "[w]ith respect to a class of secured claims"), 1129(b)(2)(B) (fairness "[w]ith respect to a class of unsecured claims"). While the statutes also refer to "interests," interests are something held only by equity security holders, see id., §501(a), and hence are irrelevant to executory contracts.

"claim" means --

(A) right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." Id., §101(4).

Under this definition, the right of the union to insist on the debtor's future performance under an executory collective bargaining agreement does not constitute a "claim." Since the contract is executory, there is no present right to payment, nor has there yet been a "breach of performance" giving rise to a right to payment with respect to the future performance which makes the contract executory. Thus there is no "claim." See Mohonk Realty Corp. v. Wise Shoe Stores, Inc., 111 F.2d 287, 290 (2d Cir.), cert. denied, 311 U.S. 654 (1940). A "claim" does not arise until after the contract is rejected, at which point there is a breach of contract by operation of §502(g). See In re Labonte, 13 B.R. 887, 891 (Bkrtcy. Ct. D. Ka. 1981). Similarly, the union is not a "creditor" within the meaning of the act, since to be a creditor the union must have a "claim." See 11 U.S.C. §101(9) (1976, Supp. V) ("creditor" means -- (A) entity that has a claim against the debtor"). Also, because payments under the contract are not owed to the union, but rather to employees, the union has no claim and hence does not qualify as a "creditor" within the meaning of chapter 11. See In re Altair Airlines, Inc., 25 B.R. 223 (Bkrtcy. Ct. E.D. Pa. 1982). Thus, the sections cited in the opinion regarding equitable treatment of "claims" and "creditors" simply have no application to the right of a union to insist that the debtor not repudiate future performance under a collective bargaining agreement.

Finally, I think the draft opinion is internally inconsistent on this point. At page 11 it states that treating a collective bargaining agreement differently than any other type of executory contract violates the policy of

equitable treatment of creditors and claims. Yet on page 9 the draft states that rejection of collective bargaining agreements should be governed by a different standard than that used for other executory contracts. If a different standard is appropriate, then it follows that the provisions regarding nondiscrimination between claims do not apply to collective bargaining agreements.

Second, I think part II-B of the opinion is both unnecessary to the result and assumes a conflict between the Bankruptcy Code and the National Labor Relations Act that does not in fact exist. In part II-B, the opinion states that a debtor in possession under chapter 11 need not comply with §8(d) of the National Labor Relations Act, 28 U.S.C. §158(d), since to do so would be inconsistent with the policies underlying chapter 11. The opinion does not, however, explain why the policies of the Bankruptcy Code should prevail over the policies of the Labor Act. This is understandable, since it would be difficult (and unwise) for a court to attempt to weigh competing policies and make an essentially legislative choice between them unless absolutely necessary. Instead of permitting a party to violate one statute in order to serve the policies of another, the starting point for statutory construction in a case such as this should be, if possible, to find a construction that renders both statutes consistent.⁴

I agree with the persuasive case made in part III for the proposition that once a petition for reorganization under chapter 11 has been filed, a collective bargaining agreement to which the debtor is a party becomes unenforceable by operation of law. Part III states, at page 18: "We conclude that from the filing of a petition in bankruptcy until formal acceptance, the collective-bargaining agreement is not an enforceable contract within the meaning of §8(d)." Once that is established, it follows that §8(d) simply has no application to the rejection of collective bargaining agreements under the Bankruptcy Code.

⁴See Burlington Truck Lines v. United States, 371 U.S. 156, 172-174 (1962); United States v. Borden Co., 308 U.S. 188, 198 (1939); Beals v. Hale, 4 How. 37, 51 (1846).

Section 8(d) applies when contractual obligations are repudiated by the unilateral actions of a party to the agreement. That is indicated by the language of the statute, which provides that "no party to such contract shall terminate or modify such contract," National Labor Relations Act §8(d), 29 U.S.C. §158(d) (emphasis supplied). The section's legislative history confirms the view that Congress was concerned with the actions of parties to collective bargaining agreements.⁵ In a chapter 11 case, however, the "modification" in the agreement has been accomplished not by unilateral action of the employer, but rather by operation of law -- the collective bargaining agreement is unenforceable as a matter of law upon the filing of the petition. The rejection of a collective bargaining agreement under §365(a) therefore works no unilateral termination or modification of the agreement, since it has already been rendered unenforceable by operation of law. In a practical sense, rejection of the contract maintains the status quo.

Moreover, §8(d) was intended to prohibit termination or modification of a contract only during the life of that contract.⁶ That construction of the statute is dictated by

⁵See, e.g., House Conf. Rep. No. 510, 80th Cong., 1st Sess. 34 (1947) ("no party to a collective bargaining contract should terminate or modify the contract"); 93 Cong. Rec. 3955 (1947) (remarks of Sen. Taft) ("either party who wishes to open the contract may give 60 days' notice in order to afford time for free collective bargaining"); *id.*, at 6662 (remarks of Sen. Murray) ("where there is an agreement a party may not terminate or modify such agreement").

⁶See House Rep. No. 245, 80th Cong., 1st Sess. 23 (1947) ("It [§8(d)] does not require bargaining on any matter during the term of a collective-bargaining agreement, except as the express terms of the agreement permit."); 93 Cong. Rec. 4156 (1947) (remarks of Sen. Murray) ("where there is a collective bargaining agreement in effect, [§8(d) imposes] the duty to refrain from terminating or modifying such contract"); *id.*, at 5146 (remarks of Sen. Ball) (§8(d) applies "where a contract between a union and an employer is in existence"); *id.*, at 6601 (remarks of Sen. Footnote continued on next page.

common sense -- once a contract is no longer in force it is illogical to speak of terminating or modifying it. Since the filing of a petition for relief under chapter 11 itself makes the contract unenforceable, it can no longer be said that the contract is still operative, and hence §8(d) has no application to the rejection of an already unenforceable contract. In sum, for the very reasons stated in part III of the opinion, I would hold that §8(d) does not apply to rejection of a collective bargaining agreement, rather than assume it does apply but can be ignored, as part II-B seems to hold.

Finally, I am concerned about the standard for rejection of collective bargaining agreements set out on page 11. I find the standard in the opinion difficult to understand. The first part of the test, that the collective bargaining agreement "burdens the estate," seems indistinguishable from the traditional business judgment test rejected on pages 8 and 9. A debtor would almost certainly never seek rejection of a collective bargaining agreement unless it "burdened the estate," and the judgment that the estate is burdened is nothing more than the traditional test that the estate would benefit by rejection. Therefore the nub of the test is its second component, "that after careful scrutiny, the equities balance in favor of rejecting the labor contract." I would not put it quite that way.

Taft) (§8(d) does not "requir[e] either party to discuss or agree to any modification of terms or conditions contained in a contract during the life of the contract"); *id.*, at 6611 (remarks of Sen. Morse) ("[T]here is specifically excluded any requirement that the parties even discuss the modification of terms and provisions of a contract if the proposed modifications are to become effective before the contract period expires."); *id.*, at 6663 (remarks of Sen. Murray) ("[T]he section shall not be construed to require parties to discuss and agree to any modification of a collective agreement during its term."); *id.*, at 7002 (remarks of Sen. Taft) ("It [§8(d)] provides that either party to a contract may refuse to change its terms or discuss such a change to take effect during the life thereof").

I would begin by noting that, at a minimum, the Labor Act requires the parties to have made reasonable efforts to reach an agreement on this subject prior to obtaining any relief -- either assumption or rejection of the contract -- from the Bankruptcy Court.⁷ The national labor policies of avoiding labor strife and encouraging collective bargaining⁸ generally require that the parties to a collective bargaining agreement be left free to reach their own agreements on subjects of collective bargaining free from governmental interference.⁹ Section 8(d) itself is designed to facilitate agreement:

"The structure and language of §8(d) point to a more specialized purpose than merely promoting general contract compliance. The conditions for a modification or termination set out in paragraphs (1) through (4) plainly are designed to regulate modifications and terminations so as to facilitate agreement in place of economic warfare. Thus, the party desiring to make a modification or termination is required to serve a written notice on the other party, offer to meet and confer, notify mediation and conciliation agencies if necessary, and meanwhile maintain contract relations." Chemical Workers v. Pittsburgh Glass, 404 U.S. 157, 187 (1971).

Section 8(d) therefore exists to facilitate orderly renegotiation of a collective bargaining agreement. See Mastro Plastics Corp. v. NLRB, 350 U.S. 170, 184-186 (1956).

⁷As the opinion recognizes at pages 18 and 19, the debtor is in all events obligated to bargain under §8(a)(5) of the National Labor Relations Act, 29 U.S.C. §158(a)(5).

⁸See §1 of the National Labor Relations Act, as amended, 29 U.S.C. §151.

⁹See Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974); NLRB v. Burns Security Services, 406 U.S. 272, 282-284 (1972); Porter Co. v. NLRB, 397 U.S. 99 (1970); NLRB v. Insurance Agents, 361 U.S. 477 (1960).

Accordingly, the purpose of §8(d)'s specific prohibition on unilateral mid-term modification of contracts is to facilitate the process of negotiation since unilateral changes are tantamount to a refusal to negotiate. NLRB v. Katz, 369 U.S. 736 (1962). By requiring the parties to seek an agreement on the future of their collective bargaining agreement, the Bankruptcy Court would serve these labor policies and minimize the likelihood of labor strife through precipitous rejection of the agreement.¹⁰

Moreover, there is nothing inconsistent with the Bankruptcy Code in requiring the parties to attempt to reach an agreement on this subject. There is reason to believe that negotiation between the parties will be consistent with successful reorganization in many if not most cases. The union has no incentive to drive the debtor out of business, thereby costing its members their jobs, and is likely to make concessions necessary to keep the debtor afloat.¹¹ The debtor has a similar interest in reaching an agreement and avoiding a crippling strike. The creditors, who presumably wish to avoid liquidation, should want to seek an agreement as well, and have leverage over the union since the reorganization cannot succeed without their cooperation.

The Bankruptcy Court need step into this process only if the parties' inability to reach agreement threatens the success of the debtor's reorganization.¹² At some point a

¹⁰A similar proposal was made in In re Brada Miller Freight System, Inc., 702 F.2d 890, 900 (11th Cir. 1983), a case cited with approval in the draft opinion and Bildisco's brief. See also In re Price Chopper Supermarkets, 19 B.R. 462, 466 (Bkrtcy. Ct. S.D. Cal. 1982).

¹¹Examples of such concessions by unions are contained in the Brief for the International Brotherhood of Teamsters at 14 n. 19.

¹²Since the filing of the petition for chapter 11 relief renders executory contract unenforceable precisely to give the debtor time to consider its options, as the opinion states at pages 15 through 18, time pressure on the debtor is alleviated by
Footnote continued on next page.

decision on the collective bargaining agreement becomes necessary to the reorganization process. If there remains an inability to agree in the face of the threat of liquidation, then the policies of chapter 11 truly demand action by the Bankruptcy Court, while the policies of the Labor Act have been adequately served since reasonable efforts to facilitate agreement have been made. At this point rejection of the collective bargaining agreement may be appropriate. The Bankruptcy Court should not have to determine that the parties have bargained to "impasse" or make any other determination beyond the scope of its expertise. All it need determine is that the point has been reached where a decision on the fate of the collective bargaining agreement is necessary to the reorganization process. That determination is fully within the competence of the Bankruptcy Court. However, prior to this point there is no chapter 11 justification for depriving employees of the fruits of collective bargaining and creating the risk of labor strife which always accompanies nonconsensual solutions to labor relations issues.

Once intervention by the Bankruptcy Court becomes necessary to the success of the reorganization, a potential conflict exists between the goals of the Bankruptcy Code and the Labor Act. Since the policy of chapter 11 is to permit successful rehabilitation of debtors, at a minimum I would not permit rejection absent a finding that that policy would be served by rejection. I am inclined to believe that the Bankruptcy Court should be required to make a finding of fact that it is more likely than not that an affirmance of the contract would prevent the successful rehabilitation of the debtor. Of course, determining what would constitute a successful rehabilitation involves balancing the interests of the affected parties -- the debtor, creditors and the employees. The Bankruptcy Court must consider the

the relief afforded it through chapter 11 and the automatic stay provision of the Code, 11 U.S.C. §362 (1976, Supp. V). Therefore, in the typical case there should be time to seek agreement between the parties before the Bankruptcy Court need rule on the ultimate acceptance or rejection of the collective bargaining agreement.

likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims and hardship that would impose on them absent rejection, and the the impact of rejection on the employees. In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also the qualitative differences between the types of hardship each may face.¹³ Beyond stating this, however, I agree that it would be unwise to attempt to anticipate the wide variety of situations faced by Bankruptcy Courts and formulate a more specific test.¹⁴

The substance of this test may differ little from the "balance of equities," but I think it should be clear to

¹³The Brada Miller court illustrated this point in this way:

"[T]he cost spreading abilities of the parties must be considered in a resolution based on the equities. Certainly, a \$50,000 loss to a group of employees averaging \$20,000 a year in salary may have a far more devastating impact than a \$100,000 loss suffered by a group of large banks and other major creditors or by the debtor-employer itself. The consideration of this factor seems especially appropriate since it was the discrepancy in economic power between labor and management that provided the impetus behind the establishment of the labor law policies we now seek to preserve." 702 F.2d, at 900 (footnote omitted).

¹⁴While this litigation does not directly present the question of what terms and conditions of employment should be employed if the Bankruptcy Court permits rejection of the collective bargaining agreements, it follows from what has been said above that the Bankruptcy Court should permit the parties to attempt to reach agreement on this point, and if it must decide this question, it should take the positions of the parties into consideration in deciding on wages and other terms and conditions of employment.

the Bankruptcy Court that it must focus on the ultimate goal of chapter 11 when considering a petition to reject the collective bargaining agreement. I do not disagree with the "balance of equities" approach, but believe that the the Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization.¹⁵ I recognize that this inquiry is of necessity speculative, and that the Bankruptcy Court should have great latitude to consider any type of evidence relevant to this issue. Nevertheless, unless there is some evidence that assumption of the collective bargaining agreement would be inconsistent with rehabilitation, the policies of chapter 11 provide no basis for depriving a debtor's employees of the fruits of collective bargaining, and creating the risk of labor unrest that this deprivation entails.

Respectfully,



Justice Rehnquist

Copies to the Conference

¹⁵For example, the Bankruptcy Court should not permit rejection of a collective bargaining agreement because of an abstract desire totally unrelated to the success of the reorganization to require "sacrifice" by the employees, even though this might be characterized as an "equitable" consideration. This sort of value judgment is not rooted in the imperatives of chapter 11 and therefore provides no justification for dispensing with statutory labor policies. The Bankruptcy Court's deliberations should focus on the success of the reorganization, and its consideration of the equities should be in that context.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

RECEIVED
SUPREME COURT U.S.
JUSTICE JOHN PAUL STEVENS

December 6, 1983 '83 DEC -7 A9:58

Re: 82-818 - National Labor Relations Board v.
Bildisco and Bildisco
82-852 - Local 408, International Brotherhood
of Teamsters v. NLRB

Dear Bill:

With apologies for the delay, I now tender you my concrete suggestion for the changes that were the subject of our correspondence on November 16 and November 17, 1983. I am perhaps erring on the side of making overly long suggestions in order that you may have something as specific as possible to work with.

My three specific proposals follow:

1. Delete the first two sentences on page 11 (those beginning with the words "In addition" and ending with "... other employees.") My reasons for this suggestion are set forth at pp. 1-4 of my letter of November 16. Moreover, I think the sentences are not necessary to the decision.

2. Delete part II-B of the present draft and replace it with either a new part III-B or a part IV which could be placed either at the very end of your present draft, or perhaps on page 18 immediately preceding the paragraph beginning "We do not think" My suggested new section might read something like this:

IV

"Because the collective bargaining agreement is not an enforceable contract within the meaning of §8(d), it follows that the chapter 11 debtor need not comply with the provisions of §8(d) prior to seeking the Bankruptcy Court's permission to reject the agreement.

"Section 8(d) applies when contractual obligations are repudiated by the unilateral actions of a party to the agreement. That is indicated by the language of the statute, which provides that 'no party to such contract shall terminate or modify such contract,' National Labor Relations Act §8(d), 29 U.S.C. §158(d) (emphasis supplied). The section's legislative history confirms the view that Congress was concerned with the actions of parties to collective bargaining agreements.¹ In a chapter 11 case, however, the 'modification' in the agreement has been accomplished not by unilateral action of the employer, but rather by operation of law -- the collective bargaining agreement is unenforceable as a matter of law upon the filing of the petition. The rejection of a collective bargaining agreement under §365(a) therefore works no unilateral termination or modification of the agreement, since it has already been rendered unenforceable by operation of law. In a practical sense, rejection of the contract maintains the status quo.

"Moreover, §8(d) was intended to prohibit termination or modification of a contract only during the life of that contract.² That construction of the statute is dictated by common sense -- once a contract is no longer in force it is illogical to speak of terminating or modifying it. Since the filing of a petition for relief under chapter 11 itself makes the contract unenforceable, it can no longer be said that the contract is still operative, and hence §8(d) has no application to the rejection of an already unenforceable contract.

¹See, e.g., House Conf. Rep. No. 510, 80th Cong., 1st Sess. 34 (1947) ('no party to a collective bargaining contract should terminate or modify the contract'); 93 Cong. Rec. 3955 (1947) (remarks of Sen. Taft) ('either party who wishes to open the contract may give 60 days' notice in order to afford time for free collective

bargaining'); id., at 6662 (remarks of Sen. Murray) ('where there is an agreement a party may not terminate or modify such agreement').

²/See House Rep. No. 245, 80th Cong., 1st Sess. 23 (1947) ('It [§8(d)] does not require bargaining on any matter during the term of a collective-bargaining agreement, except as the express terms of the agreement permit.');

93 Cong. Rec. 4156 (1947) (remarks of Sen. Murray) ('where there is a collective bargaining agreement in effect, [§8(d) imposes] the duty to refrain from terminating or modifying such contract'); id., at 5146 (remarks of Sen. Ball) (§8(d) applies 'where a contract between a union and an employer is in existence'); id., at 6601 (remarks of Sen. Taft) (§8(d) does not 'requir[e] either party to discuss or agree to any modification of terms or conditions contained in a contract during the life of the contract'); id., at 6611 (remarks of Sen. Morse) ('[T]here is specifically excluded any requirement that the parties even discuss the modification of terms and provisions of a contract if the proposed modifications are to become effective before the contract period expires.');

id., at 6663 (remarks of Sen. Murray) ('[T]he section shall not be construed to require parties to discuss and agree to any modification of a collective agreement during its term.');

id., at 7002 (remarks of Sen. Taft) ('It [§8(d)] provides that either party to a contract may refuse to change its terms or discuss such a change to take effect during the life thereof')."

3. In place of the paragraph that now appears on page 11 beginning "We agree with the Court of Appeals ..." I propose that you insert something like the following:

"Before acting on a petition to modify or reject a collective bargaining agreement, the Bankruptcy Court must be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. The Labor Act requires

no less. Not only is the debtor under a duty to bargain with the union under §8(a)(5) of the Act, 29 U.S.C. §158(a)(5), see infra, at 18-19, but the national labor policies of avoiding labor strife and encouraging collective bargaining, id., §1, 29 U.S.C. §151, generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference. See Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974); NLRB v. Burns Security Services, 406 U.S. 272, 282-294 (1972); Porter Co. v. NLRB, 397 U.S. 99 (1970); NLRB v. Insurance Agents, 361 U.S. 477 (1960). Section 8(d) itself is designed 'to facilitate agreement in place of economic warfare,' Chemical Workers v. Pittsburgh Glass, 404 U.S. 157, 187 (1971), and thereby to promote orderly renegotiation of contracts, Mastro Plastics Corp. v. NLRB, 350 U.S. 170, 184-186 (1956). The purpose of §8(d)'s specific prohibition on unilateral mid-term modifications of agreements is to facilitate negotiation since unilateral changes are tantamount to a refusal to negotiate. NLRB v. Katz, 369 U.S. 736 (1962). Requiring the Bankruptcy Court to review the parties' efforts to seek agreement on the future of their collective bargaining relationship serves these congressional policies by minimizing the possibility of labor strife through a nonconsensual termination of a collective bargaining agreement..

"The Bankruptcy Court need step into this process only if the parties' inability to reach an agreement threatens the success of the debtor's reorganization. At some point, a decision on the future of the collective bargaining agreement may become necessary to the reorganization process. If there remains an inability to agree in the face of a threat of liquidation, then the policies of chapter 11 truly demand action by the Bankruptcy Court, while the policies of the Labor Act have been adequately served since reasonable efforts to facilitate agreement have been made. At this point rejection of the collective bargaining agreement may be appropriate. The Bankruptcy

Court should not have to determine that the parties have bargained to 'impasse' or make any other determination beyond the scope of its expertise. All it need determine is that the point has been reached where a decision on the fate of the collective bargaining agreement is necessary to the reorganization process. However, prior to this point there is no chapter 11 justification for depriving employees of the fruits of collective bargaining and creating the risk of labor strife which always accompanies nonconsensual solutions to labor relations issues.

"Since the policy of chapter 11 is to permit successful rehabilitation of debtors, rejection should not be permitted without a finding that that policy would be served by such action. The Bankruptcy Court must make a finding of fact that it is more likely than not that an affirmance of the contract would prevent the successful rehabilitation of the debtor. Determining what would constitute a successful rehabilitation involves balancing the interests of the affected parties -- the debtor, creditors and the employees. The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees. In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardship each may face.

"The Bankruptcy Court is a court of equity, and in making this determination it is in a very real sense balancing the equities, as the Court of Appeals suggested. Nevertheless, the Bankruptcy Court must focus on the ultimate goal of chapter 11 when considering these equities. The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success

of the reorganization. For example, the Bankruptcy Court should not permit rejection of a collective bargaining agreement because of an abstract desire totally unrelated to the success of the reorganization to require 'sacrifice' by the employees, even though this could be characterized as an 'equitable' consideration. This sort of value judgment is not rooted in the imperatives of chapter 11 and therefore provides no justification for dispensing with statutory labor policies.

"The Bankruptcy Court's inquiry is of necessity speculative, and it must have great latitude to consider any type of evidence relevant to this issue. Nevertheless, absent a finding supported by the record that assumption of the collective bargaining agreement would probably frustrate a successful rehabilitation, chapter 11 provides no justification for depriving a debtor's employees of the fruits of collective bargaining, and creating the risk of labor unrest that this deprivation entails."

If you can see your way clear to adopting these suggestions, I will join your opinion.

Respectfully,



Justice Rehnquist

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

RECEIVED
SUPREME COURT U.S.
JUSTICE MARSHALL

December 16, 1983

'83 DEC 16 P4:03

Re: 82-818 and 82-852 - NLRB v. Bildisco and
Bildisco

Dear Bill:

Please join me.

Respectfully,



Justice Rehnquist

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

November 10, 1983

'83 NOV 10 P4:05

No. 82-818 NLRB v. Bildisco & Bildisco
No. 82-852 Local 408, International Brotherhood
of Teamsters v. NLRB

Dear Bill,

Please join me.

Sincerely,



Justice Rehnquist

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
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November 17, 1983

RECEIVED
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JUSTICE MARSHALL

'83 NOV 18 A9:49

No. 82-818 NLRB v. Bildisco and Bildisco
No. 82-852 Local 408, International Brotherhood
of Teamsters v. NLRB

Dear Bill,

Like you, I am not certain what John would suggest concerning your present draft. As I read your opinion, it does not say that §§ 1122(a), 1123(a)(4) and 1129(b) apply to collective bargaining agreements. Rather, it says those sections are indications of the Bankruptcy Code's general policy of nondiscriminatory treatment. Similarly, § 8(d) of the NLRA, though inapplicable to rejection decisions, is an indication of a policy relevant to making rejection decisions. It seems to me both policies are appropriately taken into account in deciding which of several higher-than-normal standards for rejection should be accepted by this Court.

Your opinion acknowledges that bargaining over modification of a labor contract may be beneficial to the reorganization process and that Bankruptcy Courts are free to encourage such bargaining. I wonder whether this is not sufficient. It is probably desirable to let Bankruptcy Courts experiment for a while without trying to spell out a firm requirement until we can be more confident there are no unforeseen problems.

Finally, I think John's last suggestion is valid: that the equities balancing standard should be applied with a focus on the likelihood of success of the rehabilitation. I am not sure how we could define a "successful rehabilitation," but I would be pleased to see a little more focus on the balancing factors. I had suggested at Conference that "good faith" should be required, but John's general suggestion seems more useful.

Sincerely,



Justice Rehnquist

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Supreme Court of the United States
Washington, D. C. 20543

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JUSTICE SANDRA DAY O'CONNOR



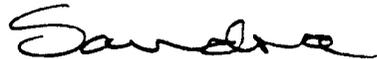
December 13, 1983

Re: Nos. 82-818 & 82-852 NLRB v. Bildisco and Bildisco

Dear Bill,

The changes you propose in the Bildisco opinion are acceptable as far as I am concerned.

Sincerely,



Justice Rehnquist

cc: The Chief Justice
Justice Powell