OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-818 & 82-852

TITLE NATIONAL LABOR RELATIONS BOARD, Petitioner v. BILDISCO AND BILDISCO, DEBTOR-IN POSSESSION, ET AL.; and
LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., Petitioner v. NATIONAL LABOR RELATIONS BOARD, ET AL.

PLACE Washington, D. C.

DATE October 11, 1983

PAGES 1 thru 52

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440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -x

3 NATIONAL LABOR RELATIONS BOARD, :

4 Petitioner, :

5 v. : No. 82-818

6 BILDISCO AND BILDISCO, DEBTOR-IN :

7 POSSESSION, ET AL., and :

8 LOCAL 408, INTERNATIONAL BROTHER- :

9 HOOD OF TEAMSTERS, ETC., :

10 Petitioner, :

11 v. : No. 82-852

12 NATIONAL LABOR RELATIONS BOARD, :

13 ET AL. :

14 -x

15 Washington, D.C.

16 Tuesday, October 11, 1983

17 The above-entitled matter came on for oral

18 argument before the Supreme Court of the United States

19 at 10:48 o'clock a.m.

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1 APPEARANCES:

2 LAWRENCE G. WALLACE, ESQ., Office of the Solicitor

3 General, Department of Justice, Washington, D.C.;

4 on behalf of the NLRB.

5 JAMES R. ZAZZALI, ESQ., Newark, New Jersey; on behalf

6 of Local 408, IBT, etc.

7 JACK M. ZACKIN, ESQ., Roseland, New Jersey; on behalf

8 of Bildisco and Bildisco.

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1 C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in National Labor Relations Board against Bildisco and Bildisco, and Local 408, International Brotherhood of Teamsters, against National Labor Relations Board.

Mr. Wallace, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court, the consolidated cases involving the same Chapter 11 debtor in possession, the Court of Appeals in this case prescribed a standard to be used by a bankruptcy court in determining whether to approve an application to reject a collective bargaining agreement as an executory contract, and how that approval of such rejection operates retroactively to deprive employees of rights under the contract during the entire post-bankruptcy petition period, and thus to deprive the National Labor Relations Board of authority to remedy as an unfair labor practice the debtor in possession's unilateral departure from the contractually prescribed terms and conditions of employment during the post-petition, pre-rejection period.

We believe the court of appeals erred in both

1 respects. Because I have only 15 minutes, and hope to
2 reserve a little time, because much can happen during
3 the ensuing 45, all I can try to do is summarize what we
4 think are the governing principles, and why our position
5 best accommodates the two federal statutes involved and
6 maximizes the effectiveness of each.
7 All the courts of appeals that have considered
8 the question have agreed, and the respondent in this
9 Court does not dispute that a special standard must
10 govern rejection of a collective bargaining agreement.
11 This is partly because of the special nature of such an
12 agreement, as prescribing a code of industrial conduct,
13 and because the employees, unlike others, are totally
14 dependent for their livelihood on their relation with
15 the employer.
16 But the basic reason is because of a statutory
17 conflict between the application to a collective
18 bargaining agreement of the bankruptcy court's authority
19 to set aside an executory contract and the Labor
20 Relations Act's prohibition of mid-term modification or
21 termination of a collective bargaining agreement unless
22 both parties to the agreement agree.
23 QUESTION: Mr. Wallace, is it so much a
24 conflict between two statutes as a problem of executory
25 contracts of a different character, one with a supplier,

1 perhaps, and one with an employee? Is that really
2 conflict in the statutes?
3 MR. WALLACE: Well, the Labor Act does say
4 that there cannot be midterm rejection or modification,
5 termination or modification of a labor contract, of a
6 collective bargaining agreement, unless both parties
7 agree pursuant to prescribed procedures, and yet there
8 is reason to think that the authority of the bankruptcy
9 court to set aside executory contracts does extend to
10 collective bargaining agreements.
11 On the face of the statutes, they do look in
12 opposite directions, and Congress has not explicitly
13 said how this conflict should be resolved, but as we
14 explain in our brief, we believe it implicitly ratified
15 the resolution that had been developed by the Court of
16 Appeals for the Second Circuit, which was the only
17 appellate decision at the time Congress enacted the
18 Bankruptcy Code, and Congress did indicate some
19 awareness of those decisions.
20 QUESTION: How did Congress indicate that
21 awareness?
22 MR. WALLACE: In legislative history of prior
23 amendments to the Bankruptcy Act, but not in the
24 legislative history of the code itself, but because the
25 same Committees dealt with --

1 QUESTION: Well, then, what is it you rely on
2 to say that they implicitly ratified a court of appeals
3 decision?
4 MR. WALLACE: Well, just the general principle
5 that Congress is presumed to be aware of how the law has
6 developed, but --
7 QUESTION: Now, wait a minute, Mr. Wallace.
8 Is there any general principle that Congress is presumed
9 to be aware of every district court, every court of
10 appeals decision, or every decision of this Court,
11 however episodic it may be?
12 MR. WALLACE: Well, we relied basically on the
13 Lorillard case, which refers to that principle, but cur
14 main argument is that in any event, the Second Circuit's
15 resclution is the prcper one, regardless of whether it
16 can be said that Congress implicitly ratified it, and
17 under that standard --
18 QUESTION: We really have three separate
19 standards expressed by the courts of appeals, don't we,
20 this one, the Migra case, and the Eleventh, and --
21 MR. WALLACE: Yes.
22 QUESTION: -- whatever -- Brada Miller.
23 MR. WALLACE: Brada Miller is what we have
24 been calling it, which is --
25 QUESTION: And you go for the allowance

1 standard way back by Judge Moore a number of years ago?

2 MR. WALLACE: Well, and Judge Mansfield's

3 opinion in REA Express for the Second Circuit. We do

4 think that the Eleventh Circuit's opinion is very close

5 to that. Although it explicitly says it disagrees with

6 it, it does say in another passage that it thinks that a

7 factor that the Second Circuit says is essential is

8 going to be an important inquiry in many, many

9 instances. The case will turn on that. And that is the

10 inquiry whether rejection of the collective bargaining

11 agreement is necessary to avoid collapse of the business

12 as necessary to the preservation of the viability of the

13 business.

14 This, we believe, should be the central

15 inquiry, because for one thing it is a question that is

16 properly within the competency of a bankruptcy court to

17 determine, unlike the kind of second guessing of the

18 collective bargaining process that otherwise is

19 suggested in opinions about balancing the equities to

20 determine whether terms and conditions of employment

21 other than those bargained for would be fairer under the

22 circumstances to both the employees and the employer,

23 and to take into account what is the likelihood that a

24 strike might be provoked if the collective bargaining

25 agreement is set aside, the kinds of inquiries that

1 Congress, as this Court has emphasized, has left to the
2 bargaining process and the parties themselves, and has
3 prohibited even experts in labor management relations,
4 such as the Labor Board, from second guessing the
5 bargaining process with respect to, and the kind of
6 inquiries that it is difficult to conceive of Congress
7 asking a bankruptcy court to resolve.

8 And while the standard focusing on preservatin
9 of the business, its viability, thus would preserve the
10 basic policy of the Bankruptcy Act, it would also
11 maximize preservation of rights under the Labor Act by
12 reducing only to a risk of error in the resolution of
13 that question the preservation of rights that otherwise
14 would survive under the labor contract, and by making it
15 less apt that the bankruptcy court's decision will
16 provoke a work stoppage because of unacceptability to
17 the employees who have been operating under the contract
18 if they perceive that the question that has been
19 answered is whether their contract rights can survive in
20 any event, and that has been the inquiry.

21 It also puts in the proper context for
22 bankruptcy court resolution such emotional matters as
23 evidence of anti-union animus that may have motivated
24 the employer to go into bankruptcy. The bankruptcy
25 court by and large should regard that as going to the

1 credibility of the employers being able to show that it
2 is necessary in the context of a comprehensive look at
3 his operations and his obligations, that it is necessary
4 to set aside the collective bargaining agreement in
5 order for the business to survive.

6 QUESTION: Mr. Wallace, if it is legitimate
7 for a company to file a bankruptcy petition because
8 executory contracts are making successful continuation
9 of the business impossible, is it permissible for a
10 company to file a bankruptcy petition for the express
11 purpose of freeing itself from an executory collective
12 bargaining agreement that it feels is making it
13 impossible?

14 MR. WALLACE: I see nothing improper about
15 that. We see nothing improper about that, if the
16 company can make the requisite showing in the context of
17 all of its obligations and operations that it needs to
18 have that contract set aside in order for the business
19 to remain a viable one, or to be converted into a viable
20 one.

21 QUESTION: Mr. Wallace, at one page in your
22 brief, you state that CA2 standard was -- that a showing
23 of will fail must be made by the debtor. On the next
24 page, you use the term "likely to fail." Do you make a
25 distinction between the two?

1 MR. WALLACE: Not really.

2 QUESTION: Not really?

3 MR. WALLACE: It is a predictive matter.

4 There is no way that the future can be proved with

5 certainty.

6 On the relation back issue, if I can advert to

7 that basically, we see no conflict between the

8 bankruptcy law and the labor law. The bankruptcy law

9 sharply differentiates between pre-petition and

10 post-petition obligations of the trustee or debtor in

11 possession in order to encourage persons to continue to

12 provide goods and services.

13 A vendor, for example, obligated to provide

14 lumber or potatoes or what have you, is prohibited by

15 the bankruptcy law from terminating the contract merely

16 because the other party goes into bankruptcy, and the

17 obvious meaning of that is that as he continues to

18 supply those goods until the contract is set aside he is

19 operating under the terms of the contract. The same

20 thing would be true of employees where terminable at

21 will but who are kept on by the debtor in possession.

22 It would never occur to anyone that the debtor

23 in possession could four months later go to the

24 bankrupty court and ask the bankruptcy court

25 retroactively to change the salaries or the health

1 benefits that those employees were told they were
2 entitled to while they were performing those services,
3 and the mere fact that there may be reason to ask the
4 court to set aside further obligations under a
5 collective bargaining agreement does not provide a
6 reason to treat employees operating under that agreement
7 any differently. If anything, it brings in
8 considerations of the Labor Act as well.
9 I would like to reserve the balance of my
10 time.
11 CHIEF JUSTICE BURGER: Very well.
12 Mr. Zazzali.
13 ORAL ARGUMENT OF JAMES R. ZAZZALI, ESQ.,
14 ON BEHALF OF LOCAL 408, IBT, ETC.
15 MR. ZAZZALI: Mr. Chief Justice, and may it
16 please the Court, I adopt the position of the Solicitor
17 General with respect to the standard issue, and instead
18 I would move on to the subject of 8(D), which is the
19 requirement in the National Labor Relations Act which
20 compels a party seeking to modify or terminate a
21 contract to give notice to and to negotiate with the
22 other party. We think that 8(D) should be a condition
23 precedent to the rejection of a union contract, because
24 we think 8(D) is in the public interest as a public
25 statute designed to protect the common weal.

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1 We are only asking for purposes of this
2 discussion that not all of the trappings and the
3 trimmings of 8(D) be superimposed upon the employer or
4 the union. Rather, we simply ask a party to give notice
5 to and to negotiate with the other party to that
6 contract before the contract is automatically rejected
7 ipso facto.

8 If the employer refuses to come to an
9 agreement, and mind you that we have never suggested
10 that concessions must be made by the employer, but if
11 the renegotiations do not work out, or if the union
12 simply refuses to negotiate, the employer is then free
13 to seek rejection of the contract in the bankruptcy
14 court, and Justice O'Connor, in response to your
15 question, we do indeed agree with the Solicitor General
16 that generally a labor contract is an executory contract
17 which may be, in appropriate circumstances, subject to
18 the correct standard, be rejected.

19 But again, as a legitimate and viable
20 condition precedent to that rejection, we think there
21 should be negotiations. That is a moderate and a modest
22 proposal. It is a reasonable and a reasoned position.
23 It is designed, above all, to again protect the public
24 interest and to pay due respect to the Bankruptcy Code,
25 and to the interests and to the rights of employers who

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1 are financially embarrassed.

2 It allows, to use the phrase of the fifties, a

3 peaceful coexistence between management and labor,

4 between employees and employer.

5 QUESTION: You think, though, that they must

6 comply literally with all the requirements of 8(D)?

7 MR. ZAZZALI: I think in terms of the policy

8 considerations here, because there are multiple

9 requirements, I don't think so, Justice White.

10 QUESTION: Well, then, what is the issue, 8(D)

11 or not?

12 MR. ZAZZALI: I think -- I think --

13 QUESTION: Or just notice and reasonable

14 amount of bargaining? Is that it?

15 MR. ZAZZALI: No, it is in negotiations.

16 Obviously, we would like to see notice to the Federal

17 Mediation and Conciliation Service, which is mandated,

18 notice to the state agencies, but I think in an

19 appropriate exercise of discretion those requirements

20 can be dispensed. It seems the key -- the key

21 responsibility, to use the vernacular, is to get the

22 parties together in the public interest to bang out an

23 agreement if at all possible, and we would therefore

24 urge that --

25 QUESTION: Well, they don't have to -- you

1 know, a lot of bargaining goes on for a long time, and
2 if it is going to go on for a long time, the company may
3 -- you may not have to bargain any more.
4 MR. ZAZZALI: Your Honor, I can appreciate the
5 concern about time. It is a suggestion that has been
6 made by some of the parties to the briefs and some of
7 the amici in the case. We would note, Number One, that
8 this is not the Railway Labor Act, which has a complex
9 and convoluted series of requirements for negotiations.
10 QUESTION: No, but I gather, Mr. Zazzali, you
11 would require them to bargain to impasse, would you not?
12 MR. ZAZZALI: Yes, but impasse --
13 QUESTION: That can be a long time.
14 MR. ZAZZALI: It can be --
15 QUESTION: I gather your position is, they
16 must bargain to impasse before the debtor in possession
17 may seek rejection.
18 MR. ZAZZALI: That's correct, but given the
19 exigencies of the particular situation, that is,
20 bankruptcy, and given the responsibility of both parties
21 and, we hope, the maturity of both parties, impasse can
22 be in two weeks, it can be achieved in two days, it can
23 be achieved in two hours.
24 QUESTION: It could be achieved in six months,
25 too.

1 QUESTION: Two years.

2 MR. ZAZZALI: That's correct, but I think it
3 is appropriate for the bankruptcy court in a proper
4 exercise of its discretion to perhaps order an expedited
5 negotiation schedule. There are --

6 QUESTION: If the union has notice, and surely
7 it would, of an application to reject the collective
8 bargaining agreement, the union could certainly
9 participate in the hearing, couldn't it?

10 MR. ZAZZALI: It could, Your Honor, but that
11 is something considerably different than negotiations.
12 Participation --

13 QUESTION: That may be. It may be. But what
14 if the -- what if the -- what if the standard is as high
15 as you would like it to be, the standard for rejection?
16 You can -- you can assume that standard, and if the
17 union can get in its two bits worth as to whether that
18 standard is satisfied, why aren't -- why isn't that
19 enough?

20 MR. ZAZZALI: Because I don't --

21 QUESTION: Because if the court were going to
22 conclude that, yes, the company would or would be likely
23 to fail unless there were modifications, why would you
24 have to go off and negotiate some more about it?

25 MR. ZAZZALI: Because as we understand the

1 bankruptcy court's determination, it is an all or none
2 decision by the bankruptcy court to terminate or not to
3 terminate, to reject all parts of that collective
4 agreement or none at all, to reject the non-monetary as
5 well as the monetary benefits.
6 QUESTION: Well, does that requirement, does
7 that suggest that even if they arrived at an agreement,
8 even if they did, the bankruptcy court could still
9 perhaps even sui sponte direct rejection?
10 MR. ZAZZALI: I can conceive of that
11 happening, but of course, sui sponte, the court in an
12 exercise of its discretion -- it might well be an abuse
13 of discretion --
14 QUESTION: The court, in other words, would
15 not be concluded by the agreement?
16 MR. ZAZZALI: Absolutely not, but going back
17 to Justice White's inquiry, it's too late by the time we
18 get to bankruptcy court to have a hearing on rejection
19 to negotiate out the problems. It seems to me to make
20 more sense to have the parties sit down, discuss,
21 negotiate, call it what you will, work out these
22 difficulties. The union --
23 QUESTION: They would in a sense be negotating
24 before the bankruptcy court --
25 MR. ZAZZALI: I would --

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1 QUESTION: -- with somebody there refereeing
2 the struggle.
3 MR. ZAZZALI: I would not encourage the
4 bankruptcy court to play an active role in the
5 negotiations. It can maintain a monitoring position
6 perhaps or a supervisory role, but to be actively
7 involved in the negotiations is probably unwise.
8 QUESTION: What is your view if the bankruptcy
9 court -- say the bankruptcy court accepted everything
10 you suggest. They reach impasse, and then the
11 bankruptcy court holds that the contract must be
12 rejected, or may be rejected? What then? What is your
13 view of the relationship between the trustee or the
14 debtor in possession and the union? Are there then
15 negotiations?
16 MR. ZAZZALI: I, although --
17 QUESTION: Or do you know?
18 MR. ZAZZALI: I think there should be
19 negotiations. I think the ball game is effectively over
20 at that point. It is beyond the twelfth hour.
21 QUESTION: But -- The collective bargaining
22 contract has been rejected, but that doesn't mean that
23 you don't represent the majority of the employees, does
24 it?
25 MR. ZAZZALI: You are correct, Your Honor, but

1 on a practical level, to obtain anything of consequence
2 in the post-rejection period simply, according to the
3 experiential data, are not going to happen. Experience
4 has indicated that we are not going to resolve it after
5 rejection. The sensible approach is to let the parties,
6 if at all possible, get together, work out their
7 difficulties, and then if the parties cannot work out
8 their difficulties, let it go to the bankruptcy court,
9 let the bankruptcy court hold the hearing on rejecting
10 the contract. At least the union would have been -- and
11 the employer would have been placed on their respective
12 spots by having to, to use the vernacular again, to put
13 up or shut up.
14 Certainly a union in that situation -- and
15 experience has indicated that the vast majority of
16 unions do face up to their responsibilities, and
17 according to the recent headlines do meet the necessity,
18 the exigencies of the moment by renegotiating
19 contracts. That is why this is a public statute, and
20 the distressing aspect of this case is that some of the
21 amici and others have suggested that it is a fight
22 between -- exclusively between employees and employer,
23 between labor and management, between big labor and big
24 management, between the Orioles and the Phillies, and it
25 is none of those things.

1 What it is, it's a public statute designed to
2 protect the public interest. Twelve years ago, in
3 Pittsburgh Plate Glass, this Court said precisely that
4 when it advised us that the purpose of 8(D) is to
5 facilitate agreement rather than economic warfare, and
6 thereby avoid interruptions in the production of goods
7 and in the flow of commerce, and it is by the simple
8 expedient of sitting down and talking out the problems,
9 which is what this labor relations business is all about
10 in the last analysis, that we are urging upon this
11 Court.
12 QUESTION: May I just be sure I understand
13 your position? On the 60-day notice requirement,
14 Section 8(D), do you say that applies or does not
15 apply?
16 MR. ZAZZALI: I think that literally it all
17 should apply, but I think in a -- since we are seeking
18 an accommodation of the two statutes, and since I think
19 that reconciliation is in the public interest, I think
20 both statutes have to bend to meet that public interest,
21 and therefore literally I don't think we have to accept
22 all the requirements of 8(D), but simply the guts to get
23 those parties together.
24 QUESTION: Well, in other words, I think what
25 you are saying is, no, it doesn't apply. It may be --

1 MR. ZAZZALI: I would --

2 QUESTION: It may be excuesd in certain

3 circumstances.

4 MR. ZAZZALI: I think the public interest

5 would tolerate something less than total compliance.

6 QUESTION: Well, what you are saying, a court

7 does not have to apply the 60-day notice requirement in

8 all cases?

9 MR. ZAZZALI: I would think -- yes, Your

10 Honor, I would --

11 QUESTION: It seems to me, then, that you are

12 really not arguing that 8(D) applies, but rather, that

13 you are arguing that the extent to which there has been

14 pretermination negotiation and notice and bargaining is

15 a part of a standard that should be applied by the

16 bankruptcy judge in deciding whether or not to approve

17 rejection.

18 MR. ZAZZALI: Respectfully, Justice Stevens, I

19 am not arguing that. I think that there should still be

20 a per se requirement in accordance with Section 8(D) to

21 get the parties together to negotiate out their

22 differences.

23 QUESTION: It is a per se requirement that

24 requires a modest rewriting of the statute.

25 MR. ZAZZALI: It might require, in Justice

1 Frankfurter's phrase, rather some elucidating litigation
2 in order to attempt to reconcile these differences. We
3 are here to accommodate the statutes. I think any
4 accommodation does not necessarily mandate a rewriting
5 of the statute perhaps reposing in the district court
6 and the district bankruptcy court the appropriate
7 exercise of discretion. That is how the common weal can
8 be best served in our judgment.

9 QUESTION: Of course, the court below really
10 held that the trustee or the debtor in possession was a
11 separate entity.

12 MR. ZAZZALI: Yes, which I think is --

13 QUESTION: And you haven't addressed that. If
14 we agree to them, all the rest of this is irrelevant.

15 MR. ZAZZALI: If you agree, Your Honor. I
16 think the commentators in other circuits have soundly
17 repudiated the new entity theory on the grounds --

18 QUESTION: Well, we haven't yet.

19 MR. ZAZZALI: That's correct, Your Honor. On
20 the grounds that it is a -- it is simply a legal
21 fiction. As Judge Tuttle said in the Brada Miller
22 decision --

23 QUESTION: Nevertheless, that was the ground
24 for the court of appeals judgment, wasn't it?

25 MR. ZAZZALI: That's correct, and the Eleventh

1 Circuit roundly disagrees with that, saying that this is
2 at best a new juridical entity rather than a new
3 entity. I think most of the commentators and the courts
4 below, admittedly not this court, have urged that --
5 QUESTION: When you say commentators, Mr.
6 Zazzali, who are you referring to?
7 MR. ZAZZALI: I think, for example, the
8 article by Countryman quoted in a number of the briefs,
9 and I think the Michigan Law Review article.
10 QUESTION: Was that an article, or was it
11 written by students?
12 MR. ZAZZALI: I think the Countryman article
13 was written by a law professor.
14 QUESTION: How about the Michigan Law Review?
15 MR. ZAZZALI: That I am honestly not sure of,
16 Your Honor.
17 QUESTION: You commend it to us anyway?
18 MR. ZAZZALI: Well, I do think that I commend
19 the conclusion to you that the new entity theory does
20 not stand for the simple reason that it makes no sense,
21 as the Eleventh Circuit said, to say that a new entity
22 is bound by an old contract. Either a new entity is or
23 is not bound, and the entire problem of new entity, as
24 the successorship theory, gives pause.
25 To say similarly that an employer who is a new

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1 entity must nevertheless go and seek rejection of a
2 contract makes no sense at all. And I think -- not a
3 commentator, but I think at least one and perhaps two of
4 the circuits have said the same thing, that it is -- it
5 makes no sense to say that the employer who is a new
6 entity must nonetheless go in and apply to reject the
7 contract -- the contract. If he is a new entity,
8 clearly, a fortiori, he is not bound by the old
9 contract.

10 The difficulty with so much of this is that
11 rather than reconciling the two statutes in favor of
12 coexistence, we have the circuit below in the matter sub
13 judicii, really sanctifying the Bankruptcy Code over the
14 national labor policy, and that is why I suggested,
15 Justice Stevens, that we really aim towards some kind of
16 a sensible accommodation of the conflicting statutes.

17 It is interesting that the employers are
18 saying today, reject the contract and therefore the
19 union has the right to strike. That sets labor
20 relations on its head in this nation, and it seems to me
21 is a deja vu return to the policies of 50 years ago,
22 when precisely -- it was precisely the Act and this
23 Court which sought to encourage meaningful, peaceful
24 collective bargaining as an alternative to the right to
25 strike.

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1 And instead, we now have employers saying,
2 gee, if you have the contract rejected, the unions then
3 have the right to strike. That is not healthy.
4 QUESTION: Are you suggesting that there is
5 any diminution of the right to strike if the contract is
6 cancelled by the bankruptcy process?
7 MR. ZAZZALI: Not at all, clearly, and that's
8 the problem. Clearly, the union shall have the right
9 to --
10 QUESTION: They are just where they were
11 before the contract.
12 MR. ZAZZALI: That's correct. The union shall
13 have the right to strike, and then we return to the test
14 of strength that --
15 QUESTION: Well, if they are where they were
16 before the contract was entered into, they were -- they
17 represented a majority of the employees, then I suppose
18 they could get an order to bargain.
19 MR. ZAZZALI: That's one of the questions
20 before this Court. The problem, of course, is --
21 QUESTION: No, I don't know whether it is --
22 this is after rejection. Suppose even if the court of
23 appeals is right, this is to be treated as a separate
24 entity, it doesn't mean that the separate entity doesn't
25 have to bargain once the contract's been rejected.

1 MR. ZAZZALI: That's correct, but --

2 QUESTION: And if the debtor in possession
3 refused to bargain with the majority representative of
4 its employees, I would suppose it would commit an unfair
5 labor practice, wouldn't it?

6 MR. ZAZZALI: That's correct, Your Honor, but
7 keep in mind that the contract has not only been
8 rejected, but every part of that contract is being
9 rejected, including seniority provisions, and therefore
10 what will happen is what is happening, according to the
11 documented cases, and employees are being laid off and
12 the union is losing its majority.

13 In closing, I thank Your Honors, and would
14 urge that the reconciliation we have urged be considered
15 rather than these employees be treated, frankly, as
16 inventory under the Bankruptcy Code. Thank you.

17 CHIEF JUSTICE BURGER: Mr. Zackin?

18 ORAL ARGUMENT OF JACK M. ZACKIN, ESQ.,
19 ON BEHALF OF BILDISCO AND BILDISCO

20 MR. ZACKIN: Mr. Chief Justice, and may it
21 please the Court, although it may be somewhat unusual, I
22 think it appropriate to begin with a discussion of what
23 this case is not about. First, this case does not
24 concern the issue of whether a financially healthy
25 company should be or will be permitted to utilize the

1 provisions of Chapter 11 for the sole purpose of
2 escaping from a unicn contract.
3 Such a factual setting and motivation have
4 never been alleged in this case, and there is no
5 suggesticn in the record that this was Bildisco's
6 situation or motivation.
7 In addition, the balancing of the equities
8 test formulated by the Third Circuit will itself prevent
9 this result. Under this test, the bankruptcy court is
10 required to scrutinize the good or bad faith of the
11 debtor who seeks to reject a labor contract. Moreover,
12 if a company is not truly financially distressed, the
13 equities will undoubtedly tip in favor of the union, and
14 rejection will not be permitted.
15 QUESTION: May I ask -- This is following up
16 on Justice O'Connor's question -- if the sole purpose of
17 a bankruptcy petition was to escape a labor contract
18 which the company honestly believed would cause
19 bankruptcy, cause insolvency and a failure, is that bad
20 faith?
21 MR. ZACKIN: No, I don't think that is bad
22 faith, Justice Stevens. I think that --
23 QUESTION: What is bad faith?
24 MR. ZACKIN: I do not think it is bad faith.
25 I think --

1 QUESTION: But what does the concept of bad
2 faith embody, then, insofar as it is related to labor
3 relations?
4 MR. ZACKIN: I think that if it is found by a
5 bankruptcy court that a company can continue to pay its
6 obligations as they become due and still honor its union
7 contract, but nevertheless --
8 QUESTION: Then they wouldn't be bankrupt.
9 MR. ZACKIN: Well, that's correct, Justice
10 Rehnquist, and if they tried to use Chapter 11 merely to
11 increase their profits by rejecting the union contract,
12 that would constitute bad faith, and I think in that
13 situation not only would the application to reject the
14 contract be denied, but the case itself, the Chapter 11
15 case, should be thrown out of bankruptcy court.
16 QUESTION: You couldn't use Chapter 11, could
17 you?
18 MR. ZACKIN: You should not be permitted to
19 use Chapter 11.
20 QUESTION: Well, I mean, normally, without the
21 union being involved, if you aren't broke, you can't use
22 Chapter 11.
23 MR. ZACKIN: That's correct, Your Honor.
24 There is an implicit good faith requirement in the
25 Bankruptcy Code.

1 QUESTION: Well, is there something over and
2 above the good faith requirement that extends across the
3 board to consideration of executory contracts by the
4 debtor in possession that applies to labor contracts in
5 particular, or is a labor contract protected by no more
6 than the requirement of good faith that you have just
7 spoken of, which I think extends across the board in
8 executory contracts?
9 MR. ZACKIN: I believe that it does extend
10 across the board, Justice Rehnquist. I think that if
11 you look at the specific provisions of the Bankruptcy
12 Code itself, there is certainly no indication that
13 Congress intended collective bargaining agreements to be
14 treated differently than any other executory contract.
15 I think that what the Third Circuit recognized was that
16 there are competing policies, as expressed in the
17 national labor laws, and that in order to accommodate
18 those policies, a special standard should be adopted so
19 that the rights of organized labor enjoy a special
20 status.
21 But if one looks strictly at the letter of the
22 Bankruptcy Code, there is absolutely no indication that
23 that was the intent of Congress.
24 QUESTION: Of course, if one looks at the
25 National Labor Relations Act, there is no indication

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1 that Congress thought an employee was going into
2 bankruptcy at midterm and rejecting the contract.
3 MR. ZACKIN: That's correct, Justice
4 Rehnquist, but I think it is important to note that
5 Congress in enacting the Bankruptcy Code did provide for
6 one specific exception with respect to the rejection of
7 labor agreements, and that is Section 1167 of the
8 Bankruptcy Code, which applies to collective bargaining
9 agreements negotiated under the Railway Labor Act, and
10 in that case Congress saw fit to say to the bankruptcy
11 courts, you may not, you may not modify or terminate
12 this contract except if the debtor complies with the
13 midterm modification requirements in the Railway Labor
14 Act.
15 They didn't do that in the case of contracts
16 negotiated under the National Labor Relations Act.
17 QUESTION: Was that because common carriers'
18 responsibilities to the public as a whole are different
19 from perhaps a building contractor?
20 MR. ZACKIN: I think that's correct, Chief
21 Justice. I think that Congress recognized that there
22 are different considerations with respect to carriers
23 engaged in interstate commerce, and those employees
24 perhaps deserve a bit more protection than employees in
25 certain other industries.

1 QUESTION: Well, it isn't so much a question
2 of the employees being protected as the traveling public
3 being protected --
4 MR. ZACKIN: I think that's --
5 QUESTION: -- by continued service.
6 MR. ZACKIN: I think that's true. I think
7 there is a long history of legislation with respect to
8 public transportation and common carriers, and Section
9 1167 is merely an outgrowth of that, recognizing that
10 there are special situations which apply to that
11 industry.
12 QUESTION: Mr. Zackin, what in your view is
13 the underlying purpose of the Bankruptcy Act itself? Is
14 it basically there to try to protect creditors, or what?
15 MR. ZACKIN: I think that the underlying
16 purpose of at least Chapter 11 of the Bankruptcy Act as
17 expressed by Congress is to promote the reorganization
18 of distressed business entities as an alternative to
19 liquidation, and that policy is found --
20 QUESTION: To what end? To protect the
21 creditors, or to protect employees, or what?
22 MR. ZACKIN: All -- both, and -- both, Justice
23 O'Connor. I think Congress recognized that if
24 rehabilitated, a business can, Number One, continue to
25 provide its employees with jobs, Number Two, pay its

1 creditors at least something on the dollar, and Number
2 Three, provide a return to its investors, its
3 shareholders, whereas if a business is liquidated in
4 Chapter 7 of the Bankruptcy Code, the statistics show
5 that none of those eventualities is likely to result.
6 Certainly the employees will be without jobs. Creditors
7 are likely to receive very little, if any, any dividend,
8 and shareholders' interests are obviously expunged.
9 So, I think there is a broad public policy
10 behind the Bankruptcy Code that involves all the
11 interests, and I think that what the Third Circuit did
12 was recognize that public policy, and decide that it was
13 improper to adopt the standards espoused by the union
14 which --
15 QUESTION: So you do defend -- you do defend
16 the theory of the court of appeals?
17 MR. ZACKIN: I very definitely defend that
18 theory, and both based on the new entity theory, which
19 was discussed, and also, even if one rejects that
20 theory, I think as the Eleventh Circuit did in Brada
21 Miller, one still can reach precisely the same
22 conclusions as the Third Circuit.
23 QUESTION: What do you think the Eleventh
24 Circuit standard is for rejection?
25 MR. ZACKIN: I think the Eleventh Circuit

1 standard is very similar if not identical to the
2 standard that the court below voiced. That is, that it
3 is a balancing of the equities, that the test voiced by
4 the union and the National Labor Relations Board is
5 simply in derogation of the rights of creditors and
6 shareholders and even non-union employees.
7 QUESTION: Do you think the same of the Second
8 Circuit standard?
9 MR. ZACKIN: No, I think the Second Circuit
10 standard is different. I think the Second Circuit has
11 basically adopted the standard which the union and the
12 board --
13 QUESTION: Well, under the Second Circuit
14 standard, which would either require a showing at the
15 threshold that you will fail or you are likely to fail
16 -- Is that it?
17 MR. ZACKIN: Yes.
18 QUESTION: Under that standard, how do you
19 understand it? Would -- Suppose it were clear that if
20 you rejected ten other executory contracts, you could
21 then survive and still pay the wage under the collective
22 bargaining contract. Do you think in that -- under the
23 Court of Appeals for the Second Circuit standard that
24 you have to prefer the collective bargaining contract as
25 compared with all other burdens?

1 MR. ZACKIN: That is precisely the way I read
2 the Second Circuit standard, and precisely what I
3 believe that the petitioners here are urging to this
4 Court.
5 QUESTION: Would it be inconsistent with the
6 Second Circuit standard if the court said, well, this
7 company is going to fail unless something is done about
8 its executory contracts? Now, we are going to make
9 everyone share the burden. We are going to reject the
10 labor contract along with the others. Is that
11 inconsistent with the Second Circuit?
12 MR. ZACKIN: I think that if the Second
13 Circuit --
14 QUESTION: Would that be inconsistent with the
15 Eleventh Circuit standard?
16 MR. ZACKIN: I think that would be more
17 consistent with the Eleventh Circuit standard. I think
18 what the Second Circuit standard leads to is the
19 obligation on the part of the debtor and the bankruptcy
20 court to sacrifice everybody else's rights, whether they
21 be creditors, non-union employees, or shareholders, if
22 those rights are sacrificed and the debtor can continue
23 to adhere to the collective bargaining agreement. I
24 think that it elevates collective bargaining rights to
25 that dominant position, and I don't think that -- that's

1 certainly not what the Eleventh Circuit did, certainly
2 not what the Third Circuit did. I think that -- they --
3 it is truly a balancing approach that those circuits
4 took, where one must weigh the competing interests of
5 all the parties involved in a reorganization proceeding
6 and determine whether the benefit stemming from
7 rejection of a labor agreement to the debtor overall and
8 its creditors and shareholders outweighs the harm to
9 employees.

10 QUESTION: Well, your preference isn't an
11 outright affirmance, but your next vote is for the Court
12 of Appeals for the Eleventh Circuit, I take it.

13 MR. ZACKIN: I think that it is interesting
14 what the -- as I read the Eleventh Circuit decision in
15 Brada Miller, they began with a criticism of the
16 so-called new entity theory, but they wound up adopting,
17 as I read it, almost verbatim the test espoused by the
18 -- or formulated by the Third Circuit, which is the
19 balancing approach, as well as the Third Circuit's
20 conclusion that a debtor in possession need not comply
21 with Section 8(D) of the National Labor Relations Act.

22 I think they got to the same place. They just
23 approached it by different -- by a different street.

24 QUESTION: Yes, but if it is a new entity, why
25 is there any need for rejection?

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1 MR. ZACKIN: Well, I think the reason is that
2 that's the scheme that Congress has set up. I think
3 what Congress did was to provide --
4 QUESTION: I know, but there isn't any theory
5 under the labor law, is there? If it is a new entity,
6 there isn't any collective bargaining contract to be
7 lived up to anyway.
8 MR. ZACKIN: Well, there is still --
9 QUESTION: Is there? Is there?
10 MR. ZACKIN: Yes, there is. I think there is.
11 QUESTION: Strictly under labor law?
12 MR. ZACKIN: I think that there -- the
13 pre-bankruptcy contract continues to survive.
14 QUESTION: Something like the successor entity
15 theory or something?
16 MR. ZACKIN: I think that that's a very apt
17 analogy which has been made by several of the circuits.
18 QUESTION: Well, then, it is not a new entity
19 theory, is it? It is just a successor entity theory.
20 MR. ZACKIN: I think that as I read -- as I
21 read --
22 QUESTION: Which wouldn't really be bound then
23 by 8(D), if it is just a successor entity rather than a
24 separate one.
25 MR. ZACKIN: The reason that a new entity is

1 still required to reject or assume a contract even
2 though it is not a party to the contract is because
3 Section 365 requires that debtors in possession take
4 that action. I think what 365 stands for is, and the
5 cases which we cite in our brief, is that the filing of
6 a Chapter 11 petition doesn't terminate a contract. It
7 suspends the enforcement of the contract.
8 QUESTION: Well, you have to have the new
9 entity theory in order to be able to make changes in the
10 collective bargaining contract without getting in
11 trouble with the Labor Board, I take it.
12 MR. ZACKIN: Not necessarily.
13 QUESTION: But that is close, though, isn't
14 it?
15 MR. ZACKIN: It would certainly help.
16 QUESTION: Yes.
17 (General laughter.)
18 MR. ZACKIN: But what the Third Circuit also
19 said, and which we also agree with, is that once a
20 collective bargaining agreement is rejected, the
21 rejection relates back to the date on which the Chapter
22 11 petition was filed, so that in our case, we obtained
23 bankruptcy court permission to reject in December. The
24 case had been filed the previous April. What the Third
25 Circuit said was that the National Labor Relations Board

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1 was then precluded from finding that any changes be made
2 in the terms and conditions of employment from that
3 April to December date, because there was simply no
4 contract. It had been terminated as a matter of law on
5 the date of the filing.

6 We think that's correct. We think that
7 Section 365(G) of the Bankruptcy Code mandates that
8 result. It clearly provides that once a -- any
9 executory contract is rejected, the rejection is deemed
10 a breach as of the date immediately prior to the date of
11 the petition, so that --

12 QUESTION: May I ask, and this is prompted by
13 Mr. Wallace's closing remarks, what standard applies to
14 the compensation of the employees during that interval?
15 What frame of reference should govern?

16 MR. ZACKIN: I think that if the contract is
17 rejected, then the employees are entitled to the
18 reasonable value of their services which they render in
19 that interim period, and I think that that is not a
20 difficult calculation to make. I think the courts can
21 look to what the standards in that industry are in the
22 particular geographical area and determine what were the
23 reasonable value of the services provided by those
24 employees, and if they have not been paid that
25 reasonable value, we concede that they are entitled to

1 file claims as administration creditors and receive a
2 first priority in payment for the difference between the
3 reasonable value and what they were actually paid.
4 QUESTION: Would you agree that the contracts,
5 the collective bargaining agreement is strong evidence
6 of the reasonable value?
7 MR. ZACKIN: I think it may be in certain
8 instances, but it also may not be indicative if in fact
9 the economic situation of the employer has changed, has
10 deteriorated to the point where he can no longer
11 legitimately pay the compensation required in the
12 collective bargaining agreement.
13 QUESTION: Well, would there be any room for
14 any bargaining over what is reasonable value under your
15 approach?
16 MR. ZACKIN: I think that if we got to the
17 point where the labor agreement is rejected, there would
18 be bargaining in the sense of there may be settlement
19 discussions. I would think there would be a claim filed
20 by the employees or by the union on behalf of the
21 employees for the value of those services, and it may
22 very well be, as in all contested matters, there may be
23 settlement negotiations between the debtor and the union
24 to determine what those claims are.
25 QUESTION: What about the hiatus that would

1 occur as here? Suppose the hiatus between the filing of
2 the bankruptcy petition and the determination on the
3 contract was several months. What kind of a paycheck is
4 going to be issued to these men?
5 MR. ZACKIN: I think it is important to note
6 that under the Third Circuit's test, the debtor in
7 possession, although a new entity, is still an employer,
8 subject to the provisions of the National Labor
9 Relations Act. It is required to bargain. It must sit
10 down, if requested by the union, and bargain over new
11 terms and conditions. So it is not a situation where
12 the union is forced to sit back forever and wait until
13 the debtor decides whether it wants to assume or reject
14 the contract. It has the right to compel bargaining.
15 And that bargaining presumably will be based on --
16 QUESTION: But you say the employer meanwhile
17 has the right unilaterally to lower the wages.
18 MR. ZACKIN: I think much like a successor,
19 Justice White. You indicated that there was some
20 difference between the successor doctrine and the new
21 entity doctrine, and certainly there is, but I think
22 where the successorship principles make sense in this
23 context is in the sense that a debtor in possession
24 should be free to set the initial terms and conditions
25 of employment, which is not to say that he does not then

1 have to bargain with the union over new terms and
2 conditions.
3 QUESTION: But ordinarily, outside of
4 bankruptcy, a successor employer can't unilaterally
5 modify the wages.
6 MR. ZACKIN: Well, I think that -- I think
7 that this case, as I read it, as I read what this Court
8 did in the Byrnes case, said that a successor is not
9 necessarily bound by the terms and conditions of its
10 predecessor's contract, and is free to set the terms and
11 conditions of employment initially, which again is not
12 to say that it doesn't have the obligation to bargain in
13 good faith.
14 QUESTION: Mr. Zackin, how many employees does
15 the debtor now have?
16 MR. ZACKIN: Now, Your Honor, there are ten
17 employees.
18 QUESTION: At the time the petition was filed,
19 there were three? Is that right?
20 MR. ZACKIN: At the time --
21 QUESTION: No, there were 18?
22 MR. ZACKIN: There were 18 at the time that
23 the Chapter 11 petition was filed. At the time we
24 requested that the bankruptcy court permit rejection, it
25 was down to three. There are now ten employees,

1 although only one is -- this is what I am advised by
2 Bildisco, Your Honor. Only one is performing a job
3 which would have been performed by a union employee.
4 QUESTION: Is the company still operating?
5 MR. ZACKIN: The company has been
6 reorganized. It is operating now, although its business
7 function has changed somewhat dramatically. It was a --
8 basically a wholesaler. It is now in the manufacturing
9 business. And that was accomplished through the
10 reorganization process of Chapter 11.
11 QUESTION: Mr. Zackin, going back to the
12 standard again that should be employed, does it make any
13 sense in your view for the Court to consider requiring
14 whatever the proof be to be made by clear and convincing
15 evidence? Is an evidentiary standard that is a little
16 tougher an appropriate thing to consider?
17 MR. ZACKIN: I don't believe so, Justice
18 O'Connor. I think that the burden that the Third
19 Circuit placed on a debtor is quite stringent in itself
20 when one analyzes it. It is really a twofold showing
21 that must be made. Number One, the debtor must show as
22 a threshold that the contract is burdensome, and then,
23 the burden is still on the debtor to show that the
24 balancing of the equities tips in favor of rejection,
25 that the harm to employees is outweighed by the benefit

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1 to everyone else involved in the reorganization
2 process.
3 I think that that in itself is quite a
4 stringent standard, especially in the absence of any
5 suggestion in the Bankruptcy Code that collective
6 bargaining agreements are to be treated differently than
7 any other type of executory contract. Under all other
8 types of executory contracts, the so-called business
9 judgment test, of course, is applied, and that is simply
10 a requirement that the debtor show that rejection of the
11 contract would benefit the estate.
12 I suggest that any time a debtor in possession
13 moves to reject a contract, it is going to be able to
14 show that, at least in the majority of the cases, or it
15 wouldn't be seeking to reject. But in place of that
16 benefit to the estate concept, which doesn't give any
17 import whatsoever to the harm to the non-debtor party to
18 the contract, the Third Circuit has said, courts must
19 focus attention in collective bargaining agreements on
20 the harm to the non-debtor party, in this case the union
21 employees, and consider what the potential impact of
22 rejection is going to be on those employees.
23 I think that in itself is quite a leap forward
24 from the business judgment test, and it is quite a bit
25 of a more stringent showing which must be made.

1 If I might in the time remaining address
2 myself to some of the arguments which have been made in
3 opposition to the new entity theory, what we have is a
4 criticism that -- of the theory on the grounds that
5 since management and operations and work force of a
6 debtor in possession are often unchanged, the debtor in
7 possession is more properly deemed as the alter ego of a
8 pre-bankruptcy company rather than as a new entity.
9 I suggest that the Second and Third Circuits,
10 both of which have adopted the new entity analysis,
11 really had it right. A Chapter 11 filing, although
12 management may continue much as before, significantly
13 changes the way in which a debtor must conduct its
14 business.
15 QUESTION: Mr. Zackin, do courts in trying to
16 treat the relationships between another executory
17 contractor whose contract has been rejected or accepted
18 go into elaborate analysis about whether the debtor in
19 possession is a new entity?
20 MR. ZACKIN: No, Justice Rehnquist, they
21 don't, although I think the new entity theory is
22 certainly consistent with the whole concept of rejection
23 of contracts. There is nothing which distinguishes --
24 QUESTION: For analytical purposes, which
25 should the debtor in possession be treated any

1 differently if it is a collective bargaining contract
2 that has been rejected than if it is an executory
3 contract to supply widgets that has been rejected?
4 MR. ZACKIN: I think that because the courts
5 have fashioned the business judgment test to apply to
6 other types of executory contracts, there was really no
7 reason to elaborate a theory as to why that standard was
8 appropriate. It was clearly appropriate because the
9 Congress and the courts deemed that debtors in
10 possession and bankrupt estates should not be bound by
11 burdensome pre-bankruptcy contractual obligations. It
12 was more or less of a given.
13 So that the courts never had to really delve
14 behind how a bankrupt company can disaffirm a contract
15 when under controlling state law, presumably, that is a
16 breach. But in the context of collective bargaining
17 agreements, where the courts have recognized special
18 equities on the side of union employees, I think that it
19 did take a little more elaboration on the part of the
20 courts to explain just how it was getting to the result
21 which it was achieving.
22 But I certainly think you can make the same
23 new entity argument with respect to any executory
24 contract. There is nothing inconsistent about it. It
25 was just, there was no need to do it, I think.

1 QUESTION: Mr. Zackin, on this new entity
2 point, one, the employees, and two, the union, what
3 happens to that entity once you go into bankruptcy,
4 Chapter 11, I mean?
5 MR. ZACKIN: The union remains as the
6 bargaining unit for the employees, assuming that the
7 majority of the debtors' employees are still members of
8 that union. There is no question under the Third
9 Circuit standard that the union remains the collective
10 bargaining agent for its employees, and that the debtor
11 in possession is obligated to bargain with the union in
12 good faith.
13 QUESTION: But there is no contract?
14 MR. ZACKIN: But there is -- the way I would
15 view it, there is a contract in existence which is --
16 the enforcement of which is suspended. In other words,
17 as the Second Circuit said in the --
18 QUESTION: The payment is suspended.
19 MR. ZACKIN: Pardon me?
20 QUESTION: The payment is suspended.
21 MR. ZACKIN: Well, the payment under the terms
22 of the contract is suspended.
23 QUESTION: I am talking about for most
24 employees, payment of wages is rather important.
25 MR. ZACKIN: Of course it is. And that is why

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1 the union can be expected to demand that the debtor in
2 possession bargain and to reach a fair wage rate if in
3 fact the debtor in possession has indicated he is going
4 to reduce the wages.
5 QUESTION: I thought you said he could also
6 bargain for a new contract.
7 MR. ZACKIN: The debtor in possession and the
8 union can bargain for a new contract, yes. That goes
9 along with the theory that the debtor in possession is a
10 new entity, not a party to the contract. It can enter
11 into a new contract.
12 QUESTION: Doesn't that mean that the old
13 contract goes out ahead of time?
14 MR. ZACKIN: I think that it does mean that at
15 least for the period of time the company is in Chapter
16 11, yes.
17 QUESTION: Could I ask you, was -- the
18 petition for reorganization, I gather, was approved?
19 MR. ZACKIN: Yes, it was.
20 QUESTION: And under the new bankruptcy law, I
21 suppose, you still have to make a showing under Chapter
22 11 like you did under Chapter 10, that you cannot -- at
23 least that you cannot pay your debts as they mature?
24 MR. ZACKIN: There really is no -- as I read
25 the Bankruptcy Code, no explicit requirement that you

1 must show that.

2 QUESTION: There was, wasn't there?

3 MR. ZACKIN: There was, you are correct --

4 QUESTION: Under Chapter 10.

5 MR. ZACKIN: -- under Chapter 10.

6 QUESTION: So you don't have to make any

7 showing that you are in financial trouble?

8 MR. ZACKIN: Only, I think, in terms of the

9 good faith requirements which are --

10 QUESTION: About what?

11 MR. ZACKIN: Well, that the motives -- I

12 believe the way the courts have defined good faith is

13 that the motives in filing were legitimate business

14 purposes in seeking to reorganize a failing business.

15 QUESTION: How do you know -- What is the

16 standard for a failing business?

17 MR. ZACKIN: I think that Justice White points

18 out that you are not able to meet your debts as they

19 become due, and --

20 QUESTION: You have to make some kind of a

21 showing like that, don't you?

22 MR. ZACKIN: Yes. I think that that would

23 certainly be a determining factor along with a balance

24 sheet test, what are the value of the assets compared

25 with the liabilities.

1 QUESTION: Well, if there is a -- If you can't
2 pay your debts as they mature, I suppose that means all
3 your debts.
4 MR. ZACKIN: I think it must apply across the
5 board, and I think if you meet that test, if you can't
6 pay your debts as they mature, you are certainly an
7 eligible candidate for Chapter 11.
8 In closing, I would just like to state that
9 what I believe the Third Circuit and the Eleventh
10 Circuit in Brada Miller have done is to truly
11 accommodate the goals behind the bankruptcy laws and the
12 goals behind the labor laws, without forcing one to give
13 way before the other.
14 The test that was formulated by the Third
15 Circuit does not unduly promote the interests of
16 organized labor to the point where it holds a
17 stranglehold position on the fate of a Chapter 11
18 debtor, and at the same time, it does not unduly
19 sacrifice the rights and the interests of organized
20 labor to achieve a successful reorganization.
21 It is an integration. It is truly a balancing
22 test. We think that it is fair to all parties involved
23 in the reorganization process. We think it is
24 workable. And for those reasons, we urge that this
25 Court affirm the decision below.

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1 Thank you very much.

2 CHIEF JUSTICE BURGER: Very well.

3 Do you have anything further, Mr. Wallace?

4 You have three minutes remaining.

5 ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

6 ON BEHALF OF THE NLRB - REBUTTAL

7 MR. WALLACE: Thank you, Mr. Chief Justice.

8 As we point out on Page 16 of our brief, the

9 National Labor Relations Act refers specifically to

10 trustees in bankruptcy as persons covered by the act.

11 The Board here in its findings on Page 34-A of the

12 appendix to the petition found that the respondent was

13 an alter ego of Bildisco, using the term in much the way

14 this Court used it in the Howard Johnson case, in a

15 footnote that began, "It is important to emphasize that

16 in that case it was not an alter ego."

17 And the collective bargaining agreement itself

18 specified that it would apply to successors to

19 Bildisco. Here you have the same ownership under a

20 different arrangement operating the same enterprise, and

21 the contract therefore continued to apply under standard

22 principles of the National Labor Relations Act.

23 Now, if a vendor of lumber or potatoes

24 continues to supply the bankrupt debtor in possession

25 until that contract is rejected, his rights are

1 prescribed by the contract, as we understand the law.
2 The contract not only says what he should be paid. It
3 will specify terms of delivery, when the payment should
4 be made, et cetera. There are rights prescribed by the
5 contract. The bankruptcy court doesn't have some
6 general measure of the market value of what he is
7 entitled to for the services that he continued to --
8 QUESTION: But, Mr. Wallace, doesn't the
9 Bankruptcy Act, Section 365(g)(1), if an executory
10 contract is rejected, expressly provide that then it
11 will relate back to the date of filing of the petition,
12 so technically perhaps --
13 MR. WALLACE: That is the source of --
14 QUESTION: -- the court is not --
15 MR. WALLACE: -- confusion, because all that
16 refers to in our view is a damage claim for rejection of
17 further rights under that contract. The other party to
18 the contract can then claim that he was damaged, and can
19 show what the monetary damages were, and that claim
20 relates back, and he stands on the same basis as
21 pre-petition creditors for those further claims, but
22 while he was performing, up until the time of rejection,
23 his rights are prescribed by the contract, and that is
24 part of the administrative expense of trying to make
25 this business thrive by assuring people that they can

1 continue to deal with this business without worrying

2 that their rights are going to be compromised by the

3 pre-existing indebtedness.

4 And the same thing is true for employees. The

5 contract here under which they were working didn't just

6 prescribe wages. It has many provisions about health

7 contributions, welfare contributions, union dues, sick

8 leave rights, paid holidays, et cetera. All of those

9 rights were prescribed by the contract just as if the

10 employer had said to non-contract emplcyees, if you stay

11 on with me, it will be at $800 a month, and I will pay

12 health insurance benefits.

13 CHIEF JUSTICE BURGER: Your time has expired

14 now, Mr. Wallace.

15 Thank you, gentlemen. The case is submitted.

16 (Whereupon, at 11:47 a.m., the cases in the

17 above-entitled matter were submitted.)

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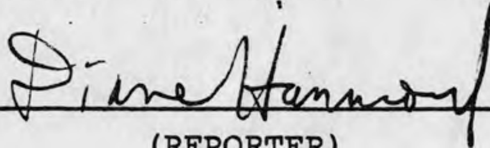
CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:
NATIONAL LABOR RELATIONS BOARD, Petitioner v. BILDISCO AND BILDISCO, DEBTOR-IN POSSESSION, ET AL.; # 82-818 and LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTER, ETC. Petitioner v. NATIONAL LABOR RELATIONS BOARD, ET AL #82-852
and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY 
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