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**LABOR LAW—BANKRUPTCY—The Effect of the
Bankruptcy of an Employer on the Employment
Relationship and on Jurisdiction over Labor
Disputes Involving the Employer**

Litigation arising in connection with the recent bankruptcy of Turney Wood Products, Inc.,¹ has brought into issue the general problem of the operation of a bankrupt employer under the federal labor laws.² The provisions of both the federal labor laws and the Bankruptcy Act³ are clear in purpose, but in areas of their interaction they have produced jurisdictional confusion. The situation presented to a single court by the cases arising from the Turney Wood Products bankruptcy provided an ideal vehicle to resolve much of that confusion;⁴ in fact, the parties involved viewed it as a test-case situation.⁵ But the resulting decisions did not achieve the desired clarification. This Note will attempt to delineate the rights and responsibilities of the trustee in bankruptcy in his roles as trustee and employer and to identify the remedies available to the parties to a labor dispute which involves a bankrupt employer.

In 1968, Turney Wood Products, Inc.,⁶ filed a voluntary petition

1. *Carpenters Local No. 2746 v. Turney Wood Prods., Inc.*, 289 F. Supp. 143 (W.D. Ark. 1968); *Durand v. NLRB*, 59 CCH Lab. Cas. 23,602 (W.D. Ark. 1969).

2. These laws include the National Labor Relations Act (hereinafter NLRA), 29 U.S.C. §§ 151-68 (1964) and the Labor Management Relations Act (hereinafter LMRA), 29 U.S.C. §§ 141-67, 171-97 (1964).

3. 11 U.S.C. §§ 1-500 (1964), *as amended*, (Supp. IV, 1965-1968).

4. This opportunity to clarify the jurisdictional confusion was especially apparent since a single federal district court, with the same judge presiding, decided both *Turney* and *Durand* and also acted as bankruptcy court.

5. *Durand v. NLRB*, 59 CCH Lab. Cas. 23,602, 23,606 (W.D. Ark. 1969):

The court thinks that it has observed in this case an attitude on the part of some of the parties to ignore practicalities and to use this litigation involving a completely defunct business as a framework within which to vindicate abstract principles of labor-management relations, collective bargaining and Board jurisdiction.

6. Turney Wood Products, Inc., was a manufacturer of church furniture sold in interstate commerce, and was thereby an employer "affecting commerce" within the meaning of the NLRA and LMRA. 59 CCH Lab. Cas. at 23,604.

in bankruptcy in the Western District of Arkansas. At that time, the company was in the second year of a three-year collective bargaining agreement with its union.⁷ The contract specified wage rates, provided that layoffs and recalls would be governed by employee seniority, and set forth a grievance procedure that included compulsory arbitration as a final step. The court⁸ appointed L. E. Durand as operating receiver—later trustee—and ordered that the plant be operated temporarily pending liquidation as provided in the Bankruptcy Act.⁹ Upon Durand's recommendation, the court authorized Durand, as trustee, to reject the collective bargaining agreement as an executory contract.¹⁰ Durand rejected the contract, reopened the plant without consulting the union, and recalled employees without regard to seniority and at substantially reduced wage rates. The union tendered specific grievances to the trustee based on these breaches of the agreement. Durand contended that he had properly exercised his right to reject the union contract, that therefore no contract capable of breach continued to exist, and that, as a further consequence, no grievance procedure had to be followed. The union then filed both a contract action under section 301 of the Labor Management Relations Act (LMRA)¹¹ and an unfair labor practice¹² complaint with the National Labor Relations Board.

In the section 301 suit, *Carpenters Local Union No. 2746 v. Turney Wood Products, Incorporated*,¹³ the union sought both specific enforcement of the arbitration provision of the collective bargaining agreement and review of the trustee's authority to reject the agreement. The union's position was that federal labor policies precluded the rejection of collective bargaining agreements and that consequently the terms of the union contract requiring arbitration were enforceable. The court rejected the union's contentions and held that the trustee may reject a collective bargaining agreement as he may reject any other executory contract.¹⁴ But, the court con-

7. The union involved was Carpenters Local Union No. 2746, United Brotherhood of Carpenters & Joiners of America, AFL-CIO.

8. Judge Henley of the United States District Court for the Western District of Arkansas sat as a court in bankruptcy pursuant to § 1 of the Bankruptcy Act: "(9) Court shall mean the judge or referee of the Court of Bankruptcy. (10) Court of Bankruptcy shall include the U.S. District Courts . . ." 11 U.S.C. § 1 (1964).

9. Pursuant to § 2a(5) of the Bankruptcy Act, a bankruptcy court may "[a]uthorize the business of bankrupts to be conducted for limited periods by receivers . . . or trustees, if necessary in the best interests of the estates . . ." 11 U.S.C. § 11(a)(5) (1964).

10. Such authorization is permitted by § 70b of the Bankruptcy Act, 11 U.S.C. § 110(b) (1964).

11. 29 U.S.C. § 185 (1964). See note 45 *infra*.

12. As used in this Note, an unfair labor practice is any conduct which violates §§ 7 or 8 of the NLRA, 29 U.S.C. §§ 157-58 (1964).

13. 289 F. Supp. 143 (W.D. Ark. 1968).

14. 289 F. Supp. at 149.

tinued, its holding did not imply that an operating trustee can continue to operate a bankrupt plant without regard to the requirements of the National Labor Relations Act (NLRA). Specifically, it stated that a trustee's refusal to bargain with the union concerning a new agreement may constitute an unfair labor practice.¹⁵

Subsequent to the court's *Turney* decision, the regional director of the NLRB ordered a hearing on the union's unfair labor practice complaint. The trial examiner found that Durand had been guilty of failing to maintain the employment conditions which existed at the time of rejection of the contract until he had bargained with the union concerning the changes proposed, and that this failure constituted an unfair labor practice. The trustee then sought an injunction against any further proceedings by the Board on the unfair labor practice charges. In *Durand v. NLRB*,¹⁶ the court refused to enjoin the unfair labor practice proceedings. Instead, it accepted the Board's position that the trustee's subsequent departure from the terms of the rejected contract was an act separate from the rejection and hence was a unilateral change in the contract terms—an action which constitutes an unfair labor practice under section 8(a)(5) of the NLRA and is thus within the Board's exclusive jurisdiction.¹⁷ Consequently, the court stated, the Board's proceedings were not an attempt to relitigate or circumvent the court's earlier affirmance of the trustee's power to reject.¹⁸

Although the court's characterization of the departure from the terms of the rejected contract as an unfair labor practice may be questioned,¹⁹ the *Turney* and *Durand* decisions rest, for the most part, on a correct assessment of the rights of a trustee in a bankruptcy to reject a collective bargaining agreement and of his duties under federal labor law. A United States district court sitting as a court of bankruptcy has exclusive jurisdiction of the bankrupt estate²⁰ and can authorize the trustee to operate the bankrupt business.²¹ When the trustee finds any executory contract to be unduly burdensome to that operation,²² he is authorized by the Bankruptcy

15. 289 F. Supp. at 149.

16. 59 CCH Lab. Cas. 23,602 (W.D. Ark. 1969).

17. 59 CCH Lab. Cas. at 23,605.

18. 59 CCH Lab. Cas. at 23,608.

19. See text accompanying notes 62-64 *infra*.

20. Bankruptcy Act §§ 2, 111, 311, 11 U.S.C. §§ 11, 511, 711 (1964); 59 CCH Lab. Cas. at 23,606.

21. Bankruptcy Act §§ 189, 343, 11 U.S.C. §§ 589, 743 (1964). See note 9 *supra*.

22. "The inference is that if the contract were shown to be sufficiently burdensome it might be set aside." Note, *Corporate Reorganizations and the Rights of Labor*, 53 HARV. L. REV. 1360, 1363 (1940). "Its [section 70b] underlying principle and that of the cases that preceded its enactment is that the trustee in bankruptcy may abandon any burdensome property and reject unprofitable executory contracts in order to

Act to reject that contract upon approval of the court.²³ a union collective bargaining agreement in force at the time of bankruptcy is an executory contract within the meaning of the Act,²⁴ although the Bankruptcy Act does not specifically so designate it.²⁵ Neither federal labor legislation nor the Bankruptcy Act indicates that a collective bargaining agreement is excluded from this power to reject executory contracts;²⁶ and indeed, some courts have sustained the trustee's rejection of union contracts.²⁷ This result appears to be sound since termination of the collective bargaining agreement by rejection is necessary to secure the objectives of the bankruptcy proceeding, which are to dispose of all claims against the bankrupt business and, in the case of reorganization, to remove potential obstacles to the rehabilitation of the business.²⁸ Thus, upon a showing of proper justification, a trustee may be authorized by the court of bankruptcy to reject a collective bargaining agreement; and the bankruptcy court has exclusive jurisdiction over that rejection.

The *Turney* holding indicates, however, that the power to reject a union contract does not allow the trustee to operate a bankrupt

further the best interests of the estate." *In re New York Investors Mut. Group, Inc.*, 143 F. Supp. 51, 54 (S.D.N.Y. 1956).

23. See § 70b with respect to pure bankruptcy, 11 U.S.C. § 110(b) (1964); § 116(1) with respect to chapter X reorganizations, 11 U.S.C. § 516(1) (1964); § 313(1) with respect to chapter XI arrangements, 11 U.S.C. § 713(1) (1964).

24. *In re Klaber Bros., Inc.*, 173 F. Supp. 83, 85 (S.D.N.Y. 1959):

"The Bankruptcy Act makes no distinction among classes of executory contracts. The power to permit rejection of an executory contract should be exercised where rejection is to the advantage of the estate." . . . [T]here should be no differentiation in the treatment of executory employment or collective bargaining contracts as to termination.

25. 6 W. COLLIER, BANKRUPTCY ¶ 3.23, at 563 (14th ed. 1969).

26. "[A]s a matter of statutory construction, the . . . rejection of labor contracts would not be impossible." Teton, *Reorganization Revisited*, 48 YALE L.J. 573, 596 (1939). The Bankruptcy Act provides, in straight bankruptcy under § 70b, for rejection of "an executory contract," 11 U.S.C. § 110(b) (1964). A chapter X reorganization plan "may provide for the rejection of any executory contract except contracts in the public authority." Bankruptcy Act § 216(4), 11 U.S.C. § 616(4) (1964). Finally, a chapter XI arrangement "may include . . . provisions for the rejection of any executory contract." Bankruptcy Act § 357(2), 11 U.S.C. § 757(2) (1964).

27. *Turney* is the first case holding that a collective bargaining agreement may be rejected under § 70b. 289 F. Supp. at 149. Other cases have upheld the power to reject union agreements under § 116 and § 313. See, e.g., *In re Klaber Bros., Inc.*, 173 F. Supp. 83 (S.D.N.Y. 1959) (§ 313); *In re Public Ledger*, 63 F. Supp. 1008 (E.D. Pa. 1945), *rev'd. on other grounds*, 161 F.2d 762 (3d Cir. 1947) (§ 116).

28. The main purpose of § 70b, when the bankrupt estate is being liquidated, is "to clarify at the earliest possible moment the mutual relations of the contracting parties" so that prompt distribution of the assets can be made. 4A W. COLLIER, BANKRUPTCY ¶ 70.43, at 536 (14th ed. 1969). In the case of reorganization, the purpose of rejection is to discharge any executory obligations which would impede the rehabilitation of the business. See *City Bank Farmers Trust v. Irving Trust Co.*, 299 U.S. 433 (1937). In either case, those who hold executory contracts properly rejected should be entitled to share in the estate as creditors. See 6A W. COLLIER, BANKRUPTCY ¶ 9.20, at 275, 276 n.3 (14th ed. 1969).

business without regard to the requirements of the NLRA.²⁹ When the trustee exercises his authority to reject a collective bargaining agreement, that contract ceases to control the relationship between employer and union. From that time, employer-employee relations are governed by the federal labor laws.³⁰ The NLRB is vested with exclusive jurisdiction to enforce the requirements of the NLRA.³¹ There is no conflict with the Bankruptcy Act in this regard: the NLRA confers on the Board the power to prevent any person from engaging in unfair labor practices,³² and the Act expressly includes trustees and receivers in bankruptcy.³³ Correspondingly, the Bankruptcy Act prohibits trustees in reorganization from interfering with employees' rights to organize.³⁴ Besides, it is generally recognized that the exclusive jurisdiction of the bankruptcy court does not bar the NLRB from issuing proper orders in labor disputes arising during reorganization.³⁵

The fact that a trustee in bankruptcy is operating a business does not alter the employer-employee relationship with respect to how it may be governed by law.³⁶ The trustee may be found guilty of unfair labor practices for violating his duties under the NLRA after he has properly rejected a union contract under the Bankruptcy Act.³⁷ In addition, the incumbent union does not lose its status as bargaining representative of the bankrupt's employees simply because of the bankruptcy proceedings and the trustee's assumption of the employer's position,³⁸ and the NLRA imposes an obligation on the

29. 289 F. Supp. at 149.

30. *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39 (3d Cir. 1942). A debtor which continues in possession of its property and in the conduct of its business during reorganization is responsible for unfair labor practices under the NLRA; the status of a debtor in this area is the same as that of any other employer. See 6A W. COLLIER, BANKRUPTCY ¶ 8.14, at 56 (14th ed. 1969).

31. "The power 'to prevent any person from engaging in any unfair labor practice affecting commerce' has been vested by Congress in the Board and the Courts of Appeal, and Congress has declared: 'This power shall be exclusive, and shall not be affected by any other means of adjustment.'" *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938).

32. Section 10 of the NLRA, 29 U.S.C. § 160(a) (1964) (emphasis added), provides: The Board is empowered, as hereinafter provided, to prevent *any person* from engaging in any unfair labor practice affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has or may be established.

33. According to § 2(a) of the NLRA, 29 U.S.C. § 152(a) (1964), "(1) The term 'person' includes . . . trustees in bankruptcy, or receivers."

34. Bankruptcy Act § 272, 11 U.S.C. § 672 (1964).

35. See, e.g., Note, *Bankruptcy: Corporate Reorganization: Survey of Chapter X in Operation*, 18 N.Y.U. L.Q. REV. 399, 426 (1941).

36. 6A W. COLLIER, BANKRUPTCY ¶ 8.14, at 55-56 & 56 n.19 (14th ed. 1969).

37. See notes 32-33 *supra*.

38. "Its [the trustee in bankruptcy's] status as an employer is no different, so far as the [NLRA] is concerned, than that of any other employer. Court supervision of corporate reorganization affords the operating possessor no freedom from its statutory

trustee as employer to bargain collectively with the certified union representative of the employees.³⁹ It has been held in the nonbankruptcy context that, when there is a change of employer, it is an unfair labor practice for the new employer to refuse to bargain with the union, at its request, concerning continued conditions and terms of employment.⁴⁰ The general rule is that when there is a duty to bargain, any unilateral change in the terms and conditions of employment is an unfair labor practice.⁴¹ However, when the obligation to bargain has been satisfied and the negotiations are at an impasse, the employer is free to effectuate such changes as have been proposed to, and rejected by, the union.⁴² It is not clear, however, that this general rule is adaptable to the situation in which the employer is a trustee in bankruptcy.⁴³

In *Turney*, after the trustee properly rejected the contract and departed from its terms, the union sought specific performance of the contract's arbitration procedures. In view of the state of the law as set forth above,⁴⁴ and in view of the fact that the contract was duly rejected, the court properly denied that relief. It is submitted, however, that the basis of the court's dismissal of the union's specific performance suit was erroneous. The union's request for specific

duty to its employees." *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 43 (3d Cir. 1942). "The bargaining relationship does not automatically terminate with a change in employers. It is well settled that, where there is substantial continuity in the identity of the employing enterprise, the purchasing employer is bound to recognize and bargain with the incumbent union" [*Northwest Galvanizing Co.*, 168 N.L.R.B. No. 6 (Oct. 31, 1967)]." Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 *Nw. U. L. Rev.* 735, 791 (1969).

39. Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1964), provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees."

40. *Chemrock Corp.*, 151 N.L.R.B. 1074 (1965). For discussion of the successor doctrine with respect to the trustee in bankruptcy as employer, see text accompanying notes 83-91 *infra*.

41. "We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of 8(a)(5) as much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). See also *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967). But for discussion of the unilateral change doctrine when the employer is a trustee in bankruptcy who has properly rejected a collective bargaining agreement, see text accompanying notes 62-65 *infra*.

42. "The obligation to refrain from altering terms and conditions of employment prior to fulfillment of the bargaining obligation is only temporary; once the bargaining obligation has been satisfied, and negotiations at an impasse, the employer is free to effectuate such changes as have been proposed to and rejected by the union." Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 *Nw. U. L. Rev.* 735, 811 (1969). See, e.g., *NLRB v. U.S. Sonics Corp.*, 312 F.2d 610 (1st Cir. 1963). However, an impasse caused by an employer's refusal to bargain in good faith has been held to be an unfair labor practice. *Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).

43. See text accompanying notes 62-65 *infra*.

44. See text accompanying notes 20-42 *supra*.

performance of the contract, filed under section 301 of the LMRA,⁴⁵ alleged that the action of the trustee rejecting the collective bargaining agreement constituted a breach of that agreement.⁴⁶ The court in *Turney* held that the rejection did not amount to a breach and that the union was not entitled to specific performance;⁴⁷ consequently, it dismissed the suit. The error of this holding lies in the court's failure to recognize that rejection of an executory contract does constitute a breach of the contract⁴⁸ and that the union as the injured party becomes entitled to any remedy afforded by law, although specific performance is obviously not the proper relief when a contract has been properly rejected by a trustee in bankruptcy.⁴⁹

The court's ruling that the rejection did not constitute a breach was apparently an attempt to avoid the difficult question raised by the union concerning the potential conflict between the federal labor laws and the Bankruptcy Act.⁵⁰ But this problem must be

45. Section 301(a), 29 U.S.C. § 185(a) (1964), provides that suits for violations of contracts between an employer and a labor organization which represents employees in an industry affecting commerce may be brought in any district court of the United States having jurisdiction of the parties.

46. "[T]he complaint in that case [*Turney*] alleged that the action of the trustee in rejecting the collective bargaining agreement constituted a breach of that agreement, and that the union was entitled to have the agreement specifically enforced." 59 CCH Lab. Cas. at 23,607.

47. 289 F. Supp. at 149; 59 CCH Lab. Cas. at 23,607.

48. "[T]he rejection of an executory contract . . . as provided in this title, shall constitute a breach of such contract." Bankruptcy Act § 63c, 11 U.S.C. § 103(c) (1964). Rejection under § 116 is also a breach [Bankruptcy Act § 202, 11 U.S.C. § 602 (1964)], as is rejection in a chapter XI arrangement [Bankruptcy Act § 353, 11 U.S.C. § 753 (1964)].

49. See text accompanying notes 82-92 *infra*. However, in a proper case for the exercise of § 301 jurisdiction, a court could grant appropriate relief even if the remedy requested is inappropriate. Rule 54(c) of the Federal Rules of Civil Procedure provides: "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

50. The union claimed that federal legislation in labor relations had so preempted the field as to take collective bargaining agreements out of the scope of the power under the Bankruptcy Act to reject executory contracts. The court in *Turney* feared that "to uphold the contention of the union would imply a conflict between federal legislation in the labor relations field . . . and the Bankruptcy Act." 289 F. Supp. at 147. While no necessary conflict appears to exist in reality, there has been substantial confusion in the law concerning the status of employer-employee relations in trustee operations under the Bankruptcy Act. By dismissing the union's § 301 suit, the court avoided addressing that confusion.

The NLRA was enacted in 1935; the Chandler version of the Bankruptcy Act, which first set forth the power of a trustee to reject executory contracts (289 F. Supp. at 148), was enacted in 1938. From 1938 to 1941, a rather active legal debate arose as to whether a collective bargaining agreement could be rejected as an executory contract. It was argued that inclusion of union contracts in the power under the Bankruptcy Act to reject executory contracts would frustrate the federal labor policy.

Although equity receivers have been held not bound by prior labor agreements, the purpose of the legislative protection of the employees right to organize freely was to enable them to conclude collective agreement with their employers, and

faced, for it has been held that while a collective bargaining agreement can be rejected under the Bankruptcy Act, such rejection does constitute a breach of the agreement⁵¹ and the trustee is still subject to the provisions of the NLRA dealing with unfair labor practices.⁵² The question of when a union contract can be rejected is one that remains largely unanswered today, and its resolution rests primarily within the discretion of the bankruptcy court. The bankruptcy court has exclusive jurisdiction over rejection of executory contracts, including a union collective bargaining agreement;⁵³ and the final decision to reject the union contract lies with the bankruptcy court.⁵⁴ The court must determine whether the trustee's decision to reject a contract as burdensome is justified by the best interests of the bankrupt estate.⁵⁵ Once rejection has been authorized by the bankruptcy court and the contract is rejected, the remedies and fora available to the union for relief from that rejection must be determined.

Three fora come to mind as potentially available to provide relief: the NLRB, the court of bankruptcy,⁵⁶ and a federal district court sitting under section 301. The union should not be able to obtain relief from the NLRB. Since a breach of contract generally does not itself constitute an unfair labor practice,⁵⁷ the Board's jurisdiction does not attach unless the breach arises out of the same transaction as does an unfair labor practice, in which case the Board's jurisdiction may be concurrent with that of a court sitting under section 301.⁵⁸ It is difficult, however, to conceive of circumstances in which an unfair labor practice could be said to arise out

to allow these agreements to be set aside would seem contrary to the policy of this legislation.

Note, *Corporate Reorganizations and the Rights of Labor*, 53 HARV. L. REV. 1360, 1363 (1940).

51. See note 48 *supra* and accompanying text.

52. See notes 29-35 *supra* and accompanying text.

53. See notes 23-24 *supra* and accompanying text.

54. Acts of trustees pursuant to § 70b are under the control of the court. Bankruptcy Act § 2a(21), 11 U.S.C. § 11(a)(21) (1964). Sections 116 and 313 speak of the court itself as authorizing any rejection. 11 U.S.C. §§ 602, 753 (1964).

55. See notes 22-23 *supra* and accompanying text.

56. It should be recalled that the court of bankruptcy may mean either the judge of a federal district court or a referee appointed by the court. See note 8 *supra*.

57. See *Vaca v. Sipes*, 386 U.S. 171 (1967); *Smith v. Evening News Assn.*, 371 U.S. 195 (1962); *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Co.*, 348 U.S. 437 (1955); *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

58. "The authority of the Board to deal with unfair labor practices which also violate a collective bargaining contract is not displaced by section 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under section 301." *Smith v. Evening News Assn.*, 371 U.S. 195, 197 (1962). See also *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967).

of the same transaction as the rejection.⁵⁹ Although rejection is similar in scope and effects to a total repudiation of a collective bargaining agreement—which in the normal employment situation has been held to constitute an unfair labor practice to which the Board's jurisdiction would attach⁶⁰—rejection by a trustee in bankruptcy should be distinguished. Rejection under the Bankruptcy Act lacks the elements of an unjustified refusal by the employer to abide by the terms of an agreement. Indeed, unlike repudiation, rejection must not only be justified by the needs of the bankrupt, but it must also be approved by a court of bankruptcy. Moreover, the procedure of rejection by a trustee is specifically sanctioned by Congress in the Bankruptcy Act.⁶¹

But it might be argued, as the Board did in *Durand*,⁶² that a departure by the trustee from the terms of the rejected contract,

59. There are essentially two situations in the normal employment setting in which both an unfair labor practice and a breach of contract have been found to arise out of the same transaction so as to produce concurrent jurisdiction in the Board and in the § 301 court. The first is the case in which the parties have incorporated into their collective bargaining agreement a provision which parallels an unfair labor practice section of the NLRA so that the same conduct may arguably violate both the contract and the NLRA. See, e.g., *Smith v. Evening News Assn.*, 371 U.S. 195 (1962). Clearly, even in the bankruptcy setting, if the trustee commits an actual unfair labor practice, he is subject to the Board's jurisdiction. See text accompanying notes 29-35 *supra*. In this setting, however, a trustee's unilateral departure from the terms of the rejected agreement does constitute an unfair labor practice. The fact that the Bankruptcy Act establishes a procedure for rejection of a collective bargaining agreement necessarily implies that the trustee may depart from the terms of the rejected contract without committing an unfair labor practice. Otherwise, rejection could become a nullity. See text accompanying notes 62-64 *infra*.

The second situation which may produce both an unfair labor practice and a breach of contract and which may thus permit concurrent jurisdiction, is the situation in which conduct that would otherwise constitute an unfair labor practice is arguably sanctioned by the terms of the collective bargaining agreement and therefore is arguably not an unfair labor practice. An example of such conduct is a change in working conditions by an employer which, if not sanctioned by the agreement, would be a unilateral change and an unfair labor practice. See, e.g., *NLRB v. Katz*, 369 U.S. 736 (1962). As was noted above, however, it is unacceptable in the bankruptcy setting to treat the trustee's departure from the terms of the rejected contract as an unfair labor practice. See text accompanying notes 62-64 *infra*. For more extensive discussion of jurisdictional overlap, see Note, *Labor Law—Jurisdiction—Contractual Interpretation, Unfair Labor Practices, and Arbitration: A Proposed Resolution of Jurisdictional Overlap*, 68 MICH. L. REV. 141 (1969).

60. It has been held that, in ordinary employment situations, repudiation of a collective bargaining agreement by an employer is a § 8(a)(5) refusal to bargain which gives the NLRB jurisdiction to exercise its remedial powers. *Hydes Supermarket*, 145 N.L.R.B. 1252, *enforced*, 339 F.2d 568 (9th Cir. 1964). This interpretation of § 8(a)(5) is derived from the definition of the duty to bargain collectively which is found in § 8(d) of the NLRA. The proviso to that section states that "where there is in effect a collective bargaining contract . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract" unless he follows certain specified procedures. 29 U.S.C. § 158(d) (1964).

61. See note 23 *supra* and accompanying text.

62. See text accompanying note 17 *supra*.

either at the time of rejection or subsequent to it, constitutes an unfair labor practice so as to give rise to concurrent jurisdiction in the Board and the courts over the rejection. Such an argument would be based on the fact that, in normal employment circumstances, any unilateral change in conditions of employment is an unfair labor practice.⁶³ In the bankruptcy situation, however, a departure from the terms of the rejected contract should not constitute an unfair labor practice, whether or not bargaining has preceded that departure. It is evident that to treat such a departure as a unilateral change could deprive rejection of much of its utility.⁶⁴ Thus, the departure should be treated as an integral part of the rejection instead of as a separate act that could constitute an unfair labor practice.

Even if the departure is treated as a unilateral change and the Board does take jurisdiction of an unfair labor practice complaint based on it, the Board must recognize the limitations on its ability to relieve the union from the consequences of the rejection and breach. Although in the nonbankruptcy setting the Board can order the restoration of the status quo prior to the unilateral change,⁶⁵ such a remedy for rejection would conflict both with the orders of the court of bankruptcy and with the primary objective of rejection—to free the bankrupt from some of those prior conditions of employment. Moreover, the possibility of the Board's ordering restoration of the status quo would give a union-creditor a unique opportunity to attack decisions of the bankruptcy court outside the normal process of review and could impose upon the trustee the

63. See note 41 *supra* and accompanying text.

64. See text accompanying note 28, 59 *supra*.

65. The NLRB has the power, in remedying an unfair labor practice, to order the reinstatement of employees with back pay and a return to conditions that existed prior to the unfair labor practice. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964). If departure by a trustee from the terms of a rejected collective bargaining agreement is called a unilateral change, and hence an unfair labor practice, the Board would appear to be able to order restoration of the status quo which existed before the rejection and departure that constituted the unfair labor practice. But such a remedy, as has been pointed out, would frustrate the purposes of the Bankruptcy Act. This interference can be avoided simply by recognizing that departure is integral to rejection and should not be treated as an unfair labor practice.

A remedial conflict might still arise in cases in which the Board assumed jurisdiction over an unfair labor practice charge which was based on a trustee's refusal to bargain *after* he had rejected a collective agreement and had departed from its terms. That assumption of jurisdiction, as has been demonstrated, would be proper. See text accompanying notes 29-35 *supra*. But if the Board, in remedying such a refusal to bargain, ordered restoration of the pre-departure status quo, conflict would arise both with the purposes of the Bankruptcy Act and with the orders of the court of bankruptcy. Restoration of the status quo prior to *departure* is clearly not an appropriate remedy for a subsequent refusal to bargain. Unlike the unfair labor practice in *Fibreboard* which involved a unilateral change, the unfair labor practice in the case posed consists of a refusal to bargain *after* an authorized departure from the terms of the rejected agreement. Even if an order to restore the status quo prior

impossible task of obeying the conflicting orders of two fora. It would not seem to be enough, however, for the Board simply to avoid issuing directly conflicting orders; the Board would also have to avoid fashioning a remedy that would undermine the ability of the court of bankruptcy to administer the bankrupt's estate. It is difficult to see how a remedy for departure from the terms of a rejected contract would not to some degree impose additional burdens upon a bankrupt employer and hence undermine the operations and orders of the bankruptcy court. It is submitted that the best solution to these problems is to avoid them by treating departure as integral to rejection, and thus as an improper basis for invoking the unfair labor practice jurisdiction of the Board.

Of course, if the trustee commits an unfair labor practice separate from his rejection of the agreement—that is, an action other than a departure from the contract terms—the union may file an unfair labor practice complaint with the NLRB.⁶⁶ For example, when, as in the *Turney Wood Products* cases, a rejection of a contract is followed by a separate, subsequent refusal of the trustee to bargain with the union concerning a new employment agreement, jurisdiction lies either in a district court sitting under section 301 or in the bankruptcy court, for the breach of contract, and in the NLRB for the unfair labor practice.

However, since rejection by itself appears to constitute only a breach of contract, over which the Board may not exercise jurisdiction, the union must look either to the court of bankruptcy or to a court sitting under section 301 for relief from the trustee's breach. When a trustee rejects a collective bargaining agreement, all of its terms cease to be binding;⁶⁷ consequently, the union must seek relief from the loss of all provisions of the rejected union

to the unfair labor practice is appropriate in the case of a mere refusal to bargain, that order should be to reinstate only those conditions which existed after the departure, since only the post-departure conduct should be able to constitute an unfair labor practice. A reasonable construction of § 10(c) of the NLRA, 29 U.S.C. § 160 (1964), which is the source of the Board's power to order "affirmative action" to remedy unfair labor practices, confirms this conclusion, because it speaks only to the questions of remedying the unfair labor practice and not to issues involving activities prior to the commission of the unfair labor practice. Even if the Board should construe § 10(c) broadly enough to give it the power to order restoration of the pre-departure situation as a remedy for a refusal to bargain, due consideration for the bankruptcy situation should restrain its exercise of that power.

66. See text accompanying notes 29-35 *supra*.

67. It seems clear that the trustee must reject the entire contract—that is, that he cannot reject some parts of a collective bargaining agreement while retaining other parts. Section 70b of the Bankruptcy Act states that the trustee must either assume or reject all executory contracts. 11 U.S.C. § 110(b) (1964). The general application of this section has been that when a trustee decides to assume a contract, he must take it "cum onere"—subject to all its provisions. 4A W. COLLIER, BANKRUPTCY § 70.43, at 519 (14th ed. 1969).

agreement. The intangible nature of many of the union and employee rights which are represented in the collective bargaining agreement indicates that adequate relief from the consequences of the rejection of the contract requires more than the monetary compensation that is available to the union as an ordinary creditor of the bankrupt. Especially in the case of a reorganization, the continued operation of the bankrupt's business by a trustee continues the employment relationship and thus perpetuates the harm to the union resulting from the breach of the collective bargaining agreement.⁶⁸ Thus a legal remedy alone would be inadequate, and a full range of equitable remedies is required in order to fashion proper relief for the union. Both a bankruptcy court and a court sitting under section 301 action have full powers in equity to provide appropriate relief,⁶⁹ and therefore any preference for one of those courts must rest on other factors.

There is no authority for the proposition that a court sitting under section 301 should have exclusive jurisdiction over suits arising from the rejection in bankruptcy of collective bargaining agreements. But the literal terms of section 301 do encompass such suits,⁷⁰ and therefore it appears that those suits are at least within the jurisdiction of a court sitting under that section. Although it cannot be said that Congress actually contemplated that a section 301 court would take jurisdiction of suits arising from rejection, section 301 does embody a congressional policy to make a specific forum available for suits involving collective bargaining agreements. Moreover, from the time when the rejection power was made available under the Bankruptcy Act, there has been concern that it should not be used to infringe unnecessarily the union and employee rights which are protected by the federal labor laws.⁷¹

68. This problem would be greater in cases of a long-term chapter X reorganization and of a chapter XI arrangement than it would be when the business is being operated only until liquidation. Bankruptcy Act §§ 189, 343, 11 U.S.C. §§ 511, 711 (1964).

69. The Bankruptcy Act § 2a vests bankruptcy courts with the jurisdiction both at law and in equity. 11 U.S.C. § 11(a) (1964). "Equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin v. England*, 385 U.S. 99, 103 (1966).

Similarly, a federal district court sitting under § 301 would have available all normal equity powers; the appropriateness of equitable relief in suits under that section has been recognized. The Supreme Court in defining the § 301 suit, quoted from the Congressional Record that "[p]roceedings in district courts contemplate not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). The concurring opinion of Justice Burton in the same case speaks of the remedial powers of a court in a § 301 suit as having their "source in Section 301 itself, and in the federal district courts' inherent equitable powers." 353 U.S. at 460. See also *FED. R. CIV. P. 54(c)*, note 49 *supra*.

70. Section 301 provides that "[s]uits for violation of contracts . . . may be brought in any District Court" 29 U.S.C. § 155 (1964). Thus, any suit based upon a rejection breach of a collective bargaining agreement would appear to fall within the statute.

71. See note 50 *supra*.

Since collective bargaining agreements do involve substantial interests not present in other executory contracts encompassed by the bankruptcy rejection power, it may be desirable to provide an opportunity for the protection of those interests in an action outside of the ordinary bankruptcy proceeding. It is arguable that a court sitting under section 301 could, without neglecting the special needs of the bankruptcy situation, bring greater objectivity to bear on the substance of the union's claims than could the court of bankruptcy, and that therefore the interests of the union and of federal labor policy would be better protected by an action outside the general bankruptcy proceedings.⁷²

Although these arguments and the literal wording of section 301⁷³ suggest that a union might be able to invoke that section in seeking a remedy for the rejection of a collective bargaining agreement, it must be recognized that the union is clearly entitled to file a claim in the bankruptcy court, since, upon rejection, it becomes a creditor of the bankrupt.⁷⁴ Moreover, the bankruptcy court has exclusive power to administer the liquidation or reorganization of a bankrupt employer. Even if a remedial order issued by a court sitting under section 301 attempted to deal only with interests peculiar to labor relations, such as job classification, seniority, or union security, the resolution of these matters would be likely to have economic repercussions and thus affect the ability of the bankruptcy court to administer the bankrupt estate effectively. In addition, the bankruptcy court has exclusive authority to determine

72. Except in proceedings involving a chapter X reorganization, the proceedings in a bankruptcy court are conducted by a referee appointed by the federal district judge. Bankruptcy Act § 22, 11 U.S.C. § 45 (1964). The referee is a specialist in bankruptcy and would bring this background, as well as his experience with the present case, to his decisions on the union's claim. A judge sitting in a § 301 suit, on the other hand, would be less likely to have predispositions based on bankruptcy operations and would probably be unfamiliar with the particular case—again, except in proceedings involving a chapter X reorganization in which the judge who has presided in the bankruptcy court is a federal district judge and may also be the judge in the § 301 action. See Bankruptcy Act § 117, 11 U.S.C. § 517 (1964).

73. See note 70 *supra*.

74. While the Bankruptcy Act does not state specifically that rejection under § 70b makes the injured party a creditor, it does speak of creditors as persons who have a claim "void or voidable under this title." Bankruptcy Act § 57, 11 U.S.C. § 93 (1964). Rejection pursuant to §§ 116 and 313, however, clearly makes the injured party a creditor: "Any person injured by such rejection shall . . . be deemed a creditor." 11 U.S.C. §§ 602, 753 (1964). The courts have recognized the right of any party injured by rejection of an executory contract to participate in the bankruptcy proceedings as a creditor: "The remedy [of a party whose executory contract has been rejected by the trustee] is a claim for damages for the breach of the agreement." *In re New York Investors Mut. Group*, 143 F. Supp. 51, 54 (S.D.N.Y. 1956). There is no evidence that a labor union is an exception to this rule. Thus, after a trustee rejects a collective bargaining agreement, "[t]he union apparently could then intervene in the proceedings as a general creditor and prove damages suffered by the termination of its contract." Note, *Corporate Reorganizations and the Rights of Labor*, 53 HARV. L. REV. 1360, 1363 (1940).

what constitutes administrative expenses entitled to priority;⁷⁵ and presumably, its cooperation in the exercise of this power would be essential to give effect to any order of the section 301 court which would increase the costs of operation of the bankrupt business. Furthermore, if the bankruptcy court, in an effort to protect its ability to administer the bankrupt estate, should countermand the order of the section 301 court, there would be an unseemly conflict between the two federal fora. These considerations suggest that the action under section 301 should not be available to the union at its option. Vesting exclusive jurisdiction in the court of bankruptcy over all claims arising from rejection of collective bargaining agreements has the further advantage of permitting the resolution of all claims against the bankrupt in a single action, and it thus promotes promptness and efficiency of adjudication. Finally, the fact that the bankruptcy court possesses the full range of equitable powers⁷⁶ and that all decisions in bankruptcy proceedings are either made in, or are immediately appealable to, the federal district court, render the benefits to be gained by an action under section 301, in another or even in the same federal district court, somewhat difficult to perceive.

The conclusion that the bankruptcy court should have exclusive jurisdiction over claims arising from the rejection of a collective bargaining agreement does not mean that a court sitting under section 301 may never play a role in the resolution of problems arising from such a rejection. There appear to be two instances when union claims for rejection of a collective bargaining agreement can be accommodated by a section 301 court without interfering with bankruptcy proceedings. First, a bankruptcy court may defer on the question of a union claim to the section 301 court. Such deference would not be inconsistent with the operation of policies of the Bankruptcy Act. Indeed, prior to the enactment of section 301, Congress recognized that, in certain areas of labor relations, matters otherwise within the bankruptcy court's jurisdiction should be handled by other agencies;⁷⁷ and the bankruptcy court itself has always given up jurisdiction to agencies which are especially competent and specifically designated to deal with certain areas.⁷⁸ For example, Congress has specifically prohibited the bankruptcy court from interfering with collective bargaining involving

75. Bankruptcy Act §§ 62, 64, 11 U.S.C. §§ 102, 104 (1964).

76. See note 69 *supra*.

77. See notes 79-80 *infra* and accompanying text.

78. "An agency especially competent and specifically designated to deal with [the problem] has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue." *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 567 (1946). See also 6A W. COLLIER, BANKRUPTCY ¶ 15.14, at 1285 (14th ed. 1969).

carriers subject to the Railway Labor Act,⁷⁹ and the Bankruptcy Act defers to the jurisdiction of the NLRB with regard to bankruptcy operations involving sections 7 and 8 of the NLRA.⁸⁰ Although the district court sitting under section 301 cannot be said to be especially competent in matters involving collective bargaining agreements, that court has been specifically designated by Congress to remedy violations of such agreements. Therefore, the bankruptcy court might well make use of that forum to resolve claims of a union arising from the rejection of its collective bargaining agreement, especially if it appeared that those questions would unduly complicate the proceedings before the court of bankruptcy. If a referee, as opposed to a district court judge, handles the bankruptcy, he might conclude that a court under section 301 would bring greater competence to bear on questions of labor relations than he could. Of course, by referring these claims to a court sitting under section 301, the bankruptcy court agrees to be bound by the decision of that forum and the possibility of conflicting orders does not arise.

The second situation in which the section 301 court may be invoked to resolve claims arising from the rejection of a collective bargaining agreement is that in which the court of bankruptcy treats the union's claims as unliquidated and hence excludes them from the final bankruptcy order. Such unliquidated claims are considered to be unprovable and are therefore not discharged by the final order.⁸¹ Thus these claims remain enforceable against the employer in a suit under section 301 even after the bankruptcy proceedings have been concluded. The bankruptcy court might follow this course of action if it felt that the union claims were without merit, that they were simply not susceptible to liquidation, or that consideration of those claims would unreasonably delay the bankruptcy proceedings. Regardless of the reason, in a case in which a union's claims are excluded, as unprovable, from the final order of the

79. 45 U.S.C. §§ 151-88 (1964). "[N]o judge or trustee acting under this title shall change the wages or working conditions of Railroad employees except in a manner prescribed in the Railway Labor Act." Bankruptcy Act § 77n, 11 U.S.C. § 205(n) (1964).

80. NLRA §§ 7-8, 29 U.S.C. §§ 157-58 (1964). Bankruptcy Act § 272, 11 U.S.C. § 672 (1964).

81. The basis for a creditor's presentation of a claim in a bankruptcy proceeding is Bankruptcy Act § 57d, 11 U.S.C. § 93(d) (1964): "Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objections to their allowance shall be made by the parties in interest." The union's claim, however, arising from the rejection, would be in the nature of an unliquidated claim; and a provision to § 57d states that such a claim "shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation." 11 U.S.C. § 93(d) (1964). Thus, notwithstanding the fact that the collective bargaining agreement was rejected and thereby breached, the bankruptcy court might dismiss a union's claim for damages resulting from that breach. However, any claim so dismissed would not be discharged by the final order of the bankruptcy court. Bankruptcy Act § 17, 11 U.S.C. § 35, (1964). Thus an enforceable claim would survive the bankruptcy and could be the basis of a § 301 suit by the union.

bankruptcy court, an action under section 301 is available to the union. Utilized in this manner, the section 301 court can complement the bankruptcy court in order to protect the interests of the union without interfering with the proceedings in bankruptcy.

Whether the relief for the rejection of the collective bargaining agreement is to be fashioned by the bankruptcy court or by the section 301 court sitting in one of the two situations discussed above, the question of the appropriate remedy arises. It has been suggested above that the full range of equitable powers should be used to provide a suitable remedy. For instance, a remedial order might incorporate those terms of the rejected collective bargaining agreement which would not jeopardize the bankrupt's liquidation or reorganization,⁸² and which represent substantial union or employee rights. In any event, a court, in fashioning a remedy for the particular case, must make an effort to balance the needs of bankruptcy administration with the policies behind the federal labor laws.

In seeking specific performance of the rejected contract's arbitration provision in *Turney*, the union might be said to have sought an inappropriate remedy. In a fundamental sense, a claim for specific performance goes beyond seeking a remedy for breach. Indeed, since specific performance amounts to enforcement of the rejected contract, that remedy, if carried to the extreme, could frustrate the whole purpose of rejection—to free the bankrupt from the burdens of an existing contract.

In seeking specific performance, the union was, in effect, attempting to establish a new labor concept—the successor doctrine⁸³—in cases in which a trustee in bankruptcy is the succeeding employer. The successor doctrine, announced by the Supreme Court in *John Wiley & Sons v. Livingston*,⁸⁴ reflects a general concern for the protection of employees from such changes in employment conditions as result from corporate sale or merger. In the *Wiley* case, the Court held that “the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances the successor employer may be required to arbitrate with

82. For example, if the trustee rejected the union contract in order to escape burdensome featherbedding provisions, the court's ruling could require that those employees who were retained by the trustee during the continued operations of the bankrupt be employed in accordance with the reasonable wage and seniority terms of the rejected contract, since those terms were not themselves harmful to the bankrupt. Any terms thus incorporated in a court's order would control the employment relation pending negotiation of a new collective bargaining agreement between the trustee and the union.

83. See generally Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 NW. U. L. REV. 735 (1969).

84. 376 U.S. 543 (1964).

with the union under the agreement."⁸⁵ That statement went a step beyond previous NLRB decisions which had held that after termination of a union contract, an employer's action in making unilateral changes in the terms and conditions of employment without negotiating with the union was an unfair labor practice.⁸⁶ The successor doctrine recognizes that although the normal operation of contract law would not bind a successor to the terms of a collective bargaining agreement, such an agreement is not an ordinary contract.⁸⁷ Furthermore, according to the doctrine, federal labor policy requires that the successor assume the employer's duties under the union contract, including arbitration when it is provided.⁸⁸ The reasoning seems to be that if a bargaining obligation survives a succession, there is no reason why the collective bargaining agreement should not also be binding on the successor, insofar as the terms are reasonable.⁸⁹

The union sought a holding in the *Turney* case that the arbitration terms survived the trustee's rejection of the union contract.⁹⁰ While the court might well have ordered independent arbitration of the dispute as a remedy in such a case, clearly the terms of the rejected contract were unenforceable.⁹¹ Thus, the court in *Turney* could easily have denied the union's specific-performance request on the ground that no enforceable contract existed after rejection.⁹²

85. 376 U.S. at 548.

86. See text accompanying notes 39-42 *supra*.

87. 376 U.S. at 550.

88. See Goldberg, *supra* note 83.

89. See Goldberg, *supra* note 83, at 811-12.

90. A recent case has held that successorship doctrine is generally inapplicable in a bankruptcy situation. See *Eastern Freightways, Inc. v. Local Union No. 707*, 300 F. Supp. 1289 (S.D.N.Y. 1969), *affd.*, CCH BANKR. L. REP. ¶ 63,348 (2d Cir. Jan. 7, 1970).

91. However, since both a bankruptcy court and a district court sitting under § 301 have full equity powers, whatever forum properly assumed jurisdiction of the union's suit could certainly have included some of the terms of the rejected contract in its remedial order. See note 69 *supra* and note 82 *supra* and accompanying text.

For an argument that the successorship doctrine should apply to collective bargaining agreements in the bankruptcy context and that arbitration under such contracts should be enforced, see Comment, *Collective Bargaining and Bankruptcy*, 42 S. CAL. L. REV. 477 (1969). That Comment argues that the arbitrator is in a position to modify the terms of the agreement to prevent an unreasonable burden on the bankrupt estate, and it bases its argument on *Steelworkers v. Reliance Universal, Inc.*, 335 F.2d 891 (3d Cir. 1964). Generally, however, the *Reliance* case's statement of the freedom of the arbitrator has not been interpreted so broadly. See Goldberg, *supra* note 83, at 780-83. Goldberg's view appears to be the sounder one in view of the traditional restriction of the basis for an arbitrator's award to the basic terms of the contract. In any event, the necessity for relying on the arbitration provision of the old collective bargaining agreement is obviated by a full appreciation of the role of the bankruptcy court and the possibility of resort to an action under § 301.

92. Of course it might also have declined to exercise jurisdiction under § 301 as an improper forum. See text accompanying notes 73-76 *supra*.

Although the court recognized that the trustee had a right to reject the agreement and consequently that specific performance should not be awarded, it erred in failing to recognize that rejection constitutes a breach. Not realizing that the union's suit under section 301 was essentially for breach—the violation of a collective bargaining agreement—the court simply dismissed the action. The dismissal of the union's suit for specific performance may have then caused the court to feel that the union was without a remedy for the trustee's departure from the terms of the rejected contract, and that feeling may have contributed to the court's subsequent willingness in *Durand* to accept the Board's characterization of the trustee's departure as an unfair labor practice. The court's construction of the scope of unfair labor practices to include a departure from the terms of a rejected contract appears to have been an effort to provide some protection of union rights that were not adequately protected and thus to fill a remedial void that was due to the court's own earlier failure both to recognize its ability and obligation as a court of bankruptcy to protect the interests expressed in the federal labor policy and to realize the proper role of an action under section 301. Should a departure from the terms of a rejected contract be considered a unilateral change and thus an unfair labor practice, the utility of rejection under the Bankruptcy Act could be seriously impaired.⁹³ For this reason and for those discussed above, the bankruptcy court, or a section 301 court in limited situations, should be recognized as the appropriate forum to redress injury caused by a trustee's authorized rejection of a collective bargaining agreement and his departure from its terms.

93. See note 59 *supra* and text accompanying notes 28, 64 *supra*.