THE REJECTION OF COLLECTIVE BARGAINING AGREEMENTS IN CHAPTER 11 REORGANIZATIONS: THE NEED FOR INFORMED JUDICIAL DECISIONS

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Under Chapter 11 of the Bankruptcy Code (Code)¹ a failing business may reorganize under the supervision of a bankruptcy court.² After the filing of a Chapter 11 petition, the debtor continues to operate while a reorganization plan is developed.³ The ultimate goals of reorganization are to avoid liquidation, to provide fair treatment of creditors' claims, and to permit the debtor to emerge from the process as a productive business and source of employment.⁴ In order to provide the debtor with sufficient flexibility in this process, the Code permits the rejection of burdensome executory contracts.⁵

Since "[h]igh priced union labor could force an otherwise financially sound company into fiscal trouble,"⁶ a debtor in a Chapter 11 proceeding will often be interested in rejecting its collective bargaining agreement.⁷ Unilateral rejection of a collective bargaining agreement by

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¹ See 11 U.S.C. § 1123 (1982 & Supp. II 1984). While the ability to reject executory contracts is justifiable on a practical basis as protecting the reorganization from being strangled by an unrealistically expensive contract, it is also justifiable as serving the goal of fairness. It would be inequitable to allow parties to these contracts to get full benefits while other creditors are forced to settle for a partial recovery. See White, The Bildisco Case and the Congressional Response, 30 WAYNE L. REV. 1169, 1169-1171 (1984).

² Reorganization is seen as more efficient than permitting the liquidation of a struggling business. "The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap." H.R. REP. No. 595, 95th Cong., 2d Sess. 220, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6179.


⁴ See 11 U.S.C. § 1123 (1982 & Supp. II 1984). While the ability to reject executory contracts is justifiable on a practical basis as protecting the reorganization from being strangled by an unrealistically expensive contract, it is also justifiable as serving the goal of fairness. It would be inequitable to allow parties to these contracts to get full benefits while other creditors are forced to settle for a partial recovery. See White, The Bildisco Case and the Congressional Response, 30 WAYNE L. REV. 1169, 1169-1171 (1984).

⁵ See 11 U.S.C. § 365(a) (1982 & Supp. II 1984). While the ability to reject executory contracts is justifiable on a practical basis as protecting the reorganization from being strangled by an unrealistically expensive contract, it is also justifiable as serving the goal of fairness. It would be inequitable to allow parties to these contracts to get full benefits while other creditors are forced to settle for a partial recovery. See White, The Bildisco Case and the Congressional Response, 30 WAYNE L. REV. 1169, 1169-1171 (1984).


⁷ Organized labor has argued that debtors may view Chapter 11 proceedings as
an employer, however, is contrary to the procedures set forth in section 8(d) of the National Labor Relations Act (NLRA). In the absence of a congressional directive on the issue of labor contract rejection in the reorganization context, the courts have allowed rejection of labor contracts, but have applied a stricter standard than that applied to the rejection of ordinary commercial contracts. The Supreme Court gave the final judicial response to this question in *NLRB v. Bildisco & Bildisco.* Congress responded quickly to *Bildisco* by passing section 1113 of the Bankruptcy Code as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984. Congress's main objective in passing section 1113 was to give more attention to labor interests than the Supreme Court had given by requiring the debtor to bargain with the union before seeking rejection of the labor contract.

This Comment argues that the congressional attempt to protect the nation's labor policy in the reorganization context is inadequate. This inadequacy stems from the fact that the requirements of section 1113 must be interpreted and enforced solely by the presiding bankruptcy judge, who has little or no experience in the field of labor and industrial relations. The Comment suggests that protection of the national labor policy in this area requires knowledgeable consideration of the labor relations issues that arise when a debtor attempts to reject a labor contract. Such consideration can be achieved through the utilization of the expertise of labor arbitrators, mediators, or officials of the National
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Labor Relations Board (NLRB). The success of this proposal will, however, require the elimination of the false perception that the policies of the bankruptcy and labor laws conflict.\textsuperscript{15} The elimination of this notion, it is argued, will allow bankruptcy judges to accept and utilize input from knowledgeable and experienced sources so that the situation in each case may be accurately assessed, and the policies underlying both acts may be promoted.

I. BACKGROUND

A. Chapter 11 Proceedings

Two kinds of proceedings are available to a failing business under the Bankruptcy Code. Liquidation,\textsuperscript{16} or straight bankruptcy, results in dissolution of the business and distribution of its assets to creditors according to statutorily established priorities.\textsuperscript{17} Reorganization, on the other hand, involves an attempt to maintain the business by reassessing and restructuring its finances.\textsuperscript{18} It is within the context of reorganization proceedings that the issue of rejection of collective bargaining agreements arises.

A reorganization proceeding begins with the filing of a petition in bankruptcy court.\textsuperscript{19} The business continues to operate, and the trustee\textsuperscript{20} or debtor in possession\textsuperscript{21} attempts "to reduce the business' losses, by selling unprofitable divisions, by closing certain plants or stores, by reducing the workforces, or by rejecting or renegotiating burdensome contracts."\textsuperscript{22} With the filing of the petition, creditor actions against the debtor outside of the bankruptcy court are automatically stayed.\textsuperscript{23} The

\textsuperscript{15} This misperception is reflected even in the titles of scholarly commentary on the subject. See, e.g., Note, The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement, 80 MICH. L. REV. 134 (1981) [hereinafter The Labor-Bankruptcy Conflict].


\textsuperscript{23} See 11 U.S.C. § 362(a) (1982 & Supp. II 1984). "The stay gives the debtor the opportunity to bring all of its creditors together for discussion, explanation of the
automatic stay establishes the bankruptcy court as the sole forum in which matters relating to the debtor's financial situation may be handled. Creditors' committees are established to consult, investigate and participate in formulating the plan of reorganization. A "disclosure statement," describing in detail the financial position of the business and how that position was reached, is filed and distributed to interested parties. Finally, a plan of reorganization is filed and submitted to all creditors and stockholders for approval. If the plan is accepted by a majority of the creditors and stockholders and is confirmed by the court, the debts of the business are realigned and the debtor is free from claims.

B. Judicial Standards for Rejection of Labor Contracts

During the reorganization process the debtor is afforded the flexibility necessary to effectuate a complete reorganization of its finances. An important source of this flexibility is subsection 365(a) of the Code, which provides that the debtor may reject burdensome executory contracts. While the Code prohibits rejection of collective bargaining agreements under the Railway Labor Act (RLA), until 1984 the Code did not explicitly address the question of whether labor agreements under the NLRA could be rejected under section 365(a). Thus, the courts were left to decide this important issue with little or no guidance from Congress.

declar's financial problems, and negotiation. Creditors are prevented from acting unilaterally to gain an advantage over other creditors or to pressure the debtor into action." H.R. REP. No. 595, 95th Cong., 2d Sess. 220, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6179.

"The basic tenor of the new Code is to funnel all matters pertaining to the bankruptcy case into the bankruptcy court as the forum to decide virtually all matters touching upon any bankruptcy case." J. ANDERSON, CHAPTER 11 REORGANIZATIONS 17 (1984) (footnote omitted).


Subsection 365(a) of the Code, 11 U.S.C. § 365, reads: "(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." The reasons for allowing rejection of executory contracts are discussed supra note 5.

When the question first reached an appellate court in *Shopmen's Local Union No. 455 v. Kevin Steel Products*, the Second Circuit, relying on the predecessor of section 365(a), allowed a debtor to reject its collective bargaining agreement. The court recognized, however, that "labor agreements are quite special" and that "[t]he decision to allow rejection should not be based solely on whether it will improve the financial status of the debtor." Thus, in recognition of the special nature of labor contracts, the court rejected the business judgment test, which is applied in considering the rejection of ordinary commercial contracts. It stated that petitions to reject labor agreements must be scrutinized with "particular care."

In *Brotherhood of Railway, Airline & Steamship Clerks v. REA Express, Inc.*, the Second Circuit reaffirmed *Kevin Steel* and developed an even stricter standard for considering the rejection of collective bargaining agreements. The court found that "[i]n view of the serious effects which rejection has on the carrier's employees it should be authorized only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the carrier will collapse and the employees will no longer have their jobs." Thus, while the court recognized that rejection of labor contracts must be allowed in some cases, the court believed that the special nature of the collective bargaining agreement required that rejection be allowed only if the reorganization would otherwise fail.

The issue finally reached the Supreme Court in *NLRB v. Bildisco & Bildisco*. In that case, the union, the NLRB, and the debtor agreed

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34 519 F.2d 698 (2d Cir. 1975). The court suggested that the issue had not arisen previously because "[i]n a Chapter X or XI proceeding, which is designed to preserve a going business, only a hardy—some might say foolhardy—employer would provoke a strike by trying to terminate an existing labor contract." 519 F.2d at 703.

35 The predecessor to section 365(a) was section 313(1) of the Act of June 22, 1938, Pub. L. No. 75-696, § 313(1), 52 Stat. 840, 906 (codified at 11 U.S.C. § 713(1) (1976)), which contained language identical to the currently applicable provision.

36 See 519 F.2d at 706-07.

37 *Id.* at 704.

38 *Id.* at 707.

39 This relaxed standard allows rejection in any case where it "will improve the financial status of the debtor." *Id.*

40 *Id.* at 706.

41 523 F.2d 164 (2d Cir. 1975).

42 *Id.* at 172.

43 The contract in question was governed by the RLA, which, like the NLRA, allows modification of the agreement only after negotiation between management and labor. See 45 U.S.C. §§ 151-188 (1982). Section 1167 of the Bankruptcy Code, barring rejection of labor agreements under the RLA, was not added until 1978. *See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 1167, 92 Stat. 2549, 2642 (codified at 11 U.S.C. § 1167 (1982)).

that a collective bargaining agreement was an executory contract that could be rejected under Section 365(a) of the Code.⁴⁶ Therefore, the Court was faced with only two issues: 1) what standard should be applied by the bankruptcy court to determine whether to allow rejection; and 2) whether the debtor is guilty of an unfair labor practice if the agreement is modified or terminated before the bankruptcy court grants approval.⁴⁷ With regard to the first issue, the Court accepted the Kevin Steel standard and found that a collective bargaining agreement may be rejected if it is burdensome, and if the bankruptcy court, after “careful scrutiny,” finds that the equities balance in favor of rejection.⁴⁸

With regard to the second issue, the Court found, over a dissent by four Justices, that the debtor could not be charged with unfair labor practices by the NLRB after filing a Chapter 11 petition.⁴⁹ The dissent criticized this portion of the Court’s opinion as focusing solely on the Bankruptcy Act, and, therefore failing to give sufficient weight to the NLRA,⁵⁰ which requires negotiation before a labor agreement may be modified or terminated.⁵¹ This portion of the Court’s opinion sparked considerable criticism outside of the Court as well. For example, one commentator claimed that the decision was a “thoughtless and insidious distortion of core federal labor policy.”⁵² Moreover, it is apparent that this portion of the decision was a major impetus in Congress’s passage of section 1113 of the Code. The new provision expressly prohibits unilateral termination of the labor agreement absent prior court approval.⁵³

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⁴⁶ See id. at 521-22.
⁴⁷ See id. at 516.
⁴⁸ See id. at 526.
⁴⁹ See id. at 527-34. The Court noted:

Though the Board’s action is nominally one to enforce §8(d) of [the NLRA], the practical effect of the enforcement action would be to require adherence to the terms of the collective-bargaining agreement. But the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again.

Id. at 532.
⁵⁰ See id. at 540-41 (Brennan, J., dissenting).
⁵² See 11 U.S.C. § 1113(f) (Supp. II 1984). However, section 1113(d)(2) does provide that if the court does not rule on the application within 30 days after the commencement of the hearing, or within such additional time as agreed upon by the debtor and the representative of the employees, the debtor may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on the application for rejection. It should also be noted that the provision provides for immediate, interim changes by the debtor in circumstances where the business would otherwise
C. The Statutory Approach: Section 1113

On February 22, 1984, the day the Supreme Court handed down the Bildisco decision, Congressman Peter Rodino introduced a bill in the House of Representatives which would have overturned both elements of the Supreme Court's decision.53 The bill prohibited unilateral action by the employer prior to court approval and adopted the stricter REA Express standard for rejection of labor contracts.54 Another bill similarly incorporating the REA Express standard55 and disallowing termination prior to court approval was introduced in the House of Representatives on March 19, 1984.56 That bill, H.R. 5174, contained a provision requiring that the debtor and union exchange proposals and that they meet and confer in good faith prior to rejection.57 It was sent to the floor of the House under a procedure limiting amendment and debate, and was passed on March 21, 1984,58 less than one month after the Supreme Court handed down its decision in Bildisco.59

Members of the Senate objected to the speed with which the


53 See H.R. 4908, 98th Cong., 2d Sess., 130 CONG. REC. H809 (daily ed. February 22, 1984). The concern with the rejection of labor contracts in reorganization came to Congress in the fall of 1983, when unions testified that employers were using bankruptcy as a weapon against them and as a method of freeing themselves from an unfavorable agreement. See Rosenberg, supra note 7, at 312. Thus, Bildisco was not the impetus for the initial consideration of the issue, but rather, the occasion for the introduction of Rodino's bill. For a complete discussion of the legislative history of § 1113, see Rosenberg, supra note 7; Note, Rejection of Collective Bargaining Agreements in the Aftermath of 11 U.S.C. Section 1113: What Does Congress Intend?, 9 DEL. J. CORP. LAW 701 (1984). The legislative process leading to the passage of § 1113 emphasizes Congress's apparent haste.


55 See supra note 42 and accompanying text.


57 See id.


59 The speed of the House response cannot be attributed entirely to strong reactions to Bildisco. Rather, Congress needed to adopt bankruptcy reform legislation before the expiration of the emergency rules that the bankruptcy courts had been operating under since Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982). In Marathon Pipeline, the Supreme Court found the appointment of bankruptcy judges with lifetime tenure under the 1978 Bankruptcy Act unconstitutional. Thus, section 1113 was simply one provision of a major bankruptcy law revision, the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 361 (codified at 11 U.S.C. §§ 101-151, 302 (Supp. II 1984)) which Congress needed to pass quickly.
House of Representatives had acted, and to the adoption of a standard that would cause the collapse of a debtor before the labor contract could be rejected. The Senate was, however, unable to agree on any labor provision and ultimately passed a bill without such a provision, leaving it to the conference committee to carve out a system for dealing with the rejection of collective bargaining agreements. Finally, at 3:00 A.M. on June 28, 1984, three hours after the rules under which the bankruptcy courts had been operating expired, the conferees reached an agreement. The provision agreed upon by the conference committee was signed into law on July 10, 1984 as section 1113 of the amended Bankruptcy Code.

Under the bankruptcy amendments, rejection of labor contracts is governed exclusively by section 1113. That provision requires the debtor, prior to filing a request for rejection of the collective bargaining agreement, to make a proposal to the union that provides only for those modifications of the agreement that are necessary to the reorganization. The proposal must treat all affected parties "fairly and equitably." The debtor should also provide the union with the information necessary to evaluate its proposal. Between the date of the proposal and the date on which hearings on the issue begin, the debtor is obligated to meet with the employees' representatives and "confer in good faith in attempting to reach mutually satisfactory modifications." The court should hold hearings within fourteen days of the filing of the debtor's request for permission to reject the labor agreement. Rejection is allowed only if the court finds that the debtor has met the obligations just described, that the union has rejected the debtor's proposal for modification "without good cause," and that "the balance of the

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60 See, e.g., 130 Cong. Rec. S6083 (daily ed. May 21, 1984) (statement of Sen. Thurmond) ("Numerous Members of the House... 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... ").
61 Senator Hatch noted: "[T]he House bill seems to promise only lost jobs and benefits. It may preserve a piece of paper called the labor contract, but contracts with a liquidated company offer hollow promises." 130 Cong. Rec. S6091 (daily ed. May 21, 1984).
63 See Rosenberg, supra note 7, at 318-19.
64 See id. at 321.
65 Under 11 U.S.C. §1113(a) (Supp. II 1984), the debtor may reject a collective bargaining agreement "only in accordance with the provisions of this section."
67 Id.
equities clearly favors rejection of such agreement. Section 1113 also makes it clear that the debtor may not unilaterally terminate the agreement prior to receiving court approval.

Congress thus rejected the position taken by the Supreme Court in Bildisco and established a set of procedural requirements that a bankruptcy court must follow before it may allow rejection. The inclusion of these requirements, particularly the duty to confer in good faith after the proposal is made, represents an attempt by Congress to promote the national labor policy in favor of collective bargaining. Prior to the passage of section 1113, commentators had suggested that a duty to bargain was the appropriate manner of safeguarding the rights of employees and the policies of the NLRA. Congress's actions have been applauded as moving away from the Court's approach, which focused solely on the bankruptcy law. The next section of this Comment argues that it is questionable whether section 1113 will actually achieve the goal of better protecting national labor policies.

II. THE CONGRESSIONAL ATTEMPT TO PROVIDE DIFFERENTIAL TREATMENT FOR COLLECTIVE BARGAINING AGREEMENTS

Through section 1113 of the Bankruptcy Code, Congress sought to protect national labor policies by providing treatment of collective bargaining agreements that differs from the treatment afforded other commercial contracts. Congress set down a list of procedural requirements to be followed before rejection of a labor contract could be allowed. The shortcoming of this effort to protect labor policies lies in the fact that the bankruptcy courts are the sole forum in which these requirements are to be interpreted and enforced. Bankruptcy judges have the exper-
tise to resolve most reorganization problems, but that expertise does not necessarily extend to the specialized area of labor relations.\textsuperscript{78}

\section{A. Labor Relations: A Specialized Area}

The area of labor relations has long been viewed as a specialized one by both the courts and Congress. This recognition of the special nature of labor relations and collective bargaining agreements is at the heart of the stated policy of the Supreme Court to defer to the NLRB in matters involving this specialized field.\textsuperscript{79} The Supreme Court articulated that policy most clearly in \textit{Universal Camera Corp. v. NLRB},\textsuperscript{80} which referred to the NLRB as "presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."\textsuperscript{81} The Supreme Court made similar observations in the \textit{Steelworkers Trilogy},\textsuperscript{82} expressing a policy that favors grievance arbitration. According to the Court, "special heed should be given to the context in which collective bargaining agreements are negotiated and the purposes which they are intended to

\textsuperscript{78} The fact that bankruptcy judges do not have experience outside of the bankruptcy field was, in fact, praised as one reason why the bankruptcy system works: "\textquoteright\textquoteright\textquoteright\textquoteright[\textit{T}he bankruptcy court system works as well as it does today is because the trial judges are \textit{specialists}, experienced in handling the problems that arise. They are experienced because they \textit{handle exclusively} bankruptcy cases.\textquoteright\textquoteright\textquoteright\textquoteright" H.R. REP. No. 595, 95th Cong., 2d Sess. 20, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 5981 (emphasis added). The specialization of the bankruptcy courts becomes a problem, however, when those courts must make determinations in another specialized field, such as labor law, "because the bankruptcy court, which must apply the test, will rarely possess expertise on problems peculiar to labor." Note, Kevin Steel and REA Express Revisited: When is a Collective Bargaining Agreement Burdensome?—In \textit{Re Bildisco}, 56 TEMPLE L.Q. 252, 277-78 (1983) (footnote omitted) [hereinafter Kevin Steel and REA Express Revisited].

\textsuperscript{79} For a general discussion of judicial review of the NLRB, see R. GORMAN, \textit{Basic Text on Labor Law} 10-14 (1976).

\textsuperscript{80} 340 U.S. 474 (1950).

\textsuperscript{81} \textit{Id.} at 488. \textit{See also NLRB v. United Steelworkers of America}, 357 U.S. 357, 362-63 (1958) ("\textit{[T]he [N]LRA} \textit{imposed responsibilities} primarily on the Board to appraise carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases and in the light of the Board's special understanding of these industrial situations."); NLRB v. \textit{Erie Register Corp.}, 373 U.S. 221, 236 (1963) ("\textit{W}e must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life . . . .")

\textsuperscript{82} The \textit{Steelworkers Trilogy} is a collection of three Supreme Court decisions decided on the same day containing a strong statement favoring arbitration of grievances under a labor contract. The cases are: United Steelworkers of America \textit{v. American Mfg.}, 363 U.S. 564 (1960); United Steelworkers of America \textit{v. Warrior & Gulf Navigation}, 363 U.S. 574 (1960); and United Steelworkers of America \textit{v. Enterprise Wheel & Car Corp.}, 363 U.S. 593 (1960).
serve." And finally, the Court made it clear that, in comparison with arbitrators, “[t]he ablest of judges cannot be expected to bring the same experience and competence to bear . . . because he cannot be similarly informed.”

Congress’s awareness that labor relations is a specialized field in which expertise can be developed is apparent in the passage of the National Labor Relations Act (NLRA). Through the NLRA, Congress established a separate statutory and administrative scheme to govern labor relations. The fact that this scheme still operates fifty years after its creation is evidence that Congress continues to view industrial relations as a specialized field, and that it continues to respect the expertise of those who enforce the NLRA’s provisions.

Because they have recognized that labor relations is a specialized area, the courts and the legislature have had little doubt that collective bargaining agreements required special treatment in the reorganization context. In Local Union No. 455 v. Kevin Steel, the Second Circuit recognized “that labor agreements are quite special.” Given that premise, the court concluded that “bankruptcy courts must scrutinize with particular care petitions to reject collective bargaining agreements.” In Brotherhood of Railway, Airline & Steamship Clerks v. REA Express, Inc. the court applied a still stricter standard because “of the serious effects which rejection has on the carrier’s employees.” The Supreme Court in NLRB v. Bildisco & Bildisco adopted a different standard but also accepted the premise that labor contracts are different, and stated, “We agree with these Courts of Appeals that because of the special nature of a collective-bargaining contract, and the consequent ‘law of the shop’ which it creates . . . a somewhat stricter standard should govern.” Thus, courts have not questioned the notion that collective bargaining agreements are different and that they require special treatment.

Perhaps an even clearer expression of the belief that collective bar-

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83 American Mfg., 363 U.S. at 567.
84 Warrior & Gulf, 363 U.S. at 582.
85 519 F.2d 698 (2d Cir. 1975).
86 Id. at 704 (emphasis added).
87 Id. at 706. See also supra notes 37-40 and accompanying text (discussing the heightened standard applied to collective bargaining agreements by the Second Circuit).
88 523 F.2d 164 (2d Cir. 1975).
89 See supra notes 42-43 and accompanying text.
90 523 F.2d at 172.
91 465 U.S. 513 (1984). For the argument that the standard applied to collective bargaining agreements in this context is irrelevant, see White, supra note 5, at 1181-83.
gaining agreements require special treatment was Congress's removal of such agreements from section 365(a) of the Bankruptcy Code, and the attendant development of an entirely separate scheme for dealing with labor contract rejection. Congress determined that the particular nature of collective bargaining agreements mandated more protection than simply the application of a standard stricter than that applied to ordinary commercial contracts. Congress thus began its consideration of the issue with the assumption, shared by the courts, that labor agreements require special treatment.

The reason that the courts and Congress readily agreed on this point is that collective bargaining agreements are indeed very different from ordinary commercial contracts. Labor contracts are not different simply because they are collectively bargained; rather, they differ in almost all respects from other commercial contracts because of the particular nature of the relationship that gives rise to them. They are blueprints for industrial self-governance, reconciling the competing interests of a number of constituencies into documents that articulate the rights and obligations of workers and management. When a debtor rejects a bargaining agreement, it rejects more than a "deal"—it rejects a carefully negotiated instrument that plays an essential role in implementing a national labor policy favoring peaceful resolution of workplace disputes.

93 One representative commented on the general consensus that labor contracts could be rejected in Chapter 11 as follows: "[T]his decision does not mean that a debtor may treat a collective bargaining contract as simply any other contract for goods or services." 130 CONG REC. H1798 (daily ed. Mar. 21, 1984) (statement of Rep. Hall).

94 Congress's belief that application of a strict standard was insufficient is supported by evidence. It has been noted that in at least half of those cases applying the REA Express standard, the most stringent test articulated by the courts, the test was passed and the contract rejected. See Kevin Steel and REA Express Revisited, supra note 78, at 274.

95 The Supreme Court has recognized this important distinction between labor agreements and ordinary commercial contracts, and the important role labor agreements play in plant governance. As the Warrior & Gulf majority noted:

A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter a relationship, for that in all probability preexists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependant solely upon the relative strength, at any given moment, of the contending forces.

Warrior & Gulf, 363 U.S. at 574. Professor Gorman has analogized labor agreements to statutes, because they articulate "a host of rules and regulations for carrying on the day-to-day activities of [union] employees," and because they are negotiated by a union
B. *Keeping Labor Law out of the Bankruptcy Courts*

Given the peculiar nature of collective bargaining agreements and the relationship from which they arise, both the Supreme Court and Congress were understandably concerned about requiring bankruptcy judges to make determinations in areas in which those judges lack the necessary expertise. The Court alluded to this concern in *Bildisco*, noting that a bankruptcy court "need not determine that the parties have bargained to impasse or make any other determination outside the field of its expertise." The congressional debates over section 1113 and its predecessor bills echo this concern. Senator Dole, for example, criticized an early proposal by Senator Packwood that the parties be required to bargain to impasse before rejection, which he felt "would effectively convert the bankruptcy courts into labor relations boards, with resulting damage not only to the collective bargaining process but also to the efficiency of the bankruptcy courts." Both the Court and the legislature were thus aware of the problem of requiring bankruptcy judges to deal with questions requiring a knowledge of the industrial setting in which such issues arise.

Congress attempted to address this concern about extending bankruptcy courts beyond their area of competence by providing that the bankruptcy judges were not to follow established labor law precedent in enforcing section 1113. Senator Thurmond commented that the requirement that a union have good cause for rejecting a proposal "is obviously not intended to import traditional labor law concepts into a bankruptcy forum or turn the bankruptcy courts into a version of the National Labor Relations Board." Congress made it clear that the bankruptcy courts were not as able to deal properly with labor issues as was the NLRB, and that therefore, those courts should not attempt to do so.

Congress was appropriately concerned about bringing the unwieldy apparatus of established labor law precedent into the bank-

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that speaks for "an amalgam of workers who are skilled and unskilled, young and old, male and female, black and white, educated and uneducated, whose ambitions, needs and interests frequently come into conflict." R. GORMAN, supra note 79, at 540-541.


99 *130 CONG. REC. S8888* (daily ed. June 29, 1984) (statement of Sen. Thurmond). *See also* *130 CONG. REC. S6194* (daily ed. May 22, 1984) (statement of Sen. Thurmond) (The fact that the "good faith" language of § 1113 is drawn from the NLRA "may result in the establishment, in the bankruptcy context, of cumbersome and rigid procedures modeled after those contained in the labor law. We should not risk imparting such procedures into the bankruptcy context.")
ruptcy courts, but its attempt to protect national labor policy through section 1113 is inadequate. Preventing the use of labor law precedent does not alter the fact that any determination of whether the requirements of section 1113 are met, and thus, whether a labor contract may be rejected, requires an assessment of the labor relations setting in which the bargaining occurs. The provision contains requirements that necessitate an evaluation of the validity and importance of the concerns of organized labor and of the actions of both the union and the debtor in their bargaining efforts. Congress, therefore, barred labor law precedent from the courts, but it did not remove the issue of labor contract rejection from the labor relations setting. Bankruptcy judges, who are solely responsible for the application of 1113, must be familiar with that setting if section 1113 is to protect labor interests adequately.

Section 1113's failure to compensate for the inexperience of bankruptcy judges in the labor relations setting is compounded by the fact that Congress was unclear about the very policies the provision was supposed to protect. Congress, through section 1113, provides a list of procedural requirements to be followed before a bankruptcy court may allow rejection, including the requirements that the debtor bargain in good faith, that the union not reject the debtor's proposal for change without good cause, and that the debtor's proposal provide only for those modifications of the agreement that are necessary to the reorganization. The legislature acted with such haste in passing section 1113, however, that the legislative history is conspicuously sparse. There are no legislative reports to accompany the section, and only vague and confusing admonitions in the Congressional Record. Senator Thurmond, for example, stated that "the intent is for these provisions to be interpreted in a workable manner," but the record as a whole provides no guidance on what a "workable manner" might be. Instead, one finds a rather circular approach, in which the "good cause" requirement is used to help define the "good faith requirement." As Senator Packwood explained, "The 'without good cause' language provides

100 See supra notes 96-98 and accompanying text.
104 See supra notes 53-64 and accompanying text.
105 See 1984 U.S. CODE Cong. & Ad. News 576; S. Bernstein, Bankruptcy Practice After the Amendments Act of 1984, at 121 (1984) (The June 29, 1984 Congressional Record "is the only public source for determining congressional intent on the final draft of the subtitle—there are no committee prints or legislative debate.").
an incentive or pressure on the debtor to negotiate in good faith.\textsuperscript{107}

Largely as a result of this confusing congressional guidance,\textsuperscript{108} the bankruptcy courts have in practice collapsed the good faith bargaining and good cause for refusal elements of section 1113 into a focus on the "necessity" of the proposed modifications.\textsuperscript{109} The courts may have seen this focus on necessity as a means of avoiding the consideration of factors that require a knowledge of the labor relations setting. Such a view, however, would rely upon the false perception that a determination of the necessity of a particular modification can be removed from its labor relations setting, and thus, that a decisionmaker would not be hindered by her lack of familiarity with that setting. This approach mistakenly assumes that a determination of whether a proposal is necessary is a straightforward process with only one possible outcome. Although it may be clear in a given situation that the debtor must cut costs by a precisely defined amount, it may also be true that the union has a legitimate reason for objecting to the manner of distributing and structuring the cost-cutting that is called for by the debtor's proposal.\textsuperscript{110}

In such a situation the court, in determining whether "good cause" for refusal in fact exists, cannot and should not avoid a searching examination of the merits of the union's objections to the debtor's proposal.

One case illustrates what can happen when a bankruptcy judge gives uninformed consideration to a union's objections to a debtor's proposal for rejecting a bargaining agreement. In \textit{In Re Allied Delivery System Co.},\textsuperscript{111} the debtor's reorganization proposal imposed a higher salary cut on union employees than it did on nonunion employees. The

\textsuperscript{107} 130 CONG. REC. S8898 (daily ed. June 29, 1984) (statement of Sen. Packwood). \textit{See also} 130 CONG. REC. H7496 (daily ed. June 29, 1984) (statement on H.R. 5174 by Reps. Hughes and Morrison) ("The phrase 'without good cause' . . . is intended to ensure that a continuing process of good faith negotiations will take place before court involvement . . . .").

\textsuperscript{108} \textit{See supra} notes 106-07 and accompanying text.

\textsuperscript{109} \textit{See In Re Allied Delivery System Co.}, 49 Bankr. 700, 704 (Bankr. N.D. Ohio 1985) (finding that if the proposal contains only fair, equitable, and necessary modifications, the union cannot have good cause for refusal); \textit{In re K & B Mounting, Inc.}, 50 Bankr. 460, 465 (Bankr. N.D. Ind. 1985) ("[A] debtor negotiates in good faith . . . by offering only necessary modifications which affect all parties equally.").

\textsuperscript{110} It should be noted that the union stands to lose a great deal if it rejects a proposal which is, in fact, necessary to the survival of the business. Some commentators suggest that the union's view of necessity should be given considerable weight because the union has very strong reasons for making an accurate assessment. \textit{See} Bordewieck & Countryman, \textit{The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors}, 57 AM. BANKR. L. J. 299, 319 (1983); \textit{cf.} Gregory, \textit{Legal Developments Since NLRB v. Bildisco: Partial Resolution of Problems Surrounding Labor Contract Rejection in Bankruptcy}, 62 DEN. U.L. REV. 615, 623-24 & n.59 (1985) [hereinafter \textit{Legal Developments}] (unions have made concessions to many truly financially distressed employers).

\textsuperscript{111} 49 Bankr. 700 (Bankr. N.D. Ohio 1985).
court did not overlook the union's "understandable" concern that non-union employees were less affected by the proposal than union employees, but did not find this concern significant enough to warrant rejection of the proposal. The debtor's favorable treatment of less expensive nonunion labor during a time of fiscal crisis raised serious questions about the employer's commitment to an effective union presence in its plant, but the court dismissed this concern by stating that fair and equitable treatment under 1113 does not necessarily mean "equal" treatment. Such a finding inherently involves a weighing of the union's concerns—a weighing that the bankruptcy court is not equipped to perform.

The courts are also called upon to make determinations beyond the scope of their expertise in evaluating whether the bargaining efforts of the two parties meet the good faith standard set forth in section 1113. Clearly the bankruptcy judge is capable of determining that a proposal was put forth and that meetings were held, but this limits the analysis to the form rather than the substance of bargaining. Any claim of bad faith will require the bankruptcy court to estimate the reasonableness of the parties' positions regarding certain terms of the agree-

112 See id. at 702-704.
113 See id. at 704; see also In Re Salt Creek Freighways, 47 Bankr. 835, 840-41 (Bankr. D. Wyo. 1985). The court recognized that "the Union may often have a principled reason for deciding to reject the debtor's proposal and which may, when viewed subjectively and from the standpoint of its self-interest, be a perfectly good reason." Id. at 840. The court found, however, that the union's policy determination that it could not negotiate away pension benefits or its affiliation with the National Master Freight Agreement, although not an unreasonable basis for rejection, did not constitute "good cause." See id. at 840-41. The court's recognition of the fact that a union may have "principled reasons" for rejection suggests that courts will be called upon to evaluate those "principled reasons." Adequate evaluation by the bankruptcy judges will require a familiarity with the industrial relations setting in which the issue arises.

114 See In Re Allied Delivery, 49 Bankr. at 702-03.
115 See id. at 703.
116 An interesting question arises when the union offers a counter-proposal which also provides for the "necessary" changes. As one commentator suggests:

Assume that a union is too sophisticated to flatly reject a proposal that meets the "necessary" and "fair and equitable" requirements of section 1113(b)(2). Assume that it instead makes a counter-proposal which, while offensive to management and favorable to the union, contains only modifications "necessary" to the reorganization and "fair and equitable" to all parties. Is it "good cause" to reject the debtor's proposal that the union's counter-proposal is equally acceptable under section 1113(b)(2)?

Gibson, *The New Law on Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. § 1113*, 58 AM. BANKR. L. J. 325, 341 (1985). Gibson goes on to say that "[t]he legislative history provides no clear answer to this question, and it will have to await resolution in the courts." Id. Resolution by the bankruptcy courts requires that those courts understand and appreciate the unique characteristics of the employer/employee relationship and the labor relations setting.
ment, though it has little knowledge of the significance of those terms to the parties.

The inability of a bankruptcy court to come to a clearly reasoned decision in the face of its lack of labor experience is revealed by the statement of the bankruptcy judge in In Re American Provision Co.:117 "[F]rankly, I am left with the impression that the debtor's attempts to confer were perfunctory only . . . ."118 A decision that will bind the debtor and an entire union for the term of the contract should not be based upon a bankruptcy judge's uninformed "impressions." Rather, the judges must receive assistance in making determinations that will unavoidably arise, and that will necessarily involve matters peculiar to the labor setting.

It is possible that Congress, given its haste to pass bankruptcy reform legislation119 and its interest in placating the concerns of organized labor,120 believed that the bargaining requirements of section 1113 would be self-enforcing. There is, in fact, evidence that members of Congress saw the bargaining requirement as removing the issue of contract rejection from the bankruptcy court and placing it on the bargaining table.121 This view, however, fails to account for the necessity of enforcing the bargaining requirements themselves.122 A debtor will

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118 Id. at 911 (emphasis added).
119 See supra notes 53-64 and accompanying text.
120 See Rosenberg, supra note 7, at 313.
121 See, e.g., 130 Cong. Rec S8898 (daily ed. June 29, 1984) (statement of Sen. Packwood) (The good faith bargaining requirement "places the primary focus on the private collective-bargaining process and not in the courts.") The Senator also expressed his belief that "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.").
122 The fact that bargaining requirements need enforcement and that such enforcement must be carried out by officials with knowledge in the field of labor relations is revealed through an examination of the history of the NLRA's good faith bargaining requirement. See 29 U.S.C. § 158(d) (1982). In determining whether the requirements of that section have been met, the physical aspects of bargaining are easily monitored: one need only find that the parties have met and conferred. However, to hold the parties only to a requirement of meeting would allow them to go through the superficial motions of bargaining with no real effort to reach an agreement. As Professor Cox has noted: "The concept of 'good faith' was brought into the law of collective bargaining as a solution to this problem." Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1413 (1958).

The early decisions of the NLRB found that good faith required "a sincere desire to reach an agreement." Fleming, The Obligation to Bargain in Good Faith, 47 Va. L. Rev. 988, 991 (1961). It was quickly discovered, however, that the state of mind could only be evaluated by looking at the bargainers' conduct. See id.; see also R. Gorman, supra note 79, at 482. Ultimately, the bargainers' conduct could only be evaluated by looking to the terms of the proposals and the reasonableness of the parties' positions. See Gross, Cullen & Hanslowe, Good Faith in Labor Negotiations: Tests and Remedies, 55 Cornell L. Rev. 1009, 1020 (1968).

Although the bargaining requirement of section 1113 was not intended to carry
have little reason to bargain with a sincere interest in compromising if, following an abbreviated bargaining session,\textsuperscript{123} a bankruptcy judge will be the only official evaluating the debtor's bargaining efforts, and if that same judge will determine whether the contract should be rejected.\textsuperscript{124}

Bargaining requirements need enforcement. They will not be enforced effectively, however, unless the court responsible for policing the reorganization process has the ability to evaluate the substance of the parties' proposals in an informed fashion. Since bankruptcy courts do not possess this ability, bankruptcy judges should be required to obtain knowledgeable assistance and input in making those determinations specifically involving labor relations. The purposes of the bankruptcy and labor laws can be effectuated fully only if the factors involved are intelligently considered.

III. KNOWLEDGEABLE INPUT: A PROPOSED SOLUTION

A. A Misperceived Obstacle

The success of any attempt to provide knowledgeable input into the section 1113 decision-making process requires eliminating the perception that the issue of labor contract rejection in Chapter 11 reorganization involves a fundamental conflict between the policies of the Bankruptcy Code and those of the National Labor Relations Act (NLRA). Evidence of this perception is found in the literature as well as the \textit{Congressional Record}. One commentator has suggested that the proper solution should involve establishing a "sound balance between the competing policies,"\textsuperscript{125} while another found that "the Bankruptcy labor law doctrines with it, certainly the experience under the NLRA is instructive as to the operation of bargaining requirements generally. That experience makes it clear that bargaining requirements need enforcement, and that enforcement requires an ability to evaluate the substance of the parties' proposals in an informed fashion. Without knowledge of the industry involved, bankruptcy judges cannot effectively evaluate the reasonableness of the industrial bargaining positions.

\textsuperscript{123} Under the terms of section 1113, the bargaining period may be as brief as 15 days. Section 1113(b)(2) requires good faith bargaining between the date when the debtor makes a proposal to the union, and the date when hearings begin. Hearings are to begin, according to section 1113(d)(1), no later than 14 days after an application for rejection is filed. Under section 1113(b)(1)(A), it is possible for the debtor to file such an application the day immediately following the date on which a proposal is given to the union. Thus the period between making a proposal to the union and the start of hearings may be as little as 15 days. As one bankruptcy judge noted: "[T]he time frame for considering the debtors proposal is intentionally very severe." S. BERNSTEIN, supra note 105, at 127.

\textsuperscript{124} Under section 1113(d)(2) the bankruptcy judge must rule on the application for rejection within 30 days after the start of the hearings.

\textsuperscript{125} \textit{The Labor-Bankruptcy Conflict}, supra note 15, at 148-52 (emphasis added).
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Code is in fundamental conflict with the federal labor policies enunciated in the National Labor Relations Act." Members of Congress revealed their perception that the policies conflict during consideration of the issue in floor debate. One Senator stated that "we now confront a basic conflict between the two valid national policies," while another Senator believed that the issue involved "two very divergent policies."

The perception of conflict results from an inaccurate view of the policies underlying Chapter 11 of the Code and the NLRA. Reorganization is not allowed under Chapter 11 to benefit only the debtor's business, and collective bargaining is not promoted blindly by the NLRA to the extent that one must bargain when liquidation will result. Rather, the underlying policy goal of both acts is the stability and continuity of industry, largely as a source of employment. The report accompanying the 1978 Bankruptcy Act states, "The purpose of a business reorganization case . . . is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." This process was promoted because Congress believed that "[i]t is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets." This policy clearly overlaps with that stated in section 1 of the NLRA: "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." Bankruptcy policy attempts to promote continuity in employment and the use of assets, while in labor, as the Supreme Court noted, "The present federal policy is to promote industrial stabilization." When the fundamental goals of the two acts are considered, there is little reason to believe that they clash in the context of labor contract rejection during reorganization.
The policies of Chapter 11 do not necessitate an absolute preference for the employer's or debtor's interest, and the policies of the NLRA do not require bargaining at all costs. The policies of both acts do, however, require an informed consideration of the needs of parties in an employer-employee relationship as well as a creditor-debtor relationship. Thus, the solution to the issue of labor contract rejection does not require an infusion of labor law into the bankruptcy courts, but simply the assurance that the analysis by the bankruptcy court adequately and intelligently takes into consideration all of the relevant facts that the issue raises.

B. Sources of Input

If providing knowledgeable input for bankruptcy judges is to be a solution to the difficulty with the application of section 1113, it is necessary to identify appropriate sources of that input. Fortunately, in the context of collective bargaining and industrial relations this is not a difficult task. Various groups have developed expertise in the industrial relations area through years of experience with employers, unions, collective bargaining agreements, and the NLRA. Specifically, Congress and the courts have labelled labor arbitrators, mediators, and NLRB officials as experts in this field. Bankruptcy courts should utilize this pool of experts when the issue of labor contract rejection arises in the reorganization context.

Labor arbitrators develop familiarity with the industrial setting by resolving the disputes that arise during the life of a bargaining agreement. They gain additional expertise by participating in negotiations for new agreements. The expertise of labor arbitrators was lauded by the Supreme Court in the Steelworkers Trilogy, which established arbitra-

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analogous to a narrowing of the gap between the interests of employees and employers when a company is failing. That is, when liquidation becomes a possibility, unions and debtors share the goal of preserving the business and the jobs it provides. The experience of Chrysler Corporation is a clear example. See Wall St. J., Oct. 26, 1979, at 3, col. 4; see also Wall St. J., Oct. 26, 1979, at 3, col. 1; Labor Settles for Less, Newsweek, May 10, 1982, at 68.

134 With regard to labor arbitrators, the Supreme Court stated: "[T]hey sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements." United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) (footnote omitted). Arbitrators are in high demand in the labor field because over 95% of all collective bargaining agreements provide for arbitration. See J. Getman & J. Blackburn, Labor Relations: Law, Practice and Policy 356 (2d ed. 1983).

135 This aspect of labor arbitration is referred to as "interest arbitration." See R. Gorman, supra note 79, at 573.
Collective bargaining and bankruptcy are preferable to court action for contract dispute resolution. Professor Gregory has suggested that “[i]ncorporating the time-honored wisdom of labor arbitrators into the bankruptcy court’s difficult decision . . . is likely to make the ultimate decision far more palatable to the parties.” And one court similarly noted that “the unique role and special expertise of the arbitrator may be of invaluable assistance to the bankruptcy judge and may serve to avoid unnecessary conflict between labor union and debtor.” Thus, labor arbitrators have highly regarded grass roots knowledge of the labor setting that bankruptcy judges could tap when making decisions involving labor contracts.

Mediators are another group of specialists who are constantly involved in labor dispute resolution. The Federal Mediation and Conciliation Service (FMCS) is an agency of professional mediators that must be notified by parties who anticipate unilateral modifications or terminations of collective bargaining agreements. The mediators then monitor these situations and, when negotiations appear to be failing, mediate between the parties in an attempt to resolve the labor dispute. Federal mediators enter labor disputes when relations are poorest and thus become involved in “the most complex, sensitive, and difficult of all labor negotiations.” Most mediators come to the

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138 As the Supreme Court noted, “The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.” United Steelworkers of America v. Warrior & Gulf Navigation, 363 U.S. 574, 582 (1960). In fact, even the NLRB defers to the determinations of labor arbitrators. See, e.g., Collyer Insulated Wire, 192 N.L.R.B. 837, 839 (1971); see generally R. Gorman, supra note 79, at 477-80.

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140 Notification of the FMCS is required by § 8(d)(3) of the NLRA, which is codified at 29 U.S.C. § 158(d)(3) (1982).


FMCS after other experience in the industrial setting; they receive intense training and are then sent into the field for experience at the bargaining table. Through constant observation and participation in negotiation sessions, mediators gain a working knowledge of union and management interests and industrial relations. The FMCS, therefore, is well-suited for providing assistance to the bankruptcy courts faced with the issue of labor contract rejection.

A final and perhaps more obvious source of labor expertise is the National Labor Relations Board (NLRB). Section 3 of the NLRA gives the Board and its General Counsel the duty of enforcing the provisions of the act. The officials who make up the Board and General Counsel work with labor disputes and collective bargaining agreements on a daily basis, and have developed an expertise that is praised and deferred to by the courts. As one bankruptcy court noted: "Congress endowed the NLRB with peculiar competence over labor matters because of its supposed expertise in this presumptively specialized field." The Board thus has strong potential as a source of assistance to bankruptcy courts making determinations involving collective bargaining agreements and the industrial setting.

C. Method of Input

There are a variety of methods through which the aforementioned sources could make information available to the bankruptcy courts. On a formal level, experts could receive the necessary statistics and documents in order to brief and argue the rejection issue before the court orally. A less rigid alternative would be for experts to monitor the negotiations, and to file a recommendation or report with the bankruptcy court. Alternatively, a court might find it most beneficial simply to obtain answers from a neutral party to specific questions regarding good faith bargaining or good cause for refusing a proposal.

143 See Kolb, Roles Mediators Play: State and Federal Practice, 20 INDUS. REL. 1, 13 (1981).
144 See W. Simkin, supra note 139, at 69-71.
145 See A. Zack, supra note 139, at 29.
147 See supra notes 79-83 and accompanying text.
149 One commentator has suggested that the NLRB and bankruptcy court jointly supervise cases involving labor contract rejection. See Legal Developments, supra note 110, at 624. Joint supervision would require a precise and difficult delineation of the relative authorities of each tribunal. This Comment's proposal attempts, instead, to work within the basic framework of the current Chapter 11 procedures, preserving the complete authority of the bankruptcy court, while mandating only that it seek assistance in making determinations that involve the specialized field of labor relations.
Since the goal of providing input is to effectuate the underlying policies of both the bankruptcy and labor laws by assisting the bankruptcy judge, the method of input should cater to the interests and needs of the particular judge involved. A bankruptcy judge must, therefore, be given the flexibility to choose that method which best suits her individual need for information. That flexibility is best ensured by a process that allows judges to consider the widest range of input alternatives possible within the context of reorganization proceedings.

With respect to the input offered by the experts, the congressional mandate that the bankruptcy forum exclude labor law precedent remains applicable. The experts must refrain from evaluating the behavior and proposals in terms of case law and definitions under the NLRA. Their assistance should reflect their knowledge of labor relations, and not their knowledge of labor law. The role of the experts must be to aid the court in understanding the meaning and significance of actions that take place in a setting with which experts are intimately familiar. It is their familiarity with the labor relations setting that must be the source of their input.

It is unclear whether, under the existing law, bankruptcy courts could take steps to obtain input from arbitrators, mediators, or officials of the NLRB. Section 1113(d)(1) provides that any "interested party" may appear and be heard at the hearings on the rejection of collective bargaining agreements. Courts have interpreted an analogous provision governing reorganization proceedings generally to allow bankruptcy courts considerable discretion in defining the phrase "interested parties." Nevertheless, it is questionable whether this provision could be interpreted to provide the courts with the authority to appoint labor experts to monitor negotiations. Congress, therefore, must make it clear that the courts should take necessary actions to obtain input from knowledgeable sources. In this way, the legislature would further a policy requiring that labor issues be handled intelligently in the bankruptcy courts.

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150 See supra notes 99-100 and accompanying text.
153 See, e.g., In Re Cash Currency Inc., 37 Bankr. 617, 628 n.10 (Bankr. N.D. Ill. 1984) ("A bankruptcy court has discretion to allow intervention in a Chapter 11 case by parties other than those specifically designated."); In Re Citizen's Loan and Thrift Co., 7 Bankr. 88, 90 (Bankr. N.D. Iowa 1980) (finding that § 1109(b) does not deprive the bankruptcy court of discretion in determining which parties may be heard).
154 The speed with which Congress acted in passing section 1113, see supra notes 53-64 and accompanying text, militates against the possibility that Congress has already considered this possibility.
CONCLUSION

The rejection of collective bargaining agreements by a debtor in Chapter 11 reorganization involves important issues under the bankruptcy and labor laws. However, the law that currently governs such rejection, section 1113 of the Bankruptcy Code, fails to account for the fact that the bankruptcy courts that must deal with the issue lack the experience and expertise to evaluate appropriately the labor issues that unavoidably arise. Thus, Congress's attempt to provide special treatment for labor contracts, which differ substantially from other executory contracts, will fail due to the bankruptcy courts' inability to deal effectively with issues beyond their competence. The legislature and the bankruptcy courts should remedy this difficulty by tapping the currently existing pool of labor experts. Labor arbitrators, mediators, or officials of the NLRB should be called upon to provide the necessary assistance to the bankruptcy courts. In this way the parallel policies of business stability and industrial peace promoted by the bankruptcy and labor laws will be served through an informed decision-making process.