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MEMORANDUM

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THE WHITE HOUSE

WASHINGTON

May 14, 1984

TO: M.B. Oglesby

THRU: Pam Turner

FROM: Bob Kabel

SUBJECT: Bankruptcy/Bildisco

D Lide, Senator Thurmond's Judiciary Committee staff director, advised me today of Thurmond, et. al. plans for dealing with the bankruptcy/Bildisco issue. You will recall that the latest extension expires May 26.

Thurmond, with the concurrence of Dole, Hatch, Biden and Heflin, intends to call up H.R. 5174, the House-passed bankruptcy bill which is on the Senate calendar. The Senate will retain the House language on the court structure; add back the 85 Omnibus judgeships; and substitue a proposal developed by the National Bankruptcy Conference (NBC). The NBC is an organization composed of bankruptcy practitioners and bankruptcy judges.

Their proposal maintains the 9-0 portion of the Bildisco decision but modifies the 5-4 provision. Generally, this approach would require that certain standards and thresholds be met prior to abrogation of labor contracts in a bankruptcy proceeding.

Attached is correspondence from the NBC and the draft bill which will be offered to H.R. 5174.

Senator Thurmond has advised the Majority Leader that he is ready to proceed on the floor with this matter at any time and that he does not anticipate its taking more than a day. Action on it could occur later this week or early next week, depending upon the Senate schedule.

Thurmond's staff advises me that the business community has not endorsed the proposal but basically supports it. The unions, on the other hand, oppose it and will seek sponsors for floor amendments.

NATIONAL BANKRUPTCY CONFERENCE

(A voluntary organization composed of persons interested in the improvement of the Bankruptcy Code and its administration.)

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WG & M

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APR - 4 1984

New York University
School of Law
40 Washington Square South
New York, NY 10012

March 15, 1984

Honorable Peter W. Rodino
Chairman, House Judiciary Committee
Rayburn House Office Building
Washington, D.C. 20515

Re: Treatment of Collective Bargaining
<u>Agreements in the Bankruptcy Code</u>

Dear Chairman Rodino:

The National Bankruptcy Conference, at its meeting on February 29, 1984, considered H. R. _______ introduced by you to amend the Bankruptcy Code with respect to its treatment of collective bargaining agreements. The Conference believes the bill, if enacted, could have an extremely adverse effect on the efforts of companies to reorganize under chapter 11 of the Code and would make it impossible for some companies to reorganize. The main provision of the bill that would have this effect is contained in subsection (f) rendering all claims arising as a result of a rejection of a collective bargaining agreement entitled to administrative expense priority. Such claims can be extremely large in amount and being thus entitled to a first priority would have to be paid in full, a normally impossible task to perform. Such claims should instead be treated as claims arising from rejection of all other executory contracts, i.e., they should fall within § 365(g) of the Code and considered as prepetition claims.

Attached hereto is a draft bill prepared by The National Bankruptcy Conference. It contains the following provisions:

1. The standard for rejecting collective bargaining agreements is set forth to codify the rule of the Bildisco case (National Labor Relations Board v. Bildisco, ____ U.S. _______ (1983)). It would permit rejection if the court finds that, on a balancing of the equities, the need for rejection outweighs the burdens of assumption. The Conference fears that a stricter standard would be difficult, if not impossible to apply in a chapter 11 case, particularly in the early stages.

2. Paragraph (1) of the new subsection provides that a collective bargaining agreement may not be rejected after a petition under the Code is filed until there has been a final hearing by the court and the trustee has demonstrated the necessity for rejection. Paragraph (2) provides that during the first 30 days after the trustee has sought rejection, the agreement is continued in effect pending the final hearing. After such 30 day period the agreement is deemed not to be in effect provided that such 30 day period may be extended by the court upon request by the union unless there is a reasonable likelihood that the trustee will prevail at the final hearing on the request for rejection. Extension of the 30 day period may be obtained by the union at a preliminary hearing which will permit both parties an opportunity quickly to set before the court the immediate needs or lack of emergency existing under the circumstances of the case. Paragraph (3) provides that during such 30 day period or any extension thereof, the trustee may not implement any changes in the terms, conditions, wages, benefits or work rules under the agreement except in an emergency situation when necessary to operate or preserve the business, and then only after notice to the union and authorization by the court after a hearing. The concept and language are taken essentially from §§ 362(d) and (e) which concern requests for relief from the automatic stay.

3. The attached would amend § 365 rather than chapter 11. Thus, it would be applicable in chapters 9 and 13 cases as well. A caveat is offered, however, that if the standard

NATIONAL BANKRUPTCY CONFERENCE

(A voluntary organization composed of persons interested in the improvement of the Bankruptcy Code and its administration.)

for rejection is changed to a stricter one, the amendment should not apply in chapter 9 cases; it just would not be feasible in those cases.

4. The attached is made applicable to cases commenced after its enactment date. The Conference believes it should not apply in pending cases.

5. The Committee Report should mention that the omission of any contrary provision in the amendment means that § 365(g) applies if a court approves rejection.

The Conference urges that the attached be introduced and seriously considered by the Judiciary Committee in place of your bill. For the reorganization process to function properly, it is essential that a delicate balance between and among the key participants be maintained. The attached proposal seeks to accomplish that result.

Sincerely,

Lawrence P. King

Lawrence P. King

A Bill

to amend title 11 of the United States Code to clarify the circumstances under which collective bargaining agreements may be rejected in cases under such title.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That:

Sec. 1. Section 365 of title 11, United States Code, is amended by inserting after subsection (k) the following new subsection:

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

"(1) The trustee, after notice and a hearing, may assume or reject a collective bargaining agreement which has been made by the debtor under the authority of title II of the Railway Labor Act, the National Labor Relations Act, or other applicable law. A collective bargaining agreement shall be rejected under this section upon the request of the trustee

if the court finds that reasonable efforts to negotiate a change in the contractual terms have been made by the debtor or by the trustee and are not likely to produce a prompt and feasible alternative to rejection, that the inability to reach an agreement threatens to impede the success of the debtor's reorganization under chapter 11 of this title or adjustment of debts under chapter 9 or 13 of this title, that the agreement is burdensome to the estate, and that in considering the needs of the debtor, the employees covered by the agreement, and other parties in interest, the equities balance in favor of the rejection of the agreement, and rejection is not sought to eliminate the CB entity.

"(2) Thirty days after a request by the trustee under paragraph (1) of this subsection, the collective bargaining agreement shall be deemed not to be in effect pending a final hearing and determination

under paragraph (1) of this subsection unless the court, after notice and a hearing, orders the agreement continued in effect pending such final hearing and determination. A hearing under this paragraph may be a preliminary hearing, or may be consolidated with the final hearing under paragraph (1) of this subsection. If the hearing under this paragraph is a preliminary hearing -

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

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

"(3) If during a period when the collective bargaining agreement continues

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

Sec. 2. The amendments made by this Act shall apply in cases commenced under title 11 of the United States Code on and after the enactment of this Act.

NATIONAL BANKRUPTCY CONFERENCE

(A voluntary organization composed of persons interested in the improvement of the Bankruptcy Code and its administration.)

May 7, 1984

FEDERAL EXPRESS

The Honorable Strom Thurmond
SR-218 Russell Senate Office Building
Washington, D.C. 20510

Re: Treatment of Collective Bargaining Agreements under the Bankruptcy Code

Dear Senator Thurmond:

On April 11, 1984, I sent you a summary of my testimony in connection with the joint hearings of the Senate Judiciary and Labor Committees concerning the above-referenced subject. Enclosed with my letter was a copy of a draft bill prepared by The National Bankruptcy Conference. The following is an explanation of the provisions of the Conference's proposal:

1. The NBC bill would amend section 365 by adding a new subsection (k). This subsection would be applicable to chapter 9, 11 and 13 cases.[1]

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1. Section 901(a) makes section 365 applicable to chapter 9 municipal reorganizations. Section 903 of Title 11 provides that chapter 9 "does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality. . . ."

   Section 904 provides that: "Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decreee, in the case or otherwise, interfere with -

   (1) any of the political or governmental powers of the debtor;

   (2) any of the property or revenues of the debtor; or

   (3) the debtor's use or enjoyment of any income-producing property."

2. The proposed section 365(k)(1) adopts the standard for rejecting collective bargaining agreements which was adopted by the Supreme Court in National Labor Relations Board v. Bildisco & Bildisco, ___ U.S. ___, 104 S. Ct. 1188 (1984). In essence, it would permit rejection if the court finds that the contract is burdensome and, after a balancing of the equities, the need for rejection outweighs the burdens of assumption. For reasons set forth in greater detail in paragraph 6 of this letter, the Conference believes that the stricter standard adopted by the Second Circuit in Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc., 523 F.2d 164 (2d Cir.), cert. denied, 423 U.S. 1017 (1975), is difficult, if not impossible to apply in reorganization cases, particularly in the early stages when the issue is apt to be raised. The Conference also believes that the standard can produce inequitable results in the context of debtors with multiple operations or multiple collective bargaining units where a majority of employees or their unions are willing to make concessions. Proposed section 365(k)(1) includes minimum conditions precedent to rejection, namely, the court must find that the debtor or trustee has made reasonable efforts to negotiate contractual modifications, that such efforts have failed or are likely to fail, and that the failure to modify the contracts threatens to impede the success of the debtor's reorganization.

3. The Conference's proposal would reverse that part of the Bildisco decision which permits the debtor to take unilateral action contrary to the collective bargaining agreement subsequent to entry of an order for relief and prior to court approval of the application for rejection. The Conference felt, however, that a debtor should be required to comply with the terms of its collective bargaining agreements after entry of the order for relief only if there was an effective mechanism for (i) emergency relief where performance would jeopardize rehabilitation efforts and (ii) prompt adjudication of the issues presented by an application to reject. In addition, the Conference felt that relief from the contract should be automatically granted if the court does not hear and/or determine the rejection application promptly.

Pargaraph (2) provides that during the first 30 days after the trustee has sought rejection, the agreement is continued in effect pending the final hearing. After such 30-day period, the agreement is deemed not to be in effect provided that such 30-day period may be extended by the court upon request by the union unless there is a reasonable likelihood that the trustee will prevail at the final hearing on the request for rejection. Extension of

the 30-day period may be obtained by the union at a preliminary hearing which will permit both parties an opportunity quickly to set before the court the immediate needs or lack of emergency existing under the circumstances of the case. Paragraph (3) provides that during such 30-day period or an extension thereof, the trustee may not implement any changes in the terms, conditions, wages, benefits or work rules under the agreement except in an emergency situation when changes are necessary to operate or preserve the business, and then only after notice to the union and authorization by the court after a hearing. The concept and language are taken essentially from §§ 362(d) and (e) which concern requests for relief from the automatic stay.

4. Section (2) of the proposed bill provides that the amendment of section 365 is applicable to cases commenced after the enactment of the amendment. The Conference believes it should not apply in pending cases.

5. The Committee Report or floor statement accompanying the amendment should mention that the omission of any contrary provision in the amendment means that section 365(g) applies if the court approves rejection. Therefore, if the contract has been assumed under section 365 or under a plan confirmed in a chapter 9, 11 or 13 case, rejection of the contract constitutes a breach of such contract immediately before the filing date and thus, damages arising by reason of such rejection are prepetition claims.

6. As you are aware, on July 24, 1975, the Second Circuit decided Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975). The court held that a collective bargaining agreement is an executory contract and could be rejected in a case under Chapter XI of the Bankruptcy Act. The court also also held that the determination of whether a collective bargaining agreement could be rejected should not be determined solely on the basis of whether rejection will improve the financial status of the debtor. The court cited with approval, In re Overseas National Airways, Inc., 238 F. Supp 359, 361-362 (E.D.N.Y. 1965), that the bankruptcy court should permit rejection of a collective bargaining agreement

> "only after thorough scrutiny, and a careful balancing of the equities on both sides, for, in relieving a debtor from its obligations under a collective bargaining agreement, it may be depriving the employees affected of their senior-

> ity, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim for money damages. That would leave the employees without compensation for their losses, at the same time enabling the debtor, at the expense of the employees, to consummate what may be a more favorable plan of arrangement with its other creditors." 519 F.2d 707.

One month later, a different Second Circuit panel decided Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc., supra. The Second Circuit held that executory collective bargaining agreements subject to the provisions of the Railway Labor Act ("RLA") could be rejected in a Chapter XI case where, "after careful weighing of all of the factors and equities involved, including the interests sought to be protected by the RLA, a district court concludes that an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a failing carrier in bankruptcy from collapse. . . ." 523 F.2d 169. The court followed the analysis of Kevin Steel Products that the debtor was a new juridical entity and thus was not a party to and was not bound by the terms of the collective bargaining agreement entered into prior to the filing date.[2] The court further

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2. In REA Express, the Second Circuit suggests that a contract may be assumed either expressly or by conforming to its terms without disaffirmance, citing Burke v. Morphy, 109 F.2d 572 (2d Cir.), cert. denied, 310 U.S. 635 (1940). Section 365(a) requires court approval for the assumption of an executory contract. This provision insures that creditors will have an opportunity to be heard in the event that the debtor chooses to assume the contract. This is particularly important since once a contract has been assumed, damages arising by reason of the subsequent breach of the contract or rejection of the contract in a subsequent liquidation case, are entitled to priority under section 507(a)(1) as administrative expenses. Under no set of circumstances, should the debtor or trustee be bound by an executory collective bargaining agreement by reason of complying with the terms of such agreement prior to filing an application to reject. Any statutory change should be accompanied by legislative history which makes it clear that a contract may be assumed only by court order and that complying with the contract pending rejection does not change the priority of claims arising by reason of breach of the contract.

noted that, although a debtor-in-possession, REA was not bound to assume the collective bargaining agreement of its predecessor. As a new employer, however, it was obligated to bargain collectively with the representatives of its employees. 523 F.2d 170. Following NLRB v. Burns Int'l. Security Services, Inc., 406 U.S. 272 (1972), the court noted that although the debtor-in-possession, as a successor employer, had a duty to bargain collectively, "it had no obligation to refrain from changing the terms of employment before such bargaining occurred." The holding of the Supreme Court in NLRB v. Burns Int'l. Security Services, Inc. as articulated by the Second Circuit in REA Express is interesting:

> "As a new employer, Burns was held to have a right unilaterally to set the initial terms on which it would hire employees. Moreover, the Court stated, to bind a successor-employer to the terms of its predecessor's collective bargaining contract could, where the terms of the agreement were onerous, discourage or inhibit a potential successor from taking over a failing business. Thus a new employer, it was emphasized, must be granted certain prerogatives at the outset in making changes in the method of operation, business structure and labor arrangements of a venture. Otherwise, the free flow of capital and efforts to revive or expand a weak enterprise might be frustrated.
>
> These principles are particularly applicable to the efforts of a trustee or debtor-in-possession to save a carrier from complete collapse or liquidation. Unless the debtor-in-possession is permitted to act promptly, albeit unilaterally, in avoiding onerous employment terms that will prevent it from continuing as a going concern, the enterprise, and with it the employment of its workers, may fail." 523 F.2d 170-171.

In most reorganization cases, applications for rejection of collective bargaining agreements will not be filed because contracts are either not burdensome or, in cases where the contracts are burdensome, the debtor and the employees' representatives negotiate modifications of such contracts in the ordinary course of the collective bargaining process. In its testimony during the hearings, a representative of the AFL-CIO stated that in 19 of 22 cases where the REA Express rejection standard was applied, the court approved rejection. In other words, in

these cases the facts demonstrated that rejection of the collective bargaining agreements was necessary if the debtor was to survive. Thus, the controversy concerning the appropriate standard for rejection of a collective bargaining agreement is actually only relevant to cases where the evidence demonstrates that the collective bargaining agreement is burdensome, and where the equities favor rejection of the contract notwithstanding the fact that failure to permit rejection would not cause the collapse of the debtor as an ongoing economic entity.

Although the "balance of the equities" standard may not be necessary for relief in the majority of cases, the Bildisco standard is far preferable to the REA Express standard for several reasons. First, the REA Express standard cannot be accurately applied at the early stages of a reorganization case when the court and other parties in interest cannot fairly be expected to pass judgment on the depth of the debtor's financial problems and the debtor's probability of successfully reorganizing. Second, the standard is generally irrelevant in chapter 9 where the continuation of the municipality is presumed. Third, the standard is very difficult to apply under the new chapter 11 where the debtor (i) may be rehabilitated and continue as a viable economic unit or (ii) may be liquidated in whole or part. Fourth, the REA Express standard discourages good faith negotiations by unions in certain circumstances and may produce substantial inequities in cases where there are multiple operations or multiple bargaining units and where one collective bargaining unit refuses to modify a contract notwithstanding substantial concessions by other union or non-union employees.

The following is an analysis of some of these factual situations:

(a) Chapter 11 of the Bankruptcy Code is a more flexible reorganization structure than either Chapter X or XI of the prior Bankruptcy Act. One aspect of this flexibility is section 1123(a)(5), which permits a plan of reorganization to provide for the liquidation of the debtor's assets. Thus, an effective reorganization is possible under chapter 11 even though the debtor will not continue as an ongoing economic entity.[3] In a liquidating

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3. See In re White Motor Corportion, No. B-80-3361 (N.D. Ohio).

chapter 11 case, all executory contracts should be terminated except for those which will enhance the value of the debtor's assets in the liquidation.[4] Various formulations of the REA Express standard, which have been suggested for inclusion in the proposed Senate bankruptcy legislation, do not adequately deal with the need to preserve the flexibility which is so important in chapter 11. In those cases where the debtor has one operation covered by one collective bargaining agreement, the problem of applying the standard for rejection should be less troublesome than in the case of a debtor with multiple plants or divisions covered by different collective bargaining agreements involving different collective bargaining units. The "balancing of the equities" test better serves this latter category of cases.

(b) You should also be aware of the fact that the concern of the Second Circuit in the Kevin Steel case that rejection would deprive employees of rights which are incapable of forming the basis of a provable claim for money damages, is not applicable under chapter 11. The old Bankruptcy Act limited the allowance of unliquidated or contingent claims.[5] The Bankruptcy Code does not limit the allowance of contingent or unliquidated claims, but rather specifically provides for the estimation of such claims if fixing or liquidation would unduly delay the closing of the case.[6] Therefore, the Bankuptcy Code addresses the concern that the Second Circuit had about rejection of collective bargaining agreements. As the

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4. For example, executory leases may be an asset of the debtor's estate and thus, may be confirmed under section 365(a) and assigned to a third party under section 365(f). If an asset is being liquidated, the debtor should be able to affirm those contracts which increase the value of the asset and reject those which diminish its value. If the continuation of a collective bargaining agreement relating to such an asset would diminish the value of the asset, the contract should be subject to rejection even though the debtor may continue as a going concern under a reorganization plan or may liquidate under a plan of liquidation.

5. See, Bankruptcy Act § 57d [repealed].

6. 11 U.S.C. § 502(c).

Supreme Court noted in Bildisco, the "balancing of the equities" test preserves the flexibility of chapter 11 in circumstances where the court should be relied upon to prevent abuse of the reorganization provisions of the Bankruptcy Code by debtors whose sole purpose in seeking relief is to avoid collective bargaining agreements.[7]

(c) A debtor may have several discrete plants or divisions or may have different collective bargaining units within a given plant or division. In those cases where employees in certain collective bargaining units are willing to grant concessions which enhance the debtor's ability to reorganize, the "balance of the equities" test permits a court to authorize rejection of a collective bargaining agreement involving a collective bargaining unit which refuses to grant concessions of the type agreed to by other collective bargaining units. Thus, the "balancing of the equities" test encourages negotiation and compromise which is the hallmark of chapter 11 and prevents the injustice of a small group of employees in one collective bargaining unit benefitting from the sacrifices of employees in other collective bargaining units. A current non-bankruptcy illustration of this situation is provided in the form of a recent Wall Street Journal article which is attached.

Very truly yours,

H. P. Minkel, Jr.

HPM:ka
enc.

cc: Ms. Sally Rogers
Charles A. Horsky, Esq.
Professor Lawrence P. King

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7. The filing of a chapter 11 petition for the sole purpose of rejection an collective bargaining agreement is a "bad faith" filing and the case may be dismissed pursuant to 11 U.S.C. § 1112. See In re Tinti Construction Co., 10 B.C.D. 767 (E.D. Wis. 1983).

THE WALL STREET JOURNAL
Wednesday, April 25, 1984

Air Florida Employees In Teamsters Union Reject Pay-Cut Plan

By a WALL STREET JOURNAL *Staff Reporter*

MIAMI—Air Florida said its mechanics, cleaners and stock clerks, represented by the Teamsters union, rejected the financially troubled airline's proposal to cut their pay 10% in return for company stock.

"In view of the fact that all of our other employee groups have accepted wage concessions, we are particularly disappointed" by the vote, Donald Lloyd-Jones, Air Florida's chairman, said Monday. "However, we intend to meet with this group (the Teamsters) again, and we will be requesting that they reconsider their position," he said.

An Air Florida spokeswoman said the Teamsters have collaborated with other troubled airlines and thus, Air Florida is hoping that the unions ultimately will accept the pay cut. The Teamsters union, which represents 200 of Air Florida's 1,800 employees, couldn't be reached for comment.

The Air Florida spokeswoman said the union's refusal would be an "important" blow, but she declined to specifically comment on how the Teamsters' vote might affect the airline, which reported a loss of $39.2 million in 1983 and a loss of $93.4 million in 1982. In March, Mr. Lloyd-Jones said the company would seek the wage cuts as well as employee furloughs as part of a plan "to return to financial health."

Earlier this month, Air Florida's six other employee groups, which represent the majority of its work force, voted to accept the wage cuts. Acceptance by all employee groups would save the carrier $5.4 million annually.

Under Air Florida's stock ownership plan, all employees who have voted to take the 10% pay cut will be compensated in Air Florida stock equal to the dollar value of the pay they have given up. The stock, based on market value at the time, will be distributed quarterly beginning with the quarter ending June 30.

As reported, General Electric Co.'s General Electric Credit Corp. unit said it is considering acquiring as much as 55% of Air Florida's common stock. Air Florida has said the wage-cut plan isn't related to its negotiations with GE, which couldn't be reached for comment.

U.S. Department of Justice

Pam - FYI

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

14 MAY 1984

MEMORANDUM TO: M. B. Oglesby, Jr.
Assistant to the President
for Legislative Affairs
The White House

FROM: Robert A. McConnell
Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs

RE: Provisions and Background of
Child Pornography Legislation

History & Substance

Before the Executive is Enrolled Bill H.R. 3635, the "Child Protection Act of 1984," child pornography legislation. Today I have sent to OMB this Department's favorable report and a proposed signing statement (copies attached). I urge that there be a public signing of the legislation but not necessarily a "traditional" signing ceremony. My thoughts are set out below.

The compromise child pornography bill, H.R. 3635 (Sawyer), like the comparable provision of the President's Comprehensive Crime Control Act, as approved by the Senate (Title XI, Part A of S. 1762), would make the following improvements in existing federal statutes:

1. Eliminate the requirement that production or distribution of child pornography materials be done for "commercial purposes";

2. Eliminate the current requirement that such materials be found to be "obscene";

3. Increase fine levels for such offenses:

4. Permit civil or criminal forfeiture of such materials or profits derived therefrom;

5. Cover children 17 years of age or younger rather than the current 15 years of age or younger; and

6. Add child pornography to the list of offenses for which a wiretap order may be entered.

In addition to these purposes of our child pornography bill, the Congressional bill goes on to clarify that knowing reproduction of child pornography materials is unlawful and to expand the definition of sexually explicit conduct to include sadistic and masochistic abuse. We have no problem with these two additions.

Child pornography amendments were first proposed in the 97th Congress. The President's Comprehensive Crime Control Act submitted to the Congress on March 16, 1983 (introduced as S. 829 and H.R. 2151) included a child pornography provision substantially similar to H.R. 3635. At the same time this issue was being considered in connection with the crime package, Senator Thurmond introduced S. 1469 which was approved by the Senate on July 22, 1983. In the House, H.R. 3635 was introduced by Hal Sawyer and approved by the House on November 14, 1983. H.R. 3635 as approved by the Congress represents a compromise between the House and Senate bills.

Key Senate and House members involved in processing this legislation were Senators Thurmond, Grassley, Specter, Biden and Kennedy as well as Representatives Rodino, Fish, Hughes, Sawyer, Sensenbrenner and Shaw. Three non-Judiciary Committee members in the House introduced child pornography bills during the early stages of consideration of this issue: Pashayan, Hutto and Marriott. In discussing this issue, the President has mentioned one private citizen, Father Bruce Ritter of Convent House.

Signing Ceremony

There are three related events which are occurring this week and which could be tied together so as to maximize the impact of all three: (1) pursuant to planning between the White House and this Department, there is to be an announcement by the Attorney General of the creation of a working group or task force to evaluate the effect of pornography on our society; (2) an Obscenity Enforcement Seminar sponsored by this Department of Justice on May 16 and 17 for Federal, state and local law enforcement charged with the responsibility for enforcing the obscenity laws; and (3) the signing of H.R. 3635 by the President.

I would urge that consideration be given to a signing ceremony at the opening of the Obscenity Enforcement Seminar. If the President's schedule does not permit that possibility, I would recommend that the bill be signed prior to the Seminar in a ceremony at the White House involving the Seminar principals and that the signing statement be read at the opening of the Seminar. The announcement of the creation of the Attorney General's task force to evaluate the impact of pornography on our society and its potential for recommending additional measures which are needed would be a natural complement to the other events.

An additional advantage of either signing ceremony would be that it could be substituted for the normal signing ceremony in which it is traditional to invite some or all of the principals behind the legislation. In this case, such an invitation list would include some who have opposed our efforts to pass the Administration's Comprehensensive Crime Control Act and related bills. A sequence of events similar to that set out above would provide a way for the President to gain the appropriate publicity and yet allow us to minimize the laurels available because of the President's action to several recalcitrant members of the Legislative Branch.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

14 MAY 1984

Honorable David A. Stockman
Director
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Stockman:

In compliance with your request, I have examined a facsimile of the enrolled bill, H.R. 3635, the "Child Protection Act of 1984". For the reasons set out below, the Department of Justice recommends Executive approval of this bill.

This bill amends the criminal laws of the United States to strengthen existing federal statutes punishing child pornography. The provisions of H.R. 3635 are very similar to those contained in the Administration's Comprehensive Crime Control Act as approved by the Senate on February 2, 1984 (Title XI, Part A of S. 1762).

The bill would make the following significant changes in present law: (1) eliminate the requirement in existing law that production or distribution of sexually explicit materials involving the use of a minor is prohibited only if done for "commercial purposes"; (2) eliminate the current requirement that distribution of materials depicting children in sexually explicit conduct is prohibited only if the material is "obscene"; (3) provide greatly increased fine levels for violations; (4) authorize criminal or civil forfeiture of materials made or distributed in violation of the statutes and any profits or proceeds derived therefrom; (5) broaden the existing statutes to cover children seventeen years of age or younger (instead of fifteen years or younger as at present); (6) authorize the use of court-approved wiretapping to facilitate investigations of child pornography offenses; (7) clarify that the knowing reproduction of materials depicting children in sexually explicit poses is unlawful; and (8) expand the definition of "sexually explicit conduct" to include a broader category of sadistic or masochistic abuse.

In summary, the President's Comprehensive Crime Control Act contains almost identical provisions except for the last two, both of which are entirely acceptable to the Department of Justice. Thus H.R. 3635 makes a number of needed improvements in federal statutes that define and punish the crime of child pornography. Accordingly, the Department of Justice recommends Executive approval of this bill.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General

DRAFT PRESIDENTIAL SIGNING STATEMENT FOR H.R. 3635

It is with pleasure that I approve H.R. 3635, the "Child Protection Act of 1984, which markedly strengthens our ability to protect our most precious national resource, our children.

Like those here today, I have been deeply concerned about the growing abuse of children by pornographers. This bill will greatly strengthen the ability of federal law enforcement officials to prosecute child pornographers and to put them behind bars where they belong. In addition to increasing criminal penalties for child pornography offenses, this bill facilitates prosecutions by removing two current elements of the offense which the Supreme Court has held to be unnecessary -- that the crime was committed for a "commercial" purpose and that the materials produced were "obscene." The bill also authorizes courts to enter electronic surveillance orders on the same basis as they can now do in many other areas so the FBI can more effectively investigate child pornographers. There are serveral other important provisions of this bill which I will not go into here. Taken together, these various reforms of existing federal child pornography laws give us important new tools with which to attach the problem of child pornography.

Despite my gratitude for the passage of this legislation, I would be remiss if I did not point out that this is but one of the important criminal justice reforms which I submitted to the Congress on March 16, 1983 as the Comprehensive Crime Control Act of 1983. The Senate approved that anti-crime legislation as a forty-nine part package by the overwhelming vote of 91-1. Ask the leaders

of the House of Representatives where is the rest of the important, Senate-passed anti-crime package? I would hope that in the few remaining weeks of this Congress the Members of the House will be given an opportunity to vote on vital changes in the laws affecting sentencing, bail, forfeiture, insanity defense and the other provisions of our crime bill.

THE WHITE HOUSE
WASHINGTON

Packwood
Abnor
Stevens
Kassebaum
Specter
Stafford
D'Amato
Pressler
Andrews.

4 more

[illegible]

STROM THURMOND, S.C., CHAIRMAN
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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

May 21, 1984

Dear Colleague:

This week the Senate will turn to consideration of H.R. 5174, the House-passed bankruptcy bill. At that time, I will offer a complete substitute for the House provisions. This substitute amendment will contain, among other provisions, a section pertaining to the rejection of collective bargaining agreements in Chapter 11 bankruptcy proceedings. It is my understanding that Senator Packwood will offer an amendment to strike this section of the substitute amendment and to insert language strongly supported by organized labor.

I urge you to vote against the Packwood amendment. This amendment, if enacted, would make it extremely difficult, if not impossible, for companies with a unionized workforce to effectively reorganize under Chapter 11. It would import into the bankruptcy context a form of collective bargaining, a step which the Supreme Court refused to take in NLRB v. Bildisco & Bildisco.

The Packwood amendment would require the debtor, prior to filing an application for rejection, to make a proposal to the union providing for such "minimal modifications" in the contract that would permit the reorganization, taking into account the best estimate of sacrifices to be made by all classes of creditors and other affected parties. This is an unworkable requirement in the context of corporate reorganizations. Aside from being an invitation to extensive litigation, it requires the debtor to, in essence, propose a reorganization plan, a process which might normally take several months, prior to obtaining any concessions in his labor costs. Such concessions might, however, be necessary for the debtor to obtain additional financing.

The Packwood amendment further requires that, after making such a proposal and prior to a hearing on the rejection application, the debtor must "meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement." This requirement is directly drawn from Section 8(d) of the National Labor Relations Act, the section which the Supreme Court specifically refused in Bildisco to apply to bankrupt companies because its procedures were too cumbersome and rigid.

The Packwood amendment purports to retain a form of the "balancing of the equities" standard unanimously approved by the Supreme Court in Bildisco. It actually significantly alters that standard by the addition of two threshold requirements which the debtor must meet. First, the court must find that the debtor has made a proposal providing such minimal modifications in the collective bargaining as would permit the reorganization. This requirement, as I indicated above, is extremely difficult to comply with at such an early stage in the bankruptcy process. Second, the court must find that the union refused to accept the proposal and that such refusal was unjustified. The meaning of this second requirement is entirely unclear, provides no guidance to the courts, and will result in substantial litigation. It should be kept in mind that these requirements will be difficult enough to apply where one labor contract is involved. The difficulty of applying these provisions where several labor contracts, are involved, as is often the case, will be significantly increased.

The Packwood amendment also sets out unrealistic time limits for the court to decide on rejection of collective bargaining agreements. Added together, these time limits could delay court action on rejection for at least 73 days and probably longer than that. This may simply be too long to force a company in serious financial difficulty to wait. Such a company may have been forced to liquidate by that point.

Finally, the provisions of the Packwood amendment would apply retroactively. Such retroactive application may have a severe effect of pending Chapter 11 cases. At best, it could cause expensive relitigation of issues. At worst, it may force companies trying to reorganize into liquidation.

As I indicated earlier, the substitute which I will offer also contains provisions regarding the collective bargaining agreement issue. These provisions, found in subtitle J of title III, represent a fair and reasonable compromise of this very controversial issue. They were drafted by the National Bankruptcy Conference (NBC), an organization composed of bankruptcy judges, law professors, and practicing attorneys who specialize in bankruptcy law. Thus, unlike the Packwood amendment, the provisions of the substitute amendment are neither the creature of management nor of labor. They represent instead the best efforts of an independent group of bankruptcy experts to draft a compromise on this difficult issue.

Very briefly, the provisions of the substitute amendment would preserve the 9-0 portion of the Bildisco decision regarding the standard which must be met for rejection of a collective bargaining agreement. That standard, of course, is that the debtor must show that the collective agreement

burdens the debtor's estate and that the equities balance in favor of rejection of the contract. While the NBC draft contains additional minimum conditions precedent to rejection -- such as that reasonable efforts to negotiate a change in contractual terms have been made by the debtor or trustee and such efforts are not likely to produce a prompt and feasible alternative -- this language is drawn from the unanimous portion of the Bildisco decision and thus does not alter the Court's conclusions regarding the standard for rejection.

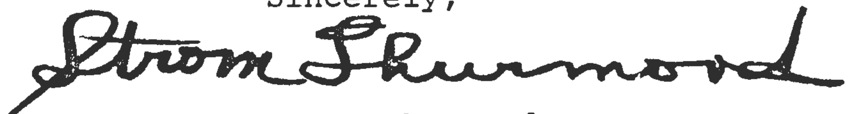
The NBC compromise does alter the more controversial 5 to 4 portion of the Supreme Court's decision. It would prevent the debtor from unilaterally abrogating the collective bargaining agreement for 30 days after filing a motion to reject. That 30-day period may be extended at the request of the union unless the court determines, after notice and a hearing, that there is a reasonable likelihood that the trustee will prevail at the final hearing on the rejection issue. The NBC provisions also address the possible need for emergency relief by providing that the court, after notice and a hearing, may authorize the trustee to make changes in the agreement if essential to the continuation of the debtor's business or necessary to avoid irreparable damage to the estate. Finally, the NBC compromise provides that its changes should apply only in cases commenced on or after the date of enactment of this Act. These provisions would not, therefore, apply to pending cases.

I believe that the provisions which I have just discussed represent a reasonable compromise in an extremely difficult and controversial matter. The NBC provisions preserve the 9 to 0 portion of the Bildisco decision while making reasonable and necessary changes to the 5 to 4 portion to address legitimate concerns regarding the disruptive effect of immediate unilateral rejection. The Packwood amendment, based on labor law concepts, is unworkable in a bankruptcy context and therefore unfair to companies in serious financial straits. I again urge you to oppose the Packwood amendment and to support the compromise provisions contained in the substitute amendment which I plan to offer.

If you have any further questions regarding this or any other aspect of the substitute amendment, please do not hesitate to call me or have a member of your staff contact Sally Rogers of my staff at 4-8059.

With kindest personal regards and best wishes,

Sincerely,



Strom Thurmond
Chairman

ST:jqx

NATIONAL BANKRUPTCY CONFERENCE

(A voluntary organization composed of persons interested in the improvement of the Bankruptcy Code and its administration.)

May 18, 1984

FEDERAL EXPRESS

The Honorable Strom Thurmond
SR-218 Russell Senate Office Building
Washington, D.C. 20510

Re: Bankruptcy Court and Federal Judgeship Act of 1984 - Article III, Subtitle J - Collective Bargaining Agreements

Dear Senator Thurmond:

We received today a copy of an amendment intended to be proposed by Senator Packwood as a substitute for the above-referenced Subtitle (the "Packwood Amendment") of the Amendment in the Nature of a Substitute for H.R. 5174 intended to be proposed by you (for yourself and Senator Heflin). The following is an evaluation of the Packwood Amendment, as compared to Subtitle J of your bill.

The Packwood Amendment contains a new section 1113 relating to rejection of collective bargaining agreements in chapter 11 cases. This section would require the following findings as conditions precedent to rejection of a collective bargaining agreement: (i) the trustee or the debtor-in-possession has made a proposal to the representative of the employees "providing for the minimal modifications in such employees' benefits and protections that would permit the reorganization, taking into account the best estimate of the sacrifices expected to be made by all classes of creditors and other affected parties to the reorganization" and has provided the employees' representative with information necessary to evaluate such proposal; (ii) the representative has refused to accept such proposal and such refusal was unjustified under the circumstances; and (iii) "the balance of the equities clearly favors rejection" of the collective bargaining agreement.

The section would prohibit the trustee from unilaterally terminating or altering any provision of the collective bargaining agreement prior to court approval of the application to reject.

The section provides for time periods for notice of a hearing on rejection, for the conduct of such hearing, and for the determination by the court of the application.

The aggregate time period for determination of the application by the trial court is 73 days.

In our view, the Packwood Amendment is inimical to orderly bankruptcy administration. The threshold condition for court determination of an application for rejection and the time periods for notice, hearing and determination of the issue could force the liquidation of a debtor in circumstances where the evidence would show that post-filing compliance with the collective bargaining agreement would cause the collapse of the debtor's rehabilitation efforts. In this sense, the Amendment would create a standard for rejection which is far more onerous than the standards set forth by the Second Circuit in Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc., 523 F.2d 164 (2d Cir.), cert. denied, 423 U.S. 1017 (1975). As you are aware, the Supreme Court in National Labor Relations Board v. Bildisco and Bilisco, ___ U.S. ___, 104 S. Ct. 1188 (1984), held that the debtor was not required to adhere to the terms of a collective bargaining agreement pending the determination of an application to reject and that the standard for rejection should be that the collective bargaining agreement is burdensome and that the balancing of the equities favor rejection. In Bildisco, the Supreme Court followed the REA Express case to the extent that the Second Circuit held that the debtor is not required to comply with the contract after the filing date. The Supreme Court rejected the Second Circuit standard that rejection be allowed only if it could be demonstrated that failure to reject would force the debtor's liquidation.

The National Bankruptcy Conference (the "Conference") considered the competing equities of the debtor and employees covered by executory collective bargaining agreements and suggested a compromise which is embodied in Subtitle J of Title III of the Thurmond Bill. Simply stated, the proposal would require the debtor to adhere to the terms of the collective bargaining agreement pending the determination of the application to reject, but would continue existing law that rejection requires a demonstration that the contract is burdensome and that the equities favor rejection. The critical element to the suggested compromise is that the debtor would have immediate access to the court for a determination of the application to reject in emergency circumstances and that the debtor would be entitled to automatic relief if the application was not determined within 30 days of being filed.

In our testimony on behalf of the Conference in connection with the joint hearings of the Judiciary and Labor Committees on April 10, 1984, we addressed the

minimal modification requirement. At that time, we stated unequivocally that the bankruptcy court could not reasonably be expected to apply the minimum modification test at the initial stages of a chapter 11 case. Chapter 11 plans of reorganization are generally negotiated between the debtor and committees representing creditors and equity securityholders. In the initial stages of a reorganization, committees generally either are not formed or, if formed, are barely functioning. In most cases, the debtor's projections and business plan are unduly optimistic and would suggest a higher percentage return to creditors than is ultimately available as, when and if, a plan is confirmed. It is unreasonable to expect a court to evaluate the ultimate issues of the case in the immediate aftermath of the filing.

It is important to remember that an application to reject a collective bargaining agreement will only be filed where representatives of employees and the debtor are unable to agree to consentual modification of the agreement. In applying the balance of the equities test, the court must consider whether the debtor has negotiated in good faith, and whether the debtor has filed its petiton for the principal purpose of avoiding collective bargaining agreements. We believe that this standard protects employees against unfair use of chapter 11. We also believe that it provides the protection necessary to insure the equitable and efficient administration of bankruptcy cases.

The Packwood Amendment would require the court to make a determination concerning "the sacrifices expected to be made by the classes of creditors and other affected parties to the reorganization" at a time when it is impossible to determine what these sacrifices are likely to be and at a time when creditors and other affected parties are not organized and cannot be expected to be effectively represented. This burden should not be imposed upon a court. For the reasons stated by the Supreme Court in its 9-0 affirmation of the Third Circuit in Bildisco, the balance of the equities test is a reasonable method of accommodating the policies of chapter 11 and of the National Labor Relations Act.

If the debtor is required to comply with the terms of the collective bargaining agreement pending the determination of the application to reject, it must be clear that damages arising by reason of rejection are to be treated as prepetition unsecured claims. This treatment is consistent with 11 U.S.C. § 365(g).

The Conference proposal would make any amendment

concerning the rejection of collective bargaining agreements effective with respect to cases filed subsequent to the date of enactment. The Conference felt that any major change in the rules of the game should be prospective in effect. The Packwood Amendment would make Section 1113 applicable to pending cases. The Amendment, as drafted, is obviously directed at Continental Airlines. The retroactive application of a change in bankruptcy law of the type contemplated by the Packwood Amendment is bad public policy. Retroactive application of the proposed Section 1113 to affect the Continental Airlines case is particularly difficult to understand. On May 16, 1984, The New York Times published an article entitled "Firing Unions" by Ray Denison, who is Legislative Director of the AFL-CIO. Mr. Denison states that:

> The Bildisco decision was the signal that scores of companies had been waiting for, permitting them to follow the lead of Continental Air Lines, the most notorious practitioner of union-busting via Chapter 11 bankruptcy reorganization. This airline was not broke. It had assets and cash. Continental employees, aware that their security and future were linked to the company's solvency, many times demonstrated a willingness to sit down and work out revised contracts and make concessions. But the airline acknowledged no such link. Management filed for bankruptcy, fired two-thirds of its union workers, cut wages and benefits by 50 percent, terminated pension plans and seniority agreements -- and then reopened for business.

In the aftermath of the Continental Airlines filing, the unions attempted to obtain a dismissal of Continental's petition on the basis that it was filed in bad faith for the primary purpose of rejecting the contracts. Contrary to the impression created by Mr. Denison in his article, the bankruptcy court found that Continental had "made efforts to obtain adjustments in its existing collective bargaining agreements but the unions were not required to agree to these requests and no agreement had been reached." In re Continental Airlines Corp., 11 Bankr. Ct. Dec. 623, 625 (Bankr. S.D. Tex. 1984). The court also found that:

> The evidence showed that there was no way for Continental Airlines to repay its obligations nor even to continue its operations for very long in the future, as things then existed. Had the airline not filed its Chapter 11 proceeding when it did, it would not have been flying for

> very much longer, its 6,000 remaining employees would now be out of a job or looking elsewhere, and its ability to reorganize would have been further seriously impaired.
>
> This court finds that the Continental Airlines group filed their respective Chapter 11 proceedings for the purpose of attempting to keep the companies alive and functioning and that they had no other viable alternative to that end. The unions have not satisfactorily demonstrated that there was any reasonable alternative under which the airline would keep operating, and this court finds that there was none. 11 Bankr. Ct. Dec. at 625.

The court found that Continental did not file for the sole or primary purpose of rejecting collective bargaining agreements, that it filed "only when management felt it had no acceptable alternative if it were to have a chance to keep the airline flying" and "that there was no intent or motive to abuse the purpose of the Bankruptcy Code." Finally, the court concluded that "the primary purpose in filing these proceedings was to keep the airline operating so as to best utilize its going-concern value. The management of the company owed this obligation to its shareholders and to its creditors." Id.

In summary, the Packwood Amendment would create impediments to the prompt determination of the issues presented by an application to reject a collective bargaining agreement, which would jeopardize the orderly administration of chapter 11 cases. The Amendment would require the debtor to adhere to the terms of the collective bargaining agreement without providing for the necessary emergency relief which is contained in Subtitle J of the Thurmond Bill. The Amendment would have retroactive effect, which is unjustifiable on general principles and does not appear to be justified by the particular circumstances of the Continental Airlines case.

We hope that this letter will be helpful in explaining to your colleagues the position taken by the National Bankruptcy Conference with respect to collective bargaining agreements in bankruptcy. We also hope that your colleagues will support Subtitle J of your bill as drafted.

Very truly yours,

H. P. Minkel, Jr.

HPM:ka

AMENDMENT NO. ___ Calendar No. ___

Purpose: To amend the provisions regarding collective bargaining agreements.

IN THE SENATE OF THE UNITED STATES--98th Cong., 2d Sess.

H.R. 5174

To provide for the appointment of United States bankruptcy judges under article III of the Constitution, to amend title 11 of the United States Code for the purpose of making certain changes in the personal bankruptcy law, of making certain changes regarding grain storage facilities, and of clarifying the circumstances under which collective-bargaining agreements may be rejected in cases under chapter 11, and for other purposes.

Referred to the Committee on ________________________________ and ordered to be printed

Ordered to lie on the table and to be printed

Amendment intended to be proposed by Mr. Packwood to the Committee Substitute

Viz:

1 Beginning on page 115, line 32, strike out through Page
2 117 line 17 and insert in lieu thereof
3 the following:
4 Subtitle J --Collective Bargaining Agreements
5 Sec. . (a) Title 11 of the United States Code is
6 amended by adding after section 1112 the following new
7 section:
8 ''§ 1113. Rejection of collective bargaining agreements
9 ''(a) The debtor in possession, or the trustee
10 (hereinafter in this section 'trustee' shall include a debtor
11 in possession), if one has been appointed under the
12 provisions of this chapter, other than a trustee in a case
13 covered by subchapter IV of this chapter and by title I of
14 the Railway Labor Act, may reject or assume a collective
15 bargaining agreement under this title only after the court
16 approves such rejection or assumption of such agreement.
17 ''(b) (1) Subsequent to filing a petition and prior to
18 filing an application seeking rejection of a collective
19 bargaining agreement, the trustee shall--

1 ''(A) make a proposal, based on the most complete and
2 reliable information available, to the authorized
3 representative of the employees covered by such
4 agreement, providing for the minimum modifications in
5 such employees benefits and protections that would permit
6 the reorganization, taking into account the best estimate
7 of the sacrifices expected to be made by all classes of
8 creditors and other affected parties to the
9 reorganization; and
10 ''(B) provide, subject to subsection (d) (3), the
11 representatives with the information necessary to
12 evaluate such proposal.
13 ''(2) During the period beginning on the date of the
14 making of a proposal provided for in paragraph (1) and ending
15 on the date of the hearing provided for in subsection (d)
16 (1), the trustee shall meet, at reasonable times, with the
17 authorized representative to confer in good faith in
18 attempting to reach mutually satisfactory modifications of
19 such agreement.
20 ''(c) The court shall approve an application for
21 rejection of a collective bargaining agreement only if the
22 court finds that--
23 ''(1) the trustee has, prior to the hearing, made a
24 proposal that fulfills the requirements of subsection (b)
25 (1);
''(2) the authorized representative has refused to
accept such proposal and under the circumstances such
refusal was unjustified; and
''(3) the balance of the equities clearly favors
rejection of such agreement.
''(d) (1) Upon the filing of an application for rejection
the court shall schedule a hearing to be held not later than
twenty-one days after the date of the filing of such
application. All interested parties may appear and be heard

at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representatives agree.

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

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

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

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

''1113. Rejection of collective bargaining agreements.''.

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

THE WHITE HOUSE

WASHINGTON

May 24, 1984

MEMORANDUM FOR WILLIAM A. NISKANEN
MICHAEL J. HOROWITZ
ROBERT KABEL
DOUGLAS RIGGS
DENNIS MULLENS
LEHMANN LI

FROM: ROGER B. PORTER RBP

SUBJECT: Bildisco Developments

As you may have heard, the Senate today passed yet another extension of the bankruptcy legislation — this time until June 20.

Frank Lilly has prepared the attached "spread sheet" analyzing the Packwood and National Bankruptcy Conference amendments as well as providing a copy of a new "compromise." It looks like our working group is still in business, at least for a few more weeks.

Attachment

cc: Francis X. Lilly
John A. Svahn

U.S. Department of Labor

Solicitor of Labor
Washington, D.C. 20210

MAY 24 1984

MEMORANDUM FOR ROGER B. PORTER
Deputy Assistant to the President
for Policy Development

FROM : FRANCIS X. LILLY

SUBJECT: Bildisco-Packwood and Thurmond (National Bankruptcy Conference) Proposed Amendments

I have enclosed a "spread sheet" similar to that previously provided which analyzes both the Packwood and National Bankruptcy Conference amendments.

My understanding is that a new "compromise" has been floated by someone on the Hill but that it has not gotten very far. I have enclosed a copy of that compromise as well. Please call me if you have any questions or new and different developments.

Enclosures

AMENDMENT NO. ______ Calendar No. ______

Purpose: To amend the provisions regarding collective bargaining agreements

IN THE SENATE OF THE UNITED STATES -- 98th Cong., 2d Sess.

H.R. 5174

To provide for the appointment of United States bankruptcy judges under article III of the Constitution, to amend title 11 of the United States Code for the purpose of making certain changes in the personal bankruptcy law, of making certain changes regarding grain storage facilities, and of clarifying the circumstances under which collective bargaining-agreements may be rejected in cases under chapter 11, and for other purposes.

Ordered to lie on the table and to be printed

Subsitute to be proposed by to the Packwood Amendment

1 Stike out subtitle of title III of the Packwood amendent, dealing
2 with collective bargaining agreements, and insert in lieu thereof the
3 following:
4 Subtitle -- Collective Bargaining Agreements
5 Sec. . (a) Title 11 of the United States Code is amended by adding
6 after section 1112 the following new section:
7 "§ 1113. Rejection of Collective bargaining agreements
8 "(a) The debtor in possession, or the trustee (hereinafter in this
9 section 'trustee' shall include a debtor in possession), if one has been
10 appointed under the provisions of this chapter, other than a trustee in a
11 case covered by subchapter IV of this chapter and by title I of the Railway
12 Labor Act, may reject or assume a collective bargaining agreement under this
13 title only after the court approves such rejection or assumption of such
14 agreement.
15 "(b)(1) Subsequent to filing a petition and filing an
16 application seeking rejection of a collective bargaining agreement, the
17 trustee shall --
18 "(A) make a proposal, based on the most complete and reliable
19 information available, to the authorized representative of the

employees covered by such agreement, providing for modifications reasonably necessary to permit the reorganization; and

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

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

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

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

"(2) the authorized representative has refused to accept such proposal; and

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

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

"(2) The court shall rule upon such application for rejection within twenty-one days after the date of the commencement of the hearing.

1

2

3 "(3) if during a period when the collective bargaining agreement
4 continues in effect, and if essential to the continuation of the debtor's
5 business, or in order to avoid irreparable damage to the estate, the court,
6 after notice and a hearing, may authorize the trustee to implement changes
7 in the terms, conditions, wages, benefits or work rules provided by a
8 collective bargaining agreement. Any hearing under this paragraph shall be
9 scheduled in accordance with the needs of the trustee.
10 "(4) The court may enter protective orders on terms consistent with
11 the need of the authorized representative to evaluate the trustee's proposal
12 and the application for rejection, and as may be necessary to prevent the
13 unauthorized disclosure of information in the possession of the debtor or
14 trustee, if such disclosure could compromise the position of the debtor with
15 respect to its competitors in the industry in which it is engaged.
16 "(5) If the court has not ruled on such application
17 for rejection within 49 days after the filing of such
18 application, the court shall be deemed to have approved
19 the application.
20 "(e) No provision of this title shall be construed to
21 permit a debtor in possession or a trustee to unilaterally
22 terminate or alter any provisions of a collective bargaining
23 agreement before approval or rejection of such contract
24 under this section.
25 (b) The table of sections for chapter 11, United States
26 Code, is amended by inserting after the item relating to
27 section 1112 the following new item:
28 "1113. Rejection of collective bargaining agreements."
29 (c) The amendments made by this section shall apply to
30 cases filed on or after the effective date of enactment.

This substitute to the Packwood amendment is a compromise proposal. It incorporates into the Packwood Amendment language from the National Bankruptcy Conference proposal (NBC) and other minor modifications.

The changes are as follows:

1. On page 1, line 15, section (b)(1) has been changed to delete the words "prior to". The Packwood language bars the filing of the application until after the proposal has been made. This change would require the making of a proposal for changes in a collective bargaining agreement only after the filing of a petition and an application. The effect of this change is to permit negotiations between labor and management to occur both before and after the filing of the application for rejection of the collective bargaining agreement.

2. On the top of page 2, lines 1-5, section (b)(1)(A) has been changed to provide a simpler, more practical standard for the trustee to use in proposing modifications in the employees' wages, benefits and working conditions. Instead of the new, unprecendented terminology in labor-management relations used in the Packwood proposal, the impact of which could only lead to confusion, the new standard simply requires the trustee to propose the modifications "reasonably necessary" to permit reorganization.

3. On page 2. line 18, section (c)(2) has been changed to provide a straightforward, objective standard which the court shall use in determining whether approval of the application is proper. The Packwood Amendment calls for a standard that would require a judge to determine whether the refusal was "unjustified." Such a standard would be even more stringent than Bildisco and would require the court to make difficult, subjective determinations. The change contained in the new proposal would eliminate the need for the court to review the good faith of the union's refusal to accept its modifications.

4. On page 2, line 19, section (c)(2) has been changed to conform the standard provided in that subsection to the "balancing of the equities" test provided for in the Bildsico decision.

5. On page 2, line 30, section (d)(2) is changed to require a court to rule upon the application for rejection within "21" days after the date of enactment of the hearing and deletes the authority for an extension of time. This change would ensure the prompt consideration of

an application.

6. On page 3, line 3, a new subsection (d)(3) has been added incorporating the "emergency relief" provisions from the NBC draft. This change is necessary to address only those situations in which a debtor is in unusually dire circumstances. It should be stressed that an emergency ruling by the court can only be made with notice to all parties and a hearing by the court at which all parties may be represented.

7. On page 3, line 16, a new subsection (b)(5) has been added to ensure that action on the application will be taken expeditiously to avoid the possibility of undue delay in ruling on the application. Without this provision, the Packwood Amendment would ignore the time sensitivity of bankruptcy filings. Companies on the brink of financial disaster should not be subjected to judicial inertia. This essential change is necessary to protect employees, creditors, and debtors from being forced due to court delays to a point of liquidation.

8. On page 3, line 24, subsection (c) has been changed to make the amendments applicable to cases filed on or after by effective date of enactment.

	H.R. 5174	Packwood Amendment	National Bankruptcy Conference (NBC) - Thurmond
1. Coverage	Title II of the Railway Labor Act and NLRA	Everything but Title I of the RLA & Subchapter 4 of Chapter 11 (Railroad reorganizations)	Title II of the RLA and NLRA and "other applicable laws"
2. Unilateral termination or alteration of C.B.A.	Not permitted; court approval required	SAME	Permitted after notice and hearing, or after 30 days, pending a hearing.
3. Information provided to employees' representatives	1113(d)(1)(B) trustee shall provide "the relevant financial and other information"	Information necessary to evaluate the proposal	NONE
4. Protective order re: disclosure of information	1113(f) - financial information relevant to determining whether C.B.A. may be rejected shall be made available "under such conditions and within such time as court may specify"	Court may enter protective order consistent with union's need to evaluate proposal and application for rejection and as may be necessary to avoid compromising position of debtor with competitors in the industry.	NONE
5. Proposal	Prerequisite to approval: trustee must have proposed modification "deemed necessary by the trustee for successful financial reorganization of the debtor and preservation of the jobs covered" by C.B.A.	Prior to applying for rejection, trustee must make proposal "based on the most complete and reliable information available, to the authorized representative of the employees covered by such agreement, providing for the minimum modifications in such employees benefits and protections that would permit the reorganization, taking into account the best estimate of the sacrifices expected to be made by all classes of creditors and other affected parties to the reorganization."	No Requirement

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6. Requirement to Bargain	Trustee must meet and confer in good faith	"The trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement."	No Requirement
7. Standard for Rejection of C.B.A.	Absent rejection, covered jobs will be lost and any financial reorganization will fail	Union has refused to accept trustee's proposal under circumstances where such refusal was unjustified and balance of equities clearly favors rejection.	C.B.A. "shall be rejected" if reasonable efforts to negotiate by debtor or trustee have been made and are not likely to produce prompt and feasible alternative to rejection, that the inability to reach an agreement threatens to impede the success of the reorganization, that agreement is burdensome and, considering needs of all parties, equities balance in favor of rejection.
8. Timing	Expedited hearing 7-14 days after filing, discretionary extension of time granted by court within 14 day period	Hearing within 21 days from filing application for rejection. 10 days notice to all parties. Court may extend time for hearing 7 days or as parties agree. Court shall rule within 30 days from hearing - extension of time for 15 days or as agreed	30 days after trustee requests rejection, C.B.A. shall be deemed not in effect unless, after notice and hearing, orders the agreement continued in effect. Hearing may be preliminary or consolidated with final hearing. If, during continuation of C.B.A. and essential to continuation of debtor's business (or, in case of municipality, to continuation

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8. Timing cont.			of necessary services), court may authorize trustee to change C.B.A., after notice and hearing - to be scheduled in accordance with the needs of trustee.
9. Appeals	No provision	SAME	SAME
10. Effective date	Does not apply to Chapter 11 cases commenced prior to enactment	Effective upon enactment	Applies only to cases commenced after enactment.