Volume 18 | Issue 1 Article 12

1972

Labor Law - Successorship - Post-Transfer Viability of the Bargaining Unit Forms a Sufficient Basis to Impose a Duty to Bargain upon an Acquiring Employer Even Where the Absence of Any Connection Between the Predecessor and Successor Precludes More Extensive Liability

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LABOR LAW — SUCCESSORSHIP — POST-TRANSFER VIABILITY OF THE BARGAINING UNIT FORMS A SUFFICIENT BASIS TO IMPOSE A DUTY TO BARGAIN UPON AN ACQUIRING EMPLOYER EVEN WHERE THE ABSENCE OF ANY CONNECTION BETWEEN THE PREDECESSOR AND SUCCESSOR PRECLUDES MORE EXTENSIVE LIABILITY.

NLRB v. Burns International Security Services, Inc. (U.S. 1972)

Burns International Security Services, Inc. (Burns) was awarded a service contract to provide plant protection for the Lockheed Aircraft Service Company. These services had formerly been provided by Wackenhut Corporation whose employees were represented by the United Plant Guard Workers of America (UPG). Prior to its being awarded the contract, Burns was aware that the UPG had been recently certified as the exclusive bargaining representative of those employees and had entered into a three-year collective bargaining agreement with Wackenhut about two months before the latter's service contract expired.[1] Burns transferred fifteen of its own employees from other locations and hired 27 of those formerly employed by Wackenhut at the Lockheed site. As a condition of employment, Burns required the former Wackenhut employees to join the American Federation of Guards (AFG) which was subsequently recognized by Burns on the basis of an authorization card majority.[2]

The UPG demanded recognition as the exclusive bargaining agent of all guards at the Lockheed plant and further demanded that Burns recognize the collective bargaining agreement previously negotiated with Wackenhut. Burns refused, and unfair labor practice charges were filed. The National Labor Relations Board (the "Board") found that Burns had violated section 8(a)(2)[3] of the National Labor Relations Act (NLRA) by improperly assisting the AFG in organizing the employees and in subsequently recognizing that union.[4] The Board also determined that, since the takeover did not affect a significant change in the operation at the Lockheed site, Burns was a successor employer and its activities had violated section 8(a)(5)[5] of the NLRA in three respects: (1) by refusing to recognize and bargain with the UPG; (2) by refusing to

1. NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272, 275 n.1 (1972), *aff'g* 441 F.2d 911 (2d Cir. 1971).

2. *Id.* at 275.

3. National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1970).

4. 182 N.L.R.B. 348, 348-49 (1970). This ruling was not appealed. 406 U.S. at 276.

5. National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), provides that an employer who refuses to bargain collectively with the representatives of his employees shall be guilty of an unfair labor practice. The term "to bargain collectively" is defined in section 8(d), 29 U.S.C. § 158(d) (1970) as:

> [T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .

The Board also concluded that Burns violated section 8(a)(1), 29 U.S.C. § 158(a)(1) (1970), by interfering with those rights protected in section 7, 29 U.S.C. § 157 (1970).

honor the agreement negotiated between the UPG and Wackenhut; and (3) by unilaterally changing the terms and conditions of employment without consulting the UPG.[6] As a result, Burns was directed to recognize the UPG, to honor the Wackenhut agreement, and to compensate the employees for losses resulting from these violations.[7]

Burns sought review[8] of the Board's decision before the Court of Appeals for the Second Circuit and the Board cross-petitioned for enforcement.[9] The court enforced that portion of the Board's order requiring Burns to recognize and bargain with the UPG,[10] but relying on the policy of free collective bargaining enunciated in section 8(d)[11] of the NLRA and buttressed by the holding in *H.K. Porter Co. v. NLRB*,[12] it refused to enforce the portion requiring Burns to honor its predecessor's contract.[13] The Supreme Court, in a decision turning "to a great extent on the precise facts involved,"[14] concurred with the reasoning of the Second Circuit and *held* that, while the rule barring elections within one year following a valid Board certification of a bargaining representative[15] was sufficient to give rise to a duty to bargain on the part of the acquiring employer, the hiring of the predecessor's employees, of itself, formed "a wholly insufficient basis"[16] for compelling such an employer to assume *in toto* the predecessor's collective bargaining agreement. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

Burns represents the most recent attempt of the Court to come to terms with one of the more complex problems of labor relations — how to make the necessary accommodation between the conflicting policies of achieving peaceful labor-management relations and preserving freedom

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6. 406 U.S. at 276. In NLRB v. Katz, 369 U.S. 736 (1962), the Court, in an opinion by Brennan, J., held unilateral action by an employer with respect to matters which are subjects of mandatory bargaining to be violative of section 8(a)(5).

7. The Board may order a person committing an unfair labor practice to cease and desist from that activity and may require that person to take affirmative remedial action, such as reinstatement with or without back pay. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1970).

8. National Labor Relations Act § 10(f), 29 U.S.C. § 160(f) (1970), permits persons aggrieved by a final board order to seek review in any federal circuit court within the jurisdiction of which the unfair labor practice occurred or the person resides or transacts business.

9. National Labor Relations Act § 10(f), 29 U.S.C. § 160(f) (1970), provides that:

> Upon . . . filing . . . such petition, the court . . . shall have . . . jurisdiction . . . to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board . . . .

10. Burns Int'l Detective Agency, Inc. v. NLRB, 441 F.2d 911, 914–15 (2d Cir. 1971).

11. Section 8(d) specifically states that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1970).

12. 397 U.S. 99 (1970). *See* text accompanying notes 86–89 *infra*.

13. 441 F.2d at 914–15.

14. 406 U.S. at 274.

15. National Labor Relations Act § 9(c)(3), 29 U.S.C. § 159(c)(3) (1970).

16. 406 U.S. at 287.

of contract.[17] The increasing concern with the potentially disastrous effects which changes in ownership could have on the work force[18] has led to the utilization of the successor doctrine which attempts to insure that the employees' major safeguard, an established bargaining relationship,[19] would survive a business transfer.

The concept of successorship is a derivation from the law of corporations[20] and implies the existence of a "substantial continuity of identity in the business enterprise before and after the change" of ownership.[21] Although the determination of the existence of the prerequisite degree of continuity is made on the basis of "all the circumstances,"[22] certain factors are considered significant. Among these are the substantial continuity of the same business operations, with the same plant, work force, and supervisors producing the same product or services in the same geographic location.[23] An employer, once found to be a successor, must meet "certain burdens or obligations to which a similarly situated employer who is not a 'successor' would not be subject."[24] These include the duty to recognize and bargain with an incumbent union,[25] remedy a

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17. *See, e.g.*, Patrick, *Implications of the John Wiley Case for Business Transfers, Collective Agreements, and Arbitration*, 18 S.C.L. REV. 413 (1966).

18. This concern was one of the primary factors behind the decision in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964), wherein the Court observed:

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations.

Id. at 549. One writer has suggested that the damage may extend much further:

> If employees observe contractual law being ignored by the successor, with their contractual gains dissipated, they are trained that industrial laws may be disregarded at opportune moments. This, of course, invites industrial lawlessness, disrespect for industrial rules, and overall cynicism of the entire collective bargaining process.

Doppelt, *Successor Companies: The NLRB Limits the Options — and Raises Some Problems*, 20 DEPAUL L. REV. 176, 184–85 (1971).

19. 182 N.L.R.B. at 350.

20. In case of merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues in existence, the latter corporation is liable for the debts, contracts, and torts of the former . . . .

15 W. FLETCHER, PRIVATE CORPORATIONS § 7121 (rev. ed. 1961) (footnotes omitted).

Those Justices voting in the minority in *Burns* also felt the UNIFORM COMMERCIAL CODE, §§ 6–101 to –111 (bulk sales), to be apposite. 406 U.S. at 305 (Rehnquist, J., concurring and dissenting). In the labor law context, such an approach seemingly would provide some protection to employees against a successor taking over with knowledge of their pre-transfer claims.

21. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964).

22. Northwest Galvanizing Co., 168 N.L.R.B. 26, 29 (1967).

23. Gordon, *Legal Questions of Successorship*, 3 GA. L. REV. 280, 284 (1969). *See* Goldberg, *The Labor Obligations of a Successor Employer*, 63 NW. U.L. REV. 735, 793–806 (1969). "The critical factor is majority employment and an employer who satisfies this test will be found a successor regardless of the absence of any of these other factors." *Id.* at 805.

24. 406 U.S. at 300 (Rehnquist, J., concurring and dissenting).

25. Tom-A-Hawk Transit, Inc. v. NLRB, 419 F.2d 1025 (7th Cir. 1969) (finding of successorship upheld on facts essentially similar to those in *Burns*); Makela Welding, Inc. v. NLRB, 387 F.2d 40 (6th Cir. 1967) (authorization card majority); NLRB v. McFarland, 306 F.2d 219 (10th Cir. 1962) (totally independent successor); NLRB v. Auto Ventshade, Inc., 276 F.2d 303 (5th Cir. 1960) (transfer between relatives).

predecessor's unfair labor practices,[26] and arbitrate grievances arising under the terms of a predecessor's collective bargaining agreement.[27]

Also aiding a union seeking to maintain its status as bargaining agent despite a transfer of ownership is the "almost conclusive presumption"[28] of continued majority representation embodied in the certification bar rule which provides that, after the Board has certified the winner of a representation election:

> No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held.[29]

This rule has been interpreted to require that an employer bargain with a particular union for a period of one year[30] after certification.[31] While the existence of "unusual circumstances"[32] involving a "change in conditions" will vitiate this duty, "a mere change of employers or of ownership in the employing industry"[33] is not sufficient because:

> There is no reason to believe that the employees will change their attitude [toward union representation] merely because the identity of their employer has changed.[34]

Thus, unless an acquiring employer can establish that unusual circumstances exist, he will be required to bargain with an incumbent union.

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26. U.S. Pipe & Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1968). *See* Gordon, *supra* note 23, at 292–308; notes 93–96 and accompanying text *infra*.

27. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).

28. 406 U.S. at 279 n.3.

29. National Labor Relations Act § 9(c)(3), 29 U.S.C. § 159(c)(3) (1970).

30. In Celanese Corp. of America, 95 N.L.R.B. 664 (1951), the Board ruled that, even after the expiration of the one year period, the bargaining relationship would still be protected by a rebuttable presumption of majority representation. This principle was later applied to the business transfer problem:

> Where . . . the Board's certification of an incumbent union has been in existence for one year when a successor employer acquires the business, the union's majority status is presumed . . . unless a doubt as to the union's majority is raised in good faith and on reasonable grounds.

NLRB v. Downtown Bakery Corp., 330 F.2d 921, 925 (6th Cir. 1964) (citations omitted).

31. Brooks v. NLRB, 348 U.S. 96 (1954); Rockwell Valves, 115 N.L.R.B. 236 (1956); WTOP, Inc., 114 N.L.R.B. 1236 (1955); Shirlington Supermarket, 108 N.L.R.B. 579 (1954).

The absence of a certification does not mean that a successor has no duty to bargain. In Makela Welding, Inc. v. NLRB, 387 F.2d 40 (6th Cir. 1967), the Sixth Circuit enforced a Board order to bargain against a successor despite the fact that "the union was never certified following a Board election," but instead was designated bargaining representative on the basis of an authorization card majority. The court concluded that "[o]n the facts we do not find that the absence of an election is sufficient reason to excuse [the successor] from the obligation to bargain with the union." *Id.* at 46.

32. Such circumstances have been found in three situations:

> (1) the certified union dissolved or became defunct; (2) as a result of a schism, substantially all the members and officers of the certified union transferred their affiliation to a new local or international; (3) the size of the bargaining unit fluctuated radically within a short time.

Brooks v. NLRB, 348 U.S. 96, 98–99 (1954).

33. 406 U.S. at 279.

34. NLRB v. Armato, 199 F.2d 800, 803 (7th Cir. 1952).

The Board in *Burns* founded its decision upon the theoretical considerations which have facilitated the development and expansion of the successor theory since its inception. This attempt to ameliorate the tension between contract law and the desire for labor peace was evidenced as early as 1939 in *NLRB v. Colten.*[35] In that case, the Board sought enforcement of a remedial order against a successor. The successor argued that, even if the employing industry remained substantially the same, the employment relationship is contractual in nature and, therefore, any liability on the part of the predecessor co-partnership was terminated with the death of one of the partners. Accepting this argument as correct,[36] the Sixth Circuit, nevertheless, enforced the Board's order, reasoning that an "unimportant" change in the business entity must not be allowed to subvert the congressional interest in "industrial amity and . . . peace."[37]

The Supreme Court applied the same rationale in *John Wiley & Sons v. Livingston,*[38] a suit pursuant to section 301 of the Labor-Management Relations Act,[39] and required the employer to arbitrate grievances arising under the terms of a predecessor's collective bargaining agreement — Wiley had merged with the predecessor employer, Interscience. Placing strong reliance on the national policy of maintaining peaceful labor relations,[40] which is the foundation of not only the successor doctrine but also the judicial posture favoring arbitration,[41] the *Wiley* Court utilized what Justice Rehnquist later termed "a form of the 'successor' doctrine"[42] to compel arbitration. In language paralleling that employed by the Sixth Circuit in *Colten,* the Court concluded:

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract . . . . Therefore . . . the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.[43]

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35. 105 F.2d 179 (6th Cir. 1939).

36. *Id.* at 182.

37. *Id.* at 183.

38. 376 U.S. 543 (1964).

39. In Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), the Supreme Court held arbitration agreements to be specifically enforceable under section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a) (1970), which provides in part:

> (a) Suits for violation of contracts between an employer and a labor organization representing the employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

40. Labor-Management Relations Act § 203(d), 29 U.S.C. § 173(d) (1970).

41. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steekworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

42. 406 U.S. at 299.

43. 376 U.S. at 550.

In light of the Court's decision in *Burns*, however, other language in *Wiley* takes on a greater significance. In urging the *Wiley* Court to order arbitration, the union contended that such a result was compelled by the corporation laws of New York,[44] the state in which Wiley was located. In the alternative, the union argued that the national policy favoring arbitration would be seriously eroded if a successor were not required to comply with its predecessor's agreement to arbitrate.[45] Directing itself to this issue, the Court stated that the law to be applied was federal and was derived "from the policy of our national labor laws"[46] and from state law to the extent that it was an aid in developing such a national labor law.[47] Even though the remainder of the opinion placed great emphasis on the decision's policy considerations, this particular language left uncertain whether *Wiley* resolved the successor issue on the basis of the generally accepted rule dealing with mergers and survival of claims or whether the decision was derived solely from the broad policy consideration of fostering labor stability. Although such a distinction may appear, at first glance, to be little more than academic, the practical problems were reflected in the differing interpretations given to *Wiley* by several of the circuit courts and by the view taken by the Supreme Court in *Burns*.

The impact of *Wiley* was first felt in *Wackenhut Corp. v. United Plant Guard Workers*[48] and in *United Steelworkers v. Reliance Universal, Inc.*,[49] both of which were pending at the time the Supreme Court decided *Wiley*. These cases clearly demonstrated that the policy of labor stability was deemed to be the controlling factor in the *Wiley* Court's ordering arbitration. Like *Wiley*, both *Wackenhut*[50] and *Reliance*[51] involved the question of a successor's duty to arbitrate, but, unlike *Wiley*, the transfers involved sales of assets rather than a merger. If the narrow reading of *Wiley* were presumed correct, the general corporation law upon which it rested would compel a different result in situations in which the transfer

44. N.Y. BUS. CORP. LAW § 906(b)(3) (McKinney 1963), provides in part: The surviving or consolidated corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent corporations. No liability or obligation due or to become due, claim or demand for existing against any such corporation . . . shall be released . . . by such merger or consolidation.

This section replaced N.Y. STOCK CORP. LAW § 90 (McKinney 1951) which was in force at the time of the decision in *Wiley*. The recodification, however, was substantially similar to the earlier statute.

45. 376 U.S. at 547–48.

46. *Id.* at 548.

47. *Id.*

48. 332 F.2d 954 (9th Cir. 1964).

49. 335 F.2d 891 (3d Cir. 1964).

50. 332 F.2d at 954 (union sought specific performance of agreement to arbitrate).

51. 335 F.2d at 893 (union sought a declaratory judgment that a successor was obligated to assume its predecessor's collective bargaining agreement).

occurred other than by merger.[52] Although cognizant of the fact that certain language in the *Wiley* opinion could be construed as limiting that case to mergers, both tribunals rejected this argument. The Ninth Circuit observed in *Wackenhut*:

> [W]e are convinced that the Supreme Court did not rest the decision in Wiley on that narrow ground, but upon a broader view dictated by the policy of the national labor laws.[53]

The courts differed, however, on whether the *Wiley* policy was broad enough to justify compelling a successor to adopt in toto its predecessor's collective bargaining agreement. While the Sixth Circuit was of the opinion that the agreement negotiated between the incumbent union and the transferor-employer "remained the basic charter of labor relations . . . after the change in ownership,"[54] the court specifically refused to direct the successor to honor its predecessor's collective bargaining agreement.[55] In *Wackenhut,* the Ninth Circuit arrived at an opposite result. Relying on "the policy of the national labor laws" as explicated in *Wiley,* the court held that Wackenhut was a successor and thus obligated "to honor the collective bargaining agreement entered into by its predecessor."[56] While some commentators have differed with respect to the scope of the Ninth Circuit's decision,[57] at least two federal appellate tribunals have read the Ninth Circuit's language literally. In *Reliance,* the Sixth Circuit opined that *Wackenhut* makes "a pre-existing labor contract unqualifiedly binding upon [a successor]."[58] The Fifth Circuit, citing *Wackenhut,* reached a similar conclusion.[59]

The Fifth Circuit also interpreted *Wiley* in *United States Gypsum Co. v. United Steelworkers.*[60] The *Gypsum* court determined that an arbitrable issue was presented when the alleged rights flowed from a predecessor's contract but the grievance arose after the successor's acquisition. The court rejected the argument advanced by the successor that the

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52. *See, e.g.,* 15 W. FLETCHER, PRIVATE CORPORATIONS § 7122 (rev. ed. 1961), which provides:

> Generally where one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the tranferor, except: (1) where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporation; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts.

53. 332 F.2d at 958.
54. 335 F.2d at 895.
55. *Id.*
56. 332 F.2d at 958.
57. *See, e.g.,* Goldberg, *supra* note 23, at 775. *But see* Gordon, *supra* note 23, at 282; Sangerman, *The Labor Obligations of the Successor to a Unionized Business,* 19 LAB. L.J. 160, 166 (1968); Note, *The Contractual Obligations of a Successor Employer under the Collective Bargaining Agreement of a Predecessor,* 113 U. PA. L. REV. 914, 927 (1965).
58. 335 F.2d at 895 n.3.
59. U.S. Pipe & Foundry Co. v. NLRB, 398 F.2d 544, 547 (5th Cir. 1968).
60. 384 F.2d 38 (4th Cir. 1967).

"vested rights" aspect of *Wiley* would permit an arbitration order only if the grievances matured before the business transfer.[61]

While individually the holdings of these cases have undoubtedly raised more questions than they have answered, their cumulative effect upon the interpretation of *Wiley* reveals a clear trend emphasizing a broad policy of labor stability. *Wackenhut, Reliance,* and *Gypsum,* either directly or by implication, imposed certain contractual duties of a predecessor upon a successor who acquired a business in circumstances where corporation law would not compel that result.[62] The demise of the "vested rights" approach came in *Gypsum,*[63] wherein the court de-emphasized all but the national labor policy argument and thus extended *Wiley* to such a degree that the Board's decision in *Burns* was the only logical result.[64] As one commentator summarized the situation, *Wiley* "not only paved the road for the Board's *Burns* decision, but escorted the Board most of the way down it."[65]

Consequently, the *Burns* Court was faced with the difficult question raised but not answered in *Wiley* — the extent of the application of the successor theory to post-transfer situations. Two issues had to be decided: first, was Burns required as a matter of law to recognize and bargain with the UPG; and second, if Burns were classified as a successor, would the resulting imposition of duties include an obligation to honor the collective bargaining agreement of its predecessor.

The most difficult aspect of the first issue focused upon the factors upon which a bargaining order might be predicated. The Board's bargaining order had rested "entirely on the successorship doctrine."[66] The Court, however, was not disposed to venture so far. While Burns had hired a majority of Wackenhut's employees and had performed the same basic operations as its predecessor, "there was no merger, no sale of assets, no dealings whatsoever"[67] between the two employers. As the minority correctly observed, prior to *Burns,* only one court would have upheld a finding of successorship in such circumstances.[68] The Court itself "studiously avoided"[69] denominating Burns a successor and yet determined that Burns did have an obligation to bargain with the incumbent union.[70] The rationale for this aspect of the *Burns* decision was not found in the successorship doctrine, but rather in the certification bar rule.[71] Thus, the Court examined the narrow question of whether

61. *Id.* at 44.
62. *See* note 44 *supra.*
63. 384 F.2d at 44–45.
64. Stern, *Binding the Successor Employer to Its Predecessor's Collective Bargaining Agreement Under the NLRA,* 45 TEMP. L.Q. 1, 38 (1971).
65. Doppelt, *supra* note 18, at 191.
66. 406 U.S. at 296 (Rehnquist, J., concurring and dissenting).
67. *Id.* at 286.
68. *Id.* at 306 n.7 (Rehnquist, J., concurring and dissenting). *See* Tom-A-Hawk Transit, Inc. v. NLRB, 419 F.2d 1025 (7th Cir. 1969).
69. *Id.* at 296.
70. *Id.* at 278.
71. *Id.* at 278–79. *See* notes 28–34 and accompanying text *supra.*

or not Burns came within one of the exceptions to this rule. Noting that "a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' "[72] as to relieve an employer of the duty to bargain, the Court concluded that "Burns could not reasonably have entertained a good faith doubt"[73] of the UPG's majority status. The majority relied heavily on the fact that there was a recent certification, that Burns had hired a majority of the former Wackenhut employees "for work in an identical unit,"[74] and that Burns was aware of both the certification and the new collective bargaining agreement.[75] Since Burns was unable to establish that it fell within the "unusual circumtances" exception, the Court upheld the Board's bargaining order.[76]

Although a definitive statement on the subject of successorship was thus lacking, as indicated by the Court's reliance on the continuity factors, the determination of Burns' responsibility to bargain represents a limited expansion of the successor doctrine to include an acquiring employer having "no dealings whatsoever"[77] with its predecessor. The theoretical justification for this expansion was the almost unassailable presumption[78] of majority representation which is associated with the certification bar rule. Since this aspect of the decision rests upon the fact of certification, and thus upon an artificial presumption of majority representation, a bargaining order probably would not be sustained where the incumbent union is not protected by such a presumption,[79] or does not, in fact, represent a majority of the employees. Such a conclusion is strengthened further by the fact that the *Burns* Court refused to require Burns to honor the collective bargaining agreement previously negotiated between UPG and Wackenhut. Therefore, it would appear that the successor doctrine was extended for the narrow purpose of determining Burns' duty to recognize and bargain with the incumbent union.

In resolving the second issue, the Court employed a more stringent standard for determining successorship. When faced with a situation other than the duty to bargain, continued viability of the bargaining unit, of itself, was insufficient to justify further liability. Adopting the reasoning employed by most lower courts,[80] the Supreme Court suggested that post-transfer continuity in the form of an accession to assets on the part of the employing entity was also a necessary prerequisite to the

72. 406 U.S. at 279.

73. *Id.* at 278.

74. *Id.*

75. *Id.*

76. *Id.* at 281.

77. *Id.* at 286.

78. *Id.* at 279 n.3.

79. *But cf.* note 30 *supra.*

80. 406 U.S. at 306 (Rehnquist, J., concurring and dissenting). *See* note 25 *supra.*

imposition of other duties.[81] Emphasizing the absence of a transfer of assets between the two employers,[82] the Court concluded that, while the facts were such as to warrant the imposition of a duty to bargain, they formed:

> [A] wholly insufficient basis for implying either in fact or in law that Burns had agreed or must be held to have agreed to honor Wackenhut's collective bargaining contract.[83]

More revealing than this conclusion, however, are the developments which preceded and prompted it.

Those cases discussed previously which required a successor, to a greater or lesser degree, to abide by the terms of its predecessor's collective bargaining agreement rested on the policy argument advanced in *Wiley*. Yet, the question of whether an acquiring employer having only minimal contacts with the transferor of the business could be required to arbitrate under the terms of its predecessor's agreement was specifically left unanswered by the *Wiley* Court.[84] That Court was of the opinion that an affirmative response would impose completely foreign conditions upon the new bargaining relationship.[85] This conclusion reflects a long standing belief that governmental interference in the collective bargaining process is objectionable.

Reacting to what it viewed as the Board's attempt "to control more and more the terms of collective bargaining agreements,"[86] Congress enacted legislation which specifically provided that the requirement to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."[87] Tested before the Supreme Court in *H.K. Porter,* this provision was interpreted to mean that:

> [The Board] is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.[88]

On the facts, the acquiring employer in *Burns* would seemingly fall within this exception to *Wiley,* and in so doing, would clearly fall as well within the purview of the free collective bargaining policy of *H.K. Porter.*

Rather than base its conclusion upon the policy argument developed in *Wiley* and explicated in *H.K. Porter,* the Court adopted a second approach to the post-transfer vitality of a predecessor's collective bargaining agreement. *Wiley* did not control the result in *Burns,* not

81. 406 U.S. at 286–87. The minority opinion made the same point. "[C]ontinuity [must] be at least in part on the employer's side of the equation, rather than only on that of the employees." *Id.* at 306 (Rehnquist, J., concurring and dissenting).
82. *Id.* at 286.
83. *Id.* at 287.
84. 376 U.S. at 551.
85. *Id.*
86. H.R. REP. No. 245, 80th Cong., 1st Sess. 1920 (1947).
87. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1970).
88. 397 U.S. at 102.

because the 1964 decision was never meant to cover such an employer but because it, unlike *Burns*:

> [A]rose in the context of a § 301 suit to compel arbitration . . . . [The Court] held only that the agreement to arbitrate . . . survived the merger . . . .
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> . . . [Such merger occurred] against a background of state law which embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation.[89]

This constricted reading of *Wiley* clearly amounts to a frontal attack upon that decision's policy basis. Choosing such an approach when the more limited rationale discussed previously would have served equally well suggests that the majority was looking beyond the precise question before it toward more substantial modifications of the successor doctrine. Implicit in this narrow reading of the *Wiley* decision is the suggestion that the Court wished to move toward elimination of those aspects of the successor theory grounded upon the policy arguments advanced by the *Wiley* Court.

The main effects to be anticipated as a result of this change in emphasis relate primarily to the duties which may be properly imposed on a successor. Aside from the limited extension in *Burns*, there would be little cause to anticipate changes in the bargaining requirement imposed on successors since this duty existed independent of *Wiley*.[90] The same would not necessarily hold true of the duty to remedy a predecessor's unfair labor practices and the requirement of arbitrating grievances under the terms of a former employer's collective bargaining agreement.[91]

Other than in situations where the successor was merely the predecessor in a slightly different guise,[92] the duty to remedy unfair labor practices of a predecessor has enjoyed what at best might be termed a rather precarious existence.[93] The major obstacle to its general acceptance was the absence of a sufficient nexus between the two employers to justify compelling the successor to remedy the wrongs of the predecessor.[94] It was this same problem which induced the Court's refusal to require Burns to adhere to Wackenhut's contract. The most recent Board approach to remedying a predecessor's unfair labor practices, as enforced by the Fifth Circuit, read *Wiley* as being broad enough to justify requiring a successor to honor a predecessor's collective bargaining agreement.[95]

89. 406 U.S. at 285–86.

90. *See* notes 35–37 and accompanying text *supra*. *See also* NLRB v. McFarland, 306 F.2d 219 (10th Cir. 1962); NLRB v. Auto Ventshade, Inc., 276 F.2d 303 (5th Cir. 1960).

91. *See* note 26 *supra*.

92. Southport Petroleum Co. v. NLRB, 315 U.S. 100 (1942).

93. U.S. Pipe & Foundry Co. v. NLRB, 398 F.2d 544, 546–48 (5th Cir. 1968).

94. *Id.*

95. *Id.* at 547.

Since this reading of *Wiley* was specifically rejected in *Burns*, any continued adherence to this approach is uncertain.

The difficulties confronting the requirement to arbitrate stem from two sources. The first of these is that the Court possibly has limited *Wiley* to its facts.[96] Second, even if this were not the case, those courts reading *Wiley* as imposing substantive contract terms in fact, if not in law,[97] may well be reluctant, in light of *Burns*, to order arbitration in post-transfer situations.

One issue remains — should a successor having sufficient contacts with a predecessor be required to assume the latter's collective bargaining agreement? The majority gave some indication of the direction in which the Court would go if this question were squarely presented:

> [A]llowing the Board to compel agreement . . . would violate the fundamental premise on which the Act is based — private bargaining under governmental supervision of the procedure alone, without *any* official compulsion over the actual terms of the contract. . . . Strife is bound to occur if the concessions which must be honored do not correspond to the relative economic strength of the parties.[98]

It would appear from its reliance on the policy of free collective bargaining of section 8(d) of the NLRA that the Court would be reluctant to require an unconsenting successor to assume a collective bargaining agreement negotiated by a predecessor.

As Judge Leventhal observed in his concurring opinion in *International Association of Machinists v. NLRB*,[99] successorship has always been "shrouded in somewhat impressionist approaches."[100] While the accuracy of this observation will continue undiminished in the wake of *Burns*, some conclusions may be drawn with respect to the current status of the law. In general, the Court recognized that the duty to bargain is a requirement separate and distinct from others which might be imposed upon a successor.[101] While post-transfer continuity in the bargaining unit alone is sufficient to give rise to the duty to bargain, other requirements should be properly imposed only where there exists both an essential similarity in the bargaining unit and a sufficient nexus between the predecessor and successor to justify requiring the latter to honor the obligations of the former. Even though its usefulness may be limited, the duty to arbitrate undoubtedly survives, but the same cannot be said

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96. *See* note 89 and accompanying text *supra*.

97. *See* notes 56 & 58–59 and accompanying text *supra*.

98. 406 U.S. at 287, *citing* H. K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (emphasis added).

99. 414 F.2d 1135, 1139 (D.C. Cir.) (Leventhal, J., concurring), *cert. denied*, 396 U.S. 889 (1969).

100. *Id.*

101. This argument was advanced and rejected in U.S. Gypsum Co. v. United Steelworkers, 384 F.2d 38, 43 (4th Cir. 1967).

of the duty to remedy a predecessor's unfair labor practices in which the successor has not participated.[102]

Due to the fact that the Court's decision was, in some respects, an extremely narrow one, it provided little in the way of positive guidelines, and therefore, the Board could continue to utilize the successor doctrine as it did prior to this decision. This approach, however, would run against the spirit of the *Burns* decision. An alternative available to the Board, and one which would be in keeping with the *Burns* mandate, is to require an acquiring employer to bargain with an incumbent union once an agreement in principle is reached for the transfer. Of course, this procedure might encounter difficulty with the policy of free collective bargaining stressed in *Burns*. However, according to the Court, Burns did not become an employer having obligations with regard to the UPG until it had hired a majority of Wackenhut's employees,[103] and prior to that time, Burns could not have bargained with the UPG without violating section 8(a)(5) of the NLRA by dealing with a union other than the one representing a majority of its employees.[104] Therefore, congressional action would appear to be required before this approach could be adopted.

Other possible approaches include requiring an employer to bargain with the union about transferring its business in a manner similar to the duty imposed in the contracting-out situation,[105] and requiring a successor to hire its predecessor's employees.[106]

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102. *See* text accompanying notes 92-96 *supra*. Where the successor has participated in the unfair labor practices, the acquiring employer is subject to Board remedial orders. NLRB v. Blair Quarries, Inc., 152 F.2d 25 (4th Cir. 1945).

103. 406 U.S. at 295.

104. As the Second Circuit observed:

> [T]he duty to bargain with the employees' agent under section 8(a)(5) imposes "the negative duty to treat with no other."

McGuire v. Humble Oil & Refining Co., 355 F.2d 352, 358 (2d Cir.), *cert. denied*, 384 U.S. 988 (1966) (footnote omitted).

105. *See, e.g.*, Fiberboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

106. The *Burns* Court observed that:

> The Board has never held that the National Labor Relations Act itself requires that an employer who submits the winning bid for a service contract or who purchases the assets of a business be obligated to hire all of the employees of the predecessor . . . .

406 U.S. at 280 n.5. *But cf.* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) ("employee" to be construed broadly); NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) ("employee" to be construed broadly).

> [W]here . . . the only substantial change wrought by the sale of a business enterprise is the transfer of ownership, the individuals employed by the seller of the enterprise must be regarded as "employees" of the purchaser as that term is used in the Act.

Chemrock Corp., 151 N.L.R.B. 1074, 1078 (1965).

This reasoning was not applicable to the situation in *Burns*. The majority recognized that:

> [T]here will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

406 U.S. at 294-95. Where this is not the case, the Court's language suggests a contrary conclusion. *Id.* at 280.

The reaction of employers to *Burns* will probably be mixed. Had the *Burns* Court upheld the Board and required Burns to assume Wackenhut's collective bargaining agreement the mere existence of this agreement[107] would have jeopardized the employer's freedom to choose its own work force[108] and the availability to the employer of the good faith defense to a refusal to bargain charge arising from an alleged contravention of the certification bar rule.[109] In addition to preserving these interests, *Burns* has seemingly limited the requirements which can be imposed upon a successor under the aegis of labor peace. Although the duty to bargain with an incumbent union exists as long as there is continuity in the bargaining unit, even the imposition of this duty remains improper in at least three situations: where the successor hires none of its predecessor's employees;[110] where the acquiring employer is able to establish that it falls within one of the exceptions to the certification bar rules;[111] and where the unit is deemed an accretion. Specifically recognized as an exception by the *Burns* Court,[112] an accretion occurs when a unionized[113] successor takes over a second business and hires only a distinct minority of the predecessor's unionized employees.

This latter exception recognizes that imposing a duty to negotiate could place a court in the unpalatable position of ordering an employer to violate section 8(a)(5) by dealing with a minority union. Although this exception also raises the possibility that, through selective hiring, an employer could create its own accretion, take advantage of the availability of a trained work force, and still avoid all obligations with respect to an incumbent union, an employer attempting to utilize this approach might be subject to a section 8(a)(3) violation for interfering with one union and a section 8(a)(2) violation for improperly assisting the other.[114]

Similar to management's response, the union reaction to *Burns* must also be mixed. While the survival of the bargaining unit is assured in situations where the opposite result might previously have been the case,

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107. Under what is termed the contract bar rule, a collective bargaining agreement operates as a bar to a representation election for a "reasonable time," currently three years. General Cable Corp., 139 N.L.R.B. 1123 (1962).

108. Once a successor is required to adopt its predecessor's collective bargaining agreement *in toto*.

> It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with the provisions of the contract . . . .

406 U.S. at 288. *Cf.* note 106 *supra*.

109. 406 U.S. at 290. *See* Ranch-Way, Inc., 183 NLRB No. 116 (1970), *order enforced*, 445 F.2d 625 (10th Cir. 1971), *vacated and remanded*, 406 U.S. 940 (1972).

110. *See* note 106 *supra*.

111. *See* note 32 *supra*.

112. 406 U.S. at 279 n.3.

113. Where the successor is not unionized, it must deal with the incumbent union even if only a minority of employees were hired. *See* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 n.5 (1964). *See also* McGuire v. Humble Oil & Refining Co., 355 F.2d 352, 357 (2d Cir. 1966).

114. *See* National Labor Relations Act §§ 8(a)(3), 8(a)(2), 29 U.S.C. §§ 185(a)(3), 185(a)(2) (1970).