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Wage Earner Plans: Wage Deduction Orders and the Employer's Power to Discharge

John J. Finn

WAGE EARNER PLANS: WAGE DEDUCTION ORDERS AND THE EMPLOYER'S POWER TO DISCHARGE

I. *In Re Jackson*[1]

Jackson, an employee of the Farmall Works of International Harvester Company, filed a petition for relief under Chapter XIII of the Bankruptcy Act.[2] On April 14, 1967, the referee in bankruptcy entered an order confirming the Wage Earner Plan, which provided for monthly payments to a trustee, and appointing a trustee who was to disburse the funds to Jackson's creditors according to the plan. The debtor failed to make regular payments to the trustee; and on January 24, 1968, at the request of the trustee, the referee entered an order requiring International to make weekly deductions from the wages of the debtor and to pay the same to the trustee. International complied with the order. But, invoking a provision in the collective bargaining agreement giving it the right to discharge any employee who does not obtain a release of any outside demand against his wages, International notified Jackson that his employment would be suspended and eventually terminated, unless the wage deduction order was released.

On February 12, 1968, the debtor filed a petition with the referee requesting that International be enjoined from suspending or terminating his employment. A temporary injunction ensued, International moved to dissolve the injunction, and on June 27, 1968, the referee permanently enjoined International. A petition for review was then filed by International.[3]

International admitted the authority of the referee to order it to make the deduction from wages but denied his authority to enjoin it from terminating or suspending the employment of the debtor solely because of such order. International contended that the referee lacked the authority to enjoin it from exercising its contractual right because of the policy of the Labor-Management Relations Act[4] favoring collective bargaining agreements. Furthermore, under Supreme Court cases interpreting and applying that Act,[5] the grievance procedure under a collective bargaining agreement is the exclusive course open to an employee covered thereby who is suspended or discharged, or threatened with either. Since International's collective bargaining agreement provided for arbitration of grievances, Jackson had no right to petition the Bankruptcy Court for an injunction.[6] International also contended that the referee lacked authority to issue the injunction because, in view of the availability of an alternative order against the employee-debtor himself, the injunction was not really "necessary" for the enforcement of the plan as required by the Bankruptcy Act.[7] The court held that the referee in bankruptcy does have the legal authority under these circumstances to enjoin International

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1 290 F. Supp. 872 (S.D. Ill. 1968).

2 11 U.S.C. §§ 1001-86 (1964).

3 290 F. Supp. at 874.

4 29 U.S.C. §§ 141-87 (1964).

5 See Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

6 290 F. Supp. at 875.

7 Id.

from terminating the debtor's employment because of the wage deduction order.

Since the enactment in 1938 of the Chandler Act,[8] including Chapter XIII, one of the practical difficulties in effectuating wage earner plans has been enlisting the cooperation of employers in making wage deductions.[9]

> In the Kansas City area, for example, when the Chapter XIII proceedings were first undertaken, many employers objected to the added work made necessary to comply with the orders of the Court and refused to cooperate. Of course the Court had power to enforce the decree by contempt proceedings and a few contempt proceedings were actually instituted.[10]

Employers, however, were able both to avoid contempt proceedings and to avoid cooperating with the court. One writer has noted that "[s]ome employers may be adamant in their refusal to make deductions of this type, preferring to discharge the employee rather than obey the court order."[11] This was the course chosen by International in the *Jackson* case. It is significant that the writers mentioning this problem,[12] including referees experienced in Chapter XIII proceedings, do not question the right of employers to take such action. "While the court has the power to order the employer to pay the trustee directly, it may not be practicable to do so if such an order would cause termination of the debtor's employment."[13] The *Jackson* case is significant because it is the first reported in which a bankruptcy court has enjoined an employer from discharging a debtor-employee. The importance of the case is heightened by the fact that this denial obviated a right to discharge for a cause specifically enumerated in a collective bargaining agreement. Obviously this decision, if followed in the future, will contribute considerably to the effectiveness of Chapter XIII wage earner plans. But at the same time it imposes a heretofore unrecognized restriction on an employer's right to discharge his employees. Whether this case establishes a wise precedent depends upon the balance which can be struck between the employer's rights, the employee's needs, public policy and existing legislation.

II. The Conflict with the Labor-Management Relations Act

International's first argument suggested that a conflict exists between the status under the Labor-Management Relations Act of its bargained-for

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[8] See Carpenters Local 2746 v. Turney Wood Prods., Inc., 289 F. Supp. 143, 148 (1968). The Chandler Act, Act of June 22, 1938, ch. 575, 52 Stat. 930, made considerable changes in the Bankruptcy Law.

[9] See generally Brown, A Primer on Wage-Earner Plans Under Chapter XIII of the Bankruptcy Act, 17 Bus. Law. 682 (1962); Bundschu, Administration of Wage Earners' Plans in the Bankruptcy Court, 18 Ref. J. 55 (1944); Hess, Wage-Earner Plans in Oregon, 47 Ore. L. Rev. 146 (1968); Kennedy, Debt Pooling Arrangements vs. Chapter XIII Proceedings, 32 Ref. J. 109 (1958); Pomeroy, The Wage Earner and the Bankruptcy Act, 2 Portland U.L. Rev. 2 (Spring 1952); Zubrensky, The Why and How of Federal Wage Earners' Plans, 3 Prac. Law. 35 (March 1957).

[10] Pomeroy, supra note 9, at 5.

[11] Kennedy, supra note 9, at 113.

[12] See Brown, Bundschu, Hess, Kennedy, Pomeroy, Zubrensky, supra note 9.

[13] Hess, supra note 9, at 149.

right (admittedly a discretionary right) to discharge employees who suffer demands against wages and the equity power of the referee under the Bankruptcy Act to enjoin an employer from exercising that right. International contended that federal policy favors the practice of collective bargaining and the settlement of disputes by bargaining between employers and representatives of their employees. The court responded that in this case no such conflict arose since the Labor-Management Relations Act does not undertake to regulate bankruptcy proceedings. The court felt that International was in a position no different from that of an employer who has no union contract. International had simply the same discretion as such an employer to decide whether to discharge an employee who suffers demands against his wages. The court assumed that an employer without a union contract could be validly enjoined from discharging an employee solely because of a wage deduction order; and that, since "[s]urely nothing in the Labor Management Relations Act, or any decision of court in relation thereto, means that by collective bargaining agreement an employer can create for himself the authority to decide whether a valid wage deduction order of a court of bankruptcy shall be effective or not,"[14] an injunction against International is equally valid. In other words, the fact that International's right was incorporated into a collective bargaining agreement gave it no special status.

Another recent case, although very different factually, raised a question regarding the status of a collective bargaining agreement in a bankruptcy proceeding. In *Carpenters Local 2746 v. Turney Wood Prods., Inc.*[15] the issue stated by the court was whether the trustee of a bankrupt corporation has the power to reject as an executory contract a collective bargaining agreement in force between the bankrupt and a labor union at the time of the filing of the petition in bankruptcy.[16] Here Section 70b of the Bankruptcy Act, authorizing a trustee in bankruptcy to reject executory contracts, was involved. The union did not contest that the collective bargaining agreement was an executory contract nor that in general a trustee may reject an executory contract. However, the union did argue that "federal legislation in the field of labor relations has so preempted the field as to take collective bargaining agreements out of the scope of section 70b."[17] The court viewed this issue as a question involving "the status of a labor contract in a straight bankruptcy proceeding"[18] and termed it "an important question as to the relationship between federal labor legislation, namely the National Labor Relations Act . . . and the Labor Management Relations (Taft-Hartley) Act . . . on the one hand, and section 70b of the Bankruptcy Act . . . on the other hand."[19] The court rejected the union's contention on the ground that it implied a conflict between federal labor legislation and the Bankruptcy Act which the court did not believe to exist. It based its conclusion on the

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[14] 290 F. Supp. at 876.

[15] 289 F. Supp. 143 (W.D. Ark. 1968).

[16] Id. at 144.

[17] Id. at 147.

[18] Id. at 149.

[19] Id. at 144.

absence of any language in either the labor legislation or the Bankruptcy Act which would exclude collective bargaining agreements from the operation of section 70b, and attributed added significance to this fact because of the presence of such exclusionary language in section 77n.[20] The court also noted the lack of special status for collective bargaining agreements in proceedings under Chapters X and XI of the Bankruptcy Act, citing cases[21] holding that the power to reject executory contracts under these chapters extends to collective bargaining agreements.

International's argument in the principal case is substantially the same as that of the union in *Carpenters*. International claimed that the favored position of the Labor-Management Relations Act put International's contractual right to discharge an employee for a stated cause beyond the power of a referee under Chapter XIII to issue orders to employers. Although previous decisions have dealt specifically with the power of the Bankruptcy Court to reject collective bargaining agreements as executory contracts under other chapters of the Bankruptcy Act, these cases did involve a question of the status of a collective bargaining agreement in bankruptcy proceedings. Since the courts have found no special status for such agreements in proceedings under other chapters of the Bankruptcy Act, there is no reason why such status should exist in a Chapter XIII proceeding. It would seem that the absence of exclusionary language in Chapter XIII would have the same implications as it did for section 70b in *Carpenters*, particularly since Chapter XIII, Chapters X and XI and section 70b were enacted as part of the same statutory scheme.[22] Although the court in the principal case did not employ this analysis, its conclusion that International had only the same discretionary right as an employer without a union contract is consistent with findings that a collective bargaining agreement has no special status in a bankruptcy proceeding. If it is asumed that a referee has authority to enjoin an employer without a union contract from discharging an employee solely because of a wage deduction order, it is logical that the employer should not be able to negate that authority simply by incorporating his previously possessed right into a collective bargaining agreement.

Since International's contract provision gives its right to discharge no special status, the referee's power to enjoin it from discharging Jackson depends upon the referee's power generally to enjoin employers from such action. In assuming this general authority of the referee the court relied on Sections 658[23] and 2(a)[24] of the Bankruptcy Act. Section 658 provides, with respect to wage earner plans:

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[20] Id. at 149.

[21] Id. at 150. See In re Klaber Bros., Inc., 173 F. Supp. 83 (S.D.N.Y. 1959) (Chapter XI); In re Public Ledger, Inc., 63 F. Supp. 1008 (E.D. Pa. 1945), rev'd on other grounds, 161 F.2d 762 (3d Cir. 1947) (Chapter X).

[22] See Carpenters Local 2746 v. Turney Wood Prods., Inc., 289 F. Supp. 143, 148 (1968); Copenhaver, Bankruptcy—Rights and Powers in Chapter XIII, 68 W. Va. L. Rev. 375, 377 (1966). See also Nadler, Rehabilitation of the Insolvent Wage Earner Under the Bankruptcy Act: A Challenge to Minnesota, 42 Minn. L. Rev. 377, 378 (1958).

[23] 11 U.S.C. § 1058 (1964).

[24] 11 U.S.C. § 11(a)(15) (1964).

> During the period of extension, the court—
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> (1) shall retain jurisdiction of the debtor and his property for all purposes of the plan and its consummation and shall have supervision and control of any agreement or assignment, provided for in the plan, in respect to any future earnings or wages of the debtor; and
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> (2) may issue such orders as may be requisite to effectuate the provisions of the plan, including orders directed to any employer of the debtor. An order directed to such employer may be enforced in the manner provided for the enforcement of judgments.

Section 2(a), on jurisdiction of courts of bankruptcy, provides that:

> (a) The courts of the United States hereinbefore defined as courts of bankruptcy . . . are invested . . . with such jurisdiction at law and in equity . . . to—
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> . . . .
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> (15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title: *Provided, however,* That an injunction to restrain a court may be issued by the judge only . . . .

As defined in the Bankruptcy Act, the word "court" includes the referee.[25]

The language of the above provisions clearly gives broad equitable powers to a referee in bankruptcy to issue orders to a debtor's employer. Wage deduction orders are frequently used to effectuate wage earner plans. Reported decisions pertaining to such orders are few,[26] but the background of Chapter XIII demonstrates that the orders were within the scope of congressional intention. Prior to the enactment of Chapter XIII, which first provided for wage earner plans, during the Depression years considerable concern centered on the increasing number of bankruptcies among wage earners. In Birmingham, Alabama, special referees were appointed to develop a rehabilitation program for wage earners that would allow them to avoid the stigma of bankruptcy and to provide for the payment of creditors out of the debtor's future earnings rather than for partial satisfaction of debts out of his existing assets.[27] Plans worked out for wage earners were often ineffective because of default on the part of the wage earners. The following excerpt describes developments up to the enactment of Chapter XIII:

> Judge Nesbit[28] primarily took the position that once a plan had been

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[25] 11 U.S.C. § 1(9) (1964).

[26] See Copenhaver, supra note 22.

[27] See Haden, Chapter XIII Wage Earner Plans—Forgotten Man Bankruptcy, 55 Ky. L. J. 564 (1967).

There are two types of wage earner plans. One is an extension, providing for payment of creditors in full. The other is a composition, providing for payment of a percentage to creditors in satisfaction of their claims. Note, Chapter XIII of the Bankruptcy Act: As Maine Goes, So *Should* the Nation, 5 San Diego L. Rev. 329, 331-32 (1968).

[28] Referee Nesbit was one of the special referees appointed in Birmingham and he

> worked out for a wage earner and accepted by his creditors it then became the duty of the court to see that the debtor or bankrupt carried out the plan by making prompt payments of the amount agreed upon. When a debtor failed to make payments as agreed upon, the Referee would issue an order on this individual's future earnings which in effect caused the employer to either make a deduction of the monthly payments or send the employee's entire earnings into court where the deduction was made.
>
> This procedure was frowned upon by the appellate courts. However, it was desirable and everyone felt that it was necessary in order to successfully conclude a reasonable percentage of the cases filed. Therefore, when the Chandler Act was written, many of the special procedures developed by the Referees in Birmingham were adopted and written into the new Chandler Act.[29]

It is obvious, then, that section 658, "including orders directed to any employer of the debtor," was written with wage deduction orders in mind. But, as noted previously, uncooperative employers could circumvent such orders by terminating the employment of employee-debtors. Thus, where the employer's cooperation could not be obtained, the bankruptcy court usually had to resort to the alternative of an order against the debtor himself. But no attempt was made to enjoin the employer from discharging the debtor.

That such an injunction was not considered is understandable in view of earlier court decisions holding that an employer could discharge his employees for any reason or no reason. "[W]here no contract . . . stands in the way, it is the unquestioned right . . . of the employer to discharge at his pleasure. . . ."[30] This right can be limited by law, as noted by the Supreme Court in *United Steelworkers v. Warrior & Gulf Nav. Co.* "Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law. . . ."[31] The rationale for this position is that the "employer has an interest in running his business as he sees fit."[32] It is not surprising that while this attitude prevailed bankruptcy courts would be hesitant to intervene.

Despite this background, the court in the *Jackson* case was not at all hesitant in assuming the authority of the referee to enjoin Jackson's discharge. This shift in attitude is not entirely unprecedented. In *Petermann v. Teamsters Local 396*,[33] the union, as employer, discharged its business agent because he refused to perjure himself before a legislative investigating committee. The union-employer claimed the right to discharge its employee

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was recruited by Chandler to prepare the draft of Chapter XIII. Note, Chapter XIII of the Bankruptcy Act: As Maine Goes, So *Should* the Nation, supra note 27, at 330.

[29] Letter from Referee Allgood to the author in Haden, supra note 27, at 582-83 (footnote added).

[30] Union Labor Hosp. Ass'n v. Vance Redwood Lumber Co., 158 Cal. 551, 554, 112 P. 886, 888 (1910).

[31] 363 U.S. 574, 583 (1960).

[32] 14 Rutgers L. Rev. 624 (1960). See the cases cited therein at 624 n.4.

[33] 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

because the employment contract was terminable at the will of either party. The court agreed with the general principle but qualified it:

> An examination of plaintiff's first cause of action discloses that he is predicating his right to redress upon an employment contract which does not contain any fixed period of duration. Generally, such a relationship is terminable at the will of either party. . . . However, the right to discharge an employee under such a contract may be limited by statute . . . or *by considerations of public policy*.[34] (Emphasis added.)

The *Petermann* holding has been recognized as a new development:

> [T]he extension of the holding which denies an employer the right to discharge an employee under a contract terminable at will where the reasons underlying the discharge are contrary to public policy appears to be an innovation in the law of employment relationships, since it has universally been held that under such a contract an employer may discharge his employees for any reason, without subjecting himself to liability.[35]

But at least in circumstances like those in the *Petermann* case, where the employee would have been required to commit perjury to keep his job, the decision would appear to be well justified and the following comment is especially appropriate:

> Notwithstanding the oft-repeated admonition that public policy is an "unruly horse" and should be used with care in any judicial decision changing conventional common-law doctrines, where, as here, the policy consideration is clear and strong, its application would appear mandatory.[36]

There are two bases, then, other than contractual restrictions, on which an employer's right to discharge employees can be limited: statutory grounds or public policy considerations. In the principal case it is arguable both that the Bankruptcy Court's authority to effectuate a wage earner's plan by issuing "orders directed to any employer of the debtor" is a statutory limitation and that the public policy underlying Chapter XIII limits the employer's right to discharge. As a statutory limitation, Chapter XIII provides for wage deduction orders and also authorizes the Bankruptcy Court to issue any orders necessary to effectuate the wage earner plan. The court is also empowered to "issue such process . . . as may be necessary for the enforcement of the provisions of this Act. . . ."[37] If it is conceded that the right of the employer to discharge his employees is not absolute, there can be no bar to an injunction against discharge solely because of a wage deduction order necessary to complete the wage earner plan where the referee is given such broad powers to

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[34] Id. at 188, 344 P.2d at 27.

[35] 14 Rutgers L. Rev., supra note 32, at 624.

[36] Id. at 626.

[37] See note 24 supra.

protect the plan. The court in *Jackson* frames the issue as a rhetorical question:

> It is here conceded that the wage deduction order to an employer is proper to effectuate a wage earner plan. May such order then be rendered a complete nullity by an employer discharging the debtor from employment for no reason except that he suffered the wage deduction order to be issued?[38]

This view draws further support from cases holding that, to effectuate the purpose of the proceedings, equity powers in Chapter XIII cases should be more liberally exercised and injunctive relief more readily granted than in other proceedings.[39] The policy considerations here are, perhaps, less striking than those in *Petermann*. Nevertheless, as the court notes,

> Congress has decided that this is in the interest of the creditors and trade and commerce generally. It will tend to see debts paid rather than to be discharged unpaid in ordinary bankruptcy, and it may help to bring order to the financial lives of debtor wage earners.[40]

The primary purpose of Chapter XIII is the rehabilitation of wage earner-debtors,[41] a goal which Congress has determined to be in the public interest. It seems reasonable to limit the employer's right to discharge employees if the exercise of this right frustrates the effectiveness of Chapter XIII. On the basis, then, of the broad statutory powers given to the referee to issue orders to implement wage earner plans and of the public policy underlying Chapter XIII, the referee has the authority to enjoin an employer from discharging an employee solely on account of a wage deduction order. The incorporation of the employer's right to discharge into a collective bargaining agreement subject to federal legislation does not place that right beyond the reach of the referee's authority.

However, in the *Jackson* case International's union contract argument presented a further difficulty for the court. International contended that, in the light of Supreme Court decisions holding that the grievance procedure under a collective bargaining agreement is the exclusive course open to an employee covered thereby who is suspended or discharged or threatened with either, Jackson had no right to seek recourse through the Bankruptcy Court. The contract provision in question authorized discharge of employees who suffered demands against wages for which they did not obtain a release.[42] The court agreed with International that wage deduction orders issued by the referee were clearly within the scope of that contract provision and conceded that, but for the bankruptcy proceeding, Jackson could not bring suit for contract violation due to his discharge. But, the court said,

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38 290 F. Supp. at 874-75.

39 See In re Bradford, 268 F. Supp. 896 (N.D. Ala. 1967); In re Arzaga, 204 F. Supp. 617, 620 (S.D. Cal. 1962).

40 290 F. Supp. at 876.

41 Hallenbeck v. Pennsylvania Mut. Life Ins. Co., 323 F.2d 566, 570 (4th Cir. 1963); In re Hendren, 240 F. Supp. 807 (S.D. Ohio 1965).

42 290 F. Supp. at 875.

> Debtor's action here is not a suit for contract violation, or an effort to substitute this court for the arbitrator under the contract. No question of contract interpretation or application is really before this Court. Debtor's action here is in the nature of a report to the Bankruptcy Court that the Wage Earner Plan under administration, and the wage deduction order, are in jeopardy. . . .[43]

The court's reasoning here is sound. True, as the Supreme Court held in *Republic Steel Corp. v. Maddox*,[44] under ordinary circumstances contract grievance procedures must, unless specified as nonexclusive, be exhausted before legal redress is sought. There the Court stated:

> As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. . . . [U]nless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. . . . And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.[45]

But it has been stated that "[a]n employee is not required to exhaust his administrative remedies . . . where it is shown that it would be useless to go through the steps of the grievance procedure."[46] For example, in *Protective Workers v. Ford Motor Co.*[47] the court stated that the "briefs of the defendant . . . show clearly that the defendant did not consider its action as constituting a breach of the bargaining agreement and that it would have been useless to have gone through the various steps of the grievance procedure. . . . Parties are not required to do a useless thing."[48] If in the *Jackson* case the employee had claimed that the wage deduction order of the referee was not within the scope of the contract provision and that therefore his discharge was wrongful, that claim would have been one for arbitration since it would involve interpretation of the contract. But with that question removed from the case, either because through arbitration the discharge was found to be valid under the terms of the contract or because, as here, the parties did not dispute its validity, no contractual dispute remains for an arbitrator to decide. The question facing the court was whether, even though International had the right to discharge Jackson under the terms of the contract, the referee had the power to enjoin the exercise of that right. Under the circumstances of the case that question would have remained even if arbitration

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[43] Id. at 876.

[44] 379 U.S. 650 (1965).

[45] Id. at 652-53.

[46] Howlett, Contract Rights of the Individual Employee as Against the Employer, 8 Lab. L.J. 316, 321 (1957). See also the cases cited therein at 321 n.27.

[47] 194 F.2d 997 (7th Cir. 1952).

[48] Id. at 1002.

had first been attempted. Thus it would have been "useless" to require arbitration.

However, some potential conflict still remains with the province of arbitration. *Jackson* does not prevent discharge of a debtor for substantial reasons other than a wage deduction order, even though such discharge would have the effect of nullifying the order. International stated that its sole reason for discharging Jackson was the wage deduction order, but pointed out that the injunction could require the bankruptcy court to examine the stated cause of any future suspension or discharge to determine whether the injunction had been violated. The same result could be reached in the situation where the employer initially stated another cause for discharge against a debtor who happened to have had a wage deduction order issued. In either case it would have to be determined whether the stated cause was a subterfuge for evading the wage deduction order. The court felt that it would be its function to resolve that question:

> [I]f other reason of any substance does exist at any time for suspension or discharge, such action would not violate the injunction. *Such determination by the Court* should not be in any sense a determination of whether "cause" for discharge existed under the terms of the collective bargaining agreement, and the procedures contained in that agreement should govern that determination, if the employer's action were to be otherwise reviewed.[49] (Emphasis added.)

But, for the court to decide whether the wage deduction order was the actual cause of discharge, it would have to determine the merits of the stated cause. That determination would seem to be properly one for arbitration. The alternative would be to require the submission of the question of actual cause to arbitration and, if the arbitrator found no substantial cause other than the wage deduction order existed, the referee could then enjoin the discharge. On the other hand, it is conceivable that the bankruptcy court, with its interest in protecting its own proceedings, would be tempted to disregard an arbitrator's finding that there was merit to the stated cause for discharge. Thus under the *Jackson* ruling it appears that, so long as there were a wage deduction order in effect, a debtor employee threatened with discharge for any reason might be given an alternative recourse through the bankruptcy court in addition to the ordinarily exclusive arbitration procedure.

III. The Necessity Argument

In the foregoing discussion it was apparent that sections 658 and 2(a) of the Bankruptcy Act give broad powers to a referee to issue orders to effectuate wage earner plans. Section 658 specifies such orders "as may be requisite to effectuate the provisions of the plan" and section 2(a), "as may be necessary for the enforcement of the provisions of this Act." International contended that the referee's injunction in the *Jackson* case did not meet the "necessary" requirement. In support of this argument International cited *United States v. Krakover*,[50] where the court held that the United States,

[49] 290 F. Supp. at 875.

[50] 377 F.2d 104 (10th Cir. 1967).

as an employer, could not be required to obey a wage deduction order of a referee. Because of the immunity of the United States to suit, there would be no means to enforce the order. The court pointed out that the referee had an adequate alternative, an order to the debtor to endorse and turn over his paychecks to the trustee, which would not deprive federal employees of the benefit of Chapter XIII, and which would protect the trustee and the creditors, and which would not infringe upon the immunity of the United States. International argued that "[s]ince this possibility of an alternative order against the Debtor exists, the injunction against it is not 'necessary for the enforcement of the provisions of this Act.' "[51] The court answered that a wage deduction order, or an injunction against termination of employment of the debtor solely because of it, is not "unnecessary" simply because a less effective alternative exists. In providing for wage deduction orders, the court said, Congress recognized their superiority over orders against employees.[52] It observed that to adopt International's position would mean, in effect, that "[w]hile Referees do have authority to issue wage deduction orders to employers to effectuate Wage Earner Plans, if an employer decides to discharge such employee because of such order, then the Referee must withdraw the order to prevent the discharge and issue a new order against the employee to require endorsement of his paycheck."[53]

Although the referee has the authority to issue such orders to employers as are required to effectuate the wage earner plan, whether or not a collective bargaining agreement is involved, "the power to enjoin . . . is not absolute, but subject to the sound discretion of the Referee."[54] The basic question involved is the propriety of the injunction. Determination of its propriety requires a balance between the necessity of the injunction to the protection of the Bankruptcy Court's proceedings and the importance of the employer's right to discharge his employees. In this process of accommodation consideration must be given to the effect of the injunction upon the collective bargaining agreement and to the potentiality of infringement by the injunction upon contract grievance procedures.

A Chapter XIII wage earner plan is dependent for its funds upon the debtor's future earnings[55] and is entirely voluntary with the debtor.[56] But the experience of the bankruptcy courts administering such proceedings has been that it is almost always impractical to rely upon the debtor to make voluntary payments to the trustee.[57]

> After an impetuous start the debtor left to his own devices will all too often find it constitutionally impossible to carry on. Unless the capacity to miss payments is taken completely out of his hands—

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[51] 290 F. Supp. at 877.

[52] Id.

[53] Id.

[54] See In re Willett, 265 F. Supp. 999, 1003 (S.D. Cal. 1967).

[55] Bankruptcy Act § 601-84, 11 U.S.C. § 1001-84 (1964); In re Hendren, 240 F. Supp. 807 (S.D. Ohio 1965); In re Belkin, 232 F. Supp. 850, 852 (W.D. Mich. 1964).

[56] See In re Hendren, 240 F. Supp. 807, 807-08 (S.D. Ohio 1965). See also Copenhaver, supra note 22, at 375.

[57] Kennedy, supra note 9, at 113.

> unless he can be forced to make them—the plan is virtually doomed to failure before it starts.[58]

Believing that rehabilitation of these debtor-wage earners was an important public policy, the courts chose methods of ensuring payments, orders to employers to make deductions from the debtors' wages or to turn over debtors' entire paychecks to the trustee or orders to the debtors themselves to endorse and turn over their paychecks to the trustee. For these same reasons provisions were included in Chapter XIII requiring debtors undertaking wage earner plans to submit future earnings to the "supervision and control of the court for the purpose of enforcing the plan"[59] and authorizing "orders directed to any employer of the debtor."[60] All of the above-mentioned methods would appear to be effective for enforcing payments. But there is no question that the most effective method is some kind of wage assignment. One writer takes the position that

> [a] wage assignment from debtor to trustee is the key to a successful wage earner plan. Years of experience have taught the writer that the great majority of plans fail without such assignment. It cannot be stressed too strongly that the wage assignment is a *sine qua non* to success. . . .[61]

The major problem with orders to the debtors themselves would seem to be enforcement. The court may enforce such orders through contempt proceedings.[62] Contempt actions might be effective if the problem were simply a matter of debtors' unwillingness to obey the court orders. But debtors undertaking wage earner plans do so voluntarily and usually with the desire to pay off their debts.[63] Their major difficulty is the lack of self-discipline necessary to do so.

> If these debtors of good intentions were also persons of iron will, this power [to enforce payments] might not be of primary importance; but they are not persons of iron will or they wouldn't be in the condition they are in to begin with. The best intentions in the world can vanish like vapor with the first chill wind of adversity or under the first rosy blush of temptation.[64]

Under such circumstances the threat of contempt action might deter some, but not many. The more likely effect of this threat would be that debtors discontinue wage earner plans, as they may do,[65] and enter straight bankruptcy, the very result which Chapter XIII proceedings seek to avoid.

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[58] Id.

[59] Bankruptcy Act § 646(4), 11 U.S.C. § 1046(4) (1964).

[60] Bankruptcy Act § 658(2), 11 U.S.C. § 1058(2) (1964).

[61] Zubrensky, Successful Use of the Federal Wage Earner Plan, 9 Prac. Law. 31, 33 (October 1963).

[62] Kennedy, supra note 9, at 113.

[63] See, e.g., Kennedy, Zubrensky, supra note 9. See also Note, Chapter XIII of the Bankruptcy Act: As Maine Goes, So *Should* the Nation, supra note 28, at 330.

[64] Kennedy, supra note 9, at 113.

[65] See Rice v. Mimms, 291 F.2d 823 (10th Cir. 1961); In re Hendren, 240 F. Supp. 807 (S.D. Ohio 1965).

Certain administrative reasons also favor orders to employers over those to debtors: "It can readily be seen that with 8,000 payments due weekly, bi-weekly or monthly, a trustee's office would literally be engulfed if each debtor were required or allowed to make his payment in person."[66] Orders to employers requiring them to turn over the entire paychecks of debtors do not have the same drawbacks. But they do increase the administrative work, requiring the trustees to cash the checks, make the necessary deductions, and then remit the balance to the debtor. They were also felt not to be in the best interests of the debtor:

> This did not appeal to us because we did not like to handle all of his money, and furthermore felt that the least contact the wage earner was compelled to have with the court and its officers for the duration of the plan, the better off he would be. In other words we wanted the wage earner to become self reliant and to retain as much of his independence as possible under the plan.[67]

An accommodation of all these considerations results from the wage deduction method. This procedure includes several advantages:

> The best solution to this problem is to ask the employers, especially those with large numbers of employees in wage earner arrangements, to deduct the required sum from each pay check of each debtor in their employ, and once each month to remit the total sum deducted from all employee-debtors to the trustee, attached to a list showing the amount remitted for each debtor. This not only simplifies the trustee's work but is a convenience to the debtors who are thereby saved many trips to the trustee's office. . . . Naturally, the certainty and regularity of payment is greatly improved by this system.[68]

Thus, while wage deduction orders may not be necessary in an absolute sense, they are desirable as the most effective implementation of the policies underlying Chapter XIII.

On the other hand, of course, certain considerations weigh in favor of the employer's right to discharge employees because of demands against their wages. It is not uncommon for employers to be annoyed at wage attachments against their employees' wages[69] and frequently such attachments have been the cause of an employee's discharge. The usual justification is the burden of added bookkeeping and expense required of the employer. Another source of annoyance has been the collection methods used by creditors of the employees.[70] In the principal case, International used the argument of increased administrative burdens, pointing out that it "employs over 90,000 people in 21 plants at various locations and has frequent involvement with Wage Earner Plans under the Bankruptcy Act."[71]

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66 Maulitz, Operations Under Chapter XIII, 27 Ref. J. 68 (1953).

67 Bundschu, supra note 9, at 55.

68 Maulitz, supra note 66, at 68-69.

69 See, e.g. Hilliard & Hurt, Wage Earner Plans Under Chapter XIII of the Bankruptcy Act, 19 Bus. Law. 271, 273 (1963).

70 Id. at 273.

71 290 F. Supp. at 875.

However, offsetting factors should be recognized. Employers now generally make a variety of required and voluntary payroll deductions, and with bookkeeping systems so arranged, less inconvenience arises for employers today than did previously in compliance with wage deduction orders.[72] The court in *Jackson* notes that International makes deductions for almost 3200 of 3650 employees at its Farmall Works for the employees' credit union, for employees' purchases of United States Bonds, and for tax deductions required by law. Thus, "[c]ontinued compliance with the order will work no important hardship on International. . . ."[73] Perhaps even more important, instead of constituting an administrative burden, the use of Chapter XIII can actually protect employers from the problems involved with wage attachments. Under Chapter XIII the bankruptcy court can bar wage attachments based on claims filed both prior and subsequent to commencement of the wage earner plan.[74] On balance, then, since wage deduction orders can contribute considerably to the effectiveness of Chapter XIII proceedings and since the burden upon employers is not substantial, ample justification exists for restraining employers from resisting such orders by discharge of employees. As the court states in *Jackson*:

> Chapter XIII places a duty on the employer to assist in this manner in the rehabilitation of the Debtor, if the Referee so orders and the Debtor is otherwise worthy of continued employment, for the benefit of his creditors as well as the Debtor himself. This declared public policy should be carried out in the absence of unreasonable burden on the employer in so doing.[75]

IV. Conclusion

Chapter XIII is important social legislation designed to assist wage earners experiencing financial difficulty. Since inception it has encountered a number of difficulties impeding its acceptance in practice. One of the major obstacles has been the frequency of default on the part of debtors. Consequently, the history of Chapter XIII has been in large part one of experimentation by the bankruptcy courts with methods to obtain sufficient control over the funds essential to the success of wage earner plans so as to ensure the successful completion of a significant proportion of such plans. It has long been recognized that the most effective method of obtaining the necessary control is the issuance of a wage deduction order to the debtor's employer. But uncooperative employers have until the present time been able to frustrate such orders and, where they have done so, the courts have been required to employ less effective alternatives. The courts should not be made to resort to secondary methods where a wage deduction order does not place an unreasonable burden upon an employer. Certainly an employer has an interest in running his business as he sees fit. But the employees and the public offer countervailing interests to be considered. An employee ought to be able to take

[72] Maulitz, supra note 66, at 69.

[73] 290 F. Supp. at 878.

[74] 11 U.S.C. § 1014 (1964); See Note, Chapter XIII of the Bankruptcy Act: As Maine Goes, So *Should* the Nation, supra note 27, at 340.

[75] 290 F. Supp. at 878.

full advantage of Chapter XIII, enacted for his benefit, without fear of arbitrary action on the part of his employer. At the same time, a public interest exists in the rehabilitation of a large group of debtors. The presence of a collective bargaining agreement should be no bar to the restriction of the employer's right, especially when the restriction falls only on a single specific application of a contract provision.

Some conflict may arise between the desire of the bankruptcy court to supervise its orders and the exclusive province of collective bargaining grievance procedures. However, it is submitted that the bankruptcy courts will in the future exercise proper restraint and will refrain from usurping the arbitrator's function. Thus, *Jackson* was correctly decided on its facts and should provide a valuable precedent for the future.

JOHN J. FINN