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Successor Employer's Obligation Under Predecessor's Collective Bargaining Agreement After a Business Reorganization

COMMENTS

SUCCESSOR EMPLOYER'S OBLIGATION UNDER PREDECESSOR'S COLLECTIVE BARGAINING AGREEMENT AFTER A BUSINESS REORGANIZATION

On March 30, 1964, the Supreme Court decided the case of *John Wiley & Sons, Inc. v. Livingston*.[1] To some in the labor movement, the decision was regarded as a stunning victory, while segments of management regarded it as an unwarranted usurpation of the managerial prerogative and an incredible defeat. Actually, the case was neither of the two.[2] A discussion of the ramifications of the decision, however, must of necessity be preceded by a recitation of the facts upon which it was grounded.

Interscience, a rather small publishing firm, employed approximately eighty people. Forty of these were represented by District 65, Retail, Wholesale and Department Store Workers and were covered by a collective bargaining agreement which did not contain a clause binding successors and assigns but did contain an arbitration clause. Prior to the expiration of this agreement, Interscience, for valid economic reasons, entered into merger negotiations, which formally culminated in a merger of the smaller Interscience with the larger Wiley, a publishing firm with some three hundred unorganized workers. District 65, both before and after the merger, maintained that the Interscience employees had rights which "vested" under the collective bargaining agreement,[3] including rights to severance and vacation pay, seniority, grievance procedure and pension fund payments. Wiley's position was that the merger "terminated the bargaining agreement for all purposes."[4] One week before the contract expired, the union brought an action in a federal district court pursuant to section 301(a) of the Labor Management Relations Act[5] to compel arbitration of its demands.

The district court held that even assuming the collective bargaining agreement's arbitration clause was binding on Wiley, the union was not entitled to

1. 376 U.S. 543 (1964). The Wiley case has been the source of many law review notes and comments. See, e.g., 6 B.C. Ind. & Com. L. Rev. 344 (1965); 113 U. Pa. L. Rev. 914 (1965); The Supreme Court, 1963 Term, 78 Harv. L. Rev. 143, 285 (1964); 1964 U. Ill. L.F. 847; 5 B.C. Ind. & Com. L. Rev. 193 (1963) (same case in the Second Circuit).

2. See text of speech on July 7, 1967 by NLRB member, John H. Fanning, before the Labor Law Section of the State Bar of Texas entitled: The Purchaser and the Labor contract—An Escalating Theory, 4 CCH Lab. L. Rep. ¶ 8087, at 13755 (1967).

3. 376 U.S. at 545.

4. Id.

5. Labor Management Relations Act (Taft-Hartley Act) § 301(a)(b), 29 U.S.C. § 185(a)(b) (1964). "Suits for violation of contracts between an employer and a labor organization representing 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. . . . Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

the relief sought since it had failed to comply with certain conditions precedent set forth in the contract.[6] The court of appeals reversed,[7] and the Supreme Court granted certiorari.[8]

In a unanimous opinion by Mr. Justice Harlan, the Court stated the issue to be "whether Wiley, which did not itself sign the collective bargaining agreement . . . [was] bound at all by the agreement's arbitration provision."[9] The Court held that Wiley was required to arbitrate and stated:

> 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*, present here, the successor employer may be required to arbitrate with the union under the agreement.[10]

The Court noted that "a collective bargaining agreement is not an ordinary contract,"[11] and that Wiley's obligation to arbitrate the dispute under the Interscience contract, therefore, had to be "construed in the context of a national labor policy."[12] However, the duty of a successor to arbitrate claims under the predecessor's agreement was not without qualification:

> We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. As indicated above, there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved. So too, we do not rule out the possibility that a union might abandon its right to arbitration by failing to make its claim known. Neither of these situations is before the Court. Although Wiley was substantially larger than Interscience, relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty.[13]

Thus, the Court ruled that the successor employer could be bound to arbitrate under a predecessor employer's collective bargaining agreement in certain

6. Livingston v. John Wiley & Sons, Inc., 203 F. Supp. 171, 173 (S.D.N.Y. 1962). The problem of procedural and substantive arbitrability was clarified by the Supreme Court in Wiley, 376 U.S. at 557.

7. Livingston v. John Wiley & Sons, Inc., 313 F.2d 52 (2d Cir. 1963). In answer to its own question as to whether the consolidation abruptly terminated the collective bargaining agreement and the rights of the union and employees, the court responded with an emphatic "no." However, the court made it clear that it was not setting forth any general rule and stated: "A further principle, particularly applicable in the formulation of new segments of federal labor law, is . . . the principle of restraint that requires us to formulate the rule that is decisive of the case before us, and to go no further." Id. at 56.

8. 373 U.S. 908 (1963).

9. 376 U.S. at 547.

10. Id. at 548 (emphasis added).

11. Id. at 550. For a discussion of the basis upon which this statement by the Court was founded, see notes 23-27 infra and accompanying text.

12. Id. at 551.

13. Id.

"appropriate circumstances." An exact delineation of these circumstances was not forthcoming from the Court, and many problems of interpretation and construction of *Wiley* have arisen. Before proceeding further, a brief discussion of the relevant decisional law prior to *Wiley* is required for a clearer comprehension of the impact that *Wiley* has had on the field of labor law.

I. STATE OF THE LAW PRIOR TO *Wiley*

Until a few years prior to *Wiley*, it was generally the rule that construction and interpretation of the meaning and effect to be given arbitration clauses in collective bargaining agreements were governed by the common law principles of literal contract interpretation. Consequently, successors were rarely bound since privity of contract, a requisite ingredient, was usually missing. Before a court would compel arbitration of any disputes pursuant to an arbitration clause in a collective bargaining agreement, it had to be substantially certain that the dispute was one covered by the clause.[14] Owing to the nature of the collective bargaining agreement and the variety of situations it encompassed, such a narrow judicial interpretation was disagreeable to many.[15]

Then, in 1957, in the case of *Textile Workers Union v. Lincoln Mills*,[16] the Supreme Court ruled that section 301(a)[17] "does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."[18] The Court stated that: "Federal interpretation of the federal law will govern, not state law."[19] Thus, the Court took collective bargaining agreements out of the realm of contract law thus making possible its later decision, in *Wiley*, to bind a non-party successor to a collective bargaining agreement through liberal application of the arbitration clause. The Court left development of the law in this area to "judicial inventiveness" in fashioning a remedy that would effectuate the national policy.[20]

In accord with this intention of fashioning a federal labor policy, the Supreme Court, in 1960, overruled the common law interpretation[21] of arbitration clauses,

14. See, e.g., International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317 (1947). See also International Ass'n of Machinists v. Shawnee Indus., Inc., 224 F. Supp. 347 (W.D. Okla. 1963); Machinists Ass'n v. Falstaff Brewing Corp., 328 S.W.2d 778 (Tex. Civ. App. 1959); 15 W. Fletcher, Private Corporations § 7121 (rev. ed. 1961).

15. See generally Cox, Reflections upon Labor Arbitration, 72 Harv. L. Rev. 1482 (1959).

16. 353 U.S. 448 (1957). See also Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

17. Labor Management Relations Act (Taft-Hartley Act) § 301(a), 29 U.S.C. § 185(a) (1964).

18. 353 U.S. at 455. See also General Electric Co. v. Local 205, United Electrical Workers, 353 U.S. 547 (1957); Goodall-Sanford Inc. v. United Textile Workers, 353 U.S. 550 (1957).

19. 353 U.S. at 457.

20. Id.

21. See NLRB v. Armato, 199 F.2d 800 (7th Cir. 1952); International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 189 F.2d 177 (9th Cir. 1951); International

set the stage for the successorship cases and added breadth to its holding in *Lincoln Mills*[22] when it handed down the so-called "Steelworkers Trilogy."[23] In rather forceful language, the Court set forth the rule that:

> An order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*[24]

In addition, certain other principles are to be derived from the Steelworkers Trilogy. First, since arbitration is a matter of contract, parties can not be required to arbitrate unless they had contractually so bound themselves.[25] Second, since arbitration is the alternative to the strike, hesitancy on the part of courts in ordering parties to arbitrate has no place in labor arbitration, and Congress has expressed a preference for the resolution of disputes by the procedures agreed upon by the parties.[26] Third, upon the determination by the court that the parties have agreed to submit a particular item of dispute to arbitration it should order arbitration regardless of its views as to the substance of the claim.[27] Fourth, absent fraud, the arbitrator's award should be enforced unless it is a practical certainty that his award is based upon some factor or factors extraneous to the agreement as entered into between the parties.

Thus, the pre-*Wiley* law indicated a trend toward a liberal interpretation of the arbitration clause in the collective bargaining agreement. Actually, in view of the Supreme Court's concern for fashioning a federal labor policy,[28] and its grave concern for the maintenance of industrial peace,[29] the holding in *Wiley* was not as unanticipated as it may have first appeared. Although acceptance of the Court's reasoning was not universal,[30] it did become evident that the Supreme Court had embarked upon a course of rewriting the rules by which

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Ass'n of Machinists v. Cutler-Hammer Inc., 271 App. Div. 917, 67 N.Y.S.2d 317 (1947); Sewell Mfg. Co., 72 N.L.R.B. 85 (1947); Tampa Transit Lines, Inc., 71 N.L.R.B. 742 (1946); Synchro Mach. Co., 62 N.L.R.B. 985 (1945).

22. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

23. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

24. United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-83 (1960) (emphasis added) (footnote omitted). But see International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317 (1947). See also Drake Bakeries Inc. v. Local 50, American Bakery & Confectionary Workers Int'l, 370 U.S. 254, 258 (1962).

25. See United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

26. See United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

27. Id.

28. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

29. See United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

30. Hays, The Supreme Court and Labor Law, October Term, 1959, 60 Colum. L. Rev. 901, 930 (1960). See also Wallen, Recent Supreme Court Decisions on Arbitration: An Arbitrator's View, 63 W. Va. L. Rev. 295 (1961).

arbitration clauses in collective bargaining agreements were to be governed in the future. This much was fairly certain. However, the manner in which the federal labor policy of avoiding industrial strife was to be carried out and the principles enunciated by the Court, applied, was nowise certain, particularly in view of the fact that *Wiley* provided few clear guidelines, if any. The issues raised, but not satisfactorily answered by the Supreme Court, are well illustrated by decisions in the various courts which have attempted to construe and apply *Wiley*.

II. Degree To Which Collective Bargaining Binds Successor

The problem of whether the entire collective bargaining agreement or only the arbitration clause bound the successor was left open by *Wiley*. The case of *Wackenhut Corp. v. International Union, United Plant Guard Workers*,[31] decided three months later, did little to dispel the uncertainty. The Wackenhut Corporation entered into an agreement with General Plant Protection Co. to purchase "substantially all of the assets."[32] Both companies were engaged in a similar operation, and while Wackenhut assumed practically all of General Plant's liabilities, it did not expressly assume the existing labor agreement between General Plant and the United Plant Guard Workers of America. As of the effective date of the sale, the former General Plant employees continued their regular duties, wore the same uniforms and were responsible to the same supervisors. Thus, very little had changed from the employee viewpoint. However, when the union sought to hold Wackenhut to the collective bargaining agreement between itself and General Plant, Wackenhut refused to honor the agreement, which it had neither signed nor expressly assumed.

Consonant with the ruling in *Wiley*, the court refused to approve Wackenhut's position and stated:

> The specific rule which we derive from Wiley is that where there is substantial similarity of operation and continuity of identity of the business enterprise before and after a change in ownership,[33] a collective bargaining agreement containing an arbitration provision, entered into by the predecessor employer is binding upon the successor employer.[34]

The court, however, failed to elaborate on the degree to which the predecessor's contract bound the successor. Perhaps the court was intentionally vague since it realized that to answer this question is to impale oneself on the horns of a dilemma. On the one hand, if the entire collective bargaining agreement is unqualifiedly binding on the successor employer, the arbitrator is stripped of virtually all of his discretion and is in an extremely poor position to employ his informed judgment in bringing about an equitable solution that would contribute to the avoidance of industrial strife. Such an interpretation would emasculate the flexibility of the arbitral process. The other side of the coin is equally

31. 332 F.2d 954 (9th Cir. 1964).

32. Id. at 956.

33. There was no problem with satisfying this criterion set forth in Wiley. Id. at 957 (footnote added).

34. Id. at 958.

problematic. If it is held that the arbitrator is free to choose which provisions, if any, bind the successor, as well as the extent and degree to which they bind him, then when the parties do submit to arbitration, the arbitrator will be in a position, while exercising his discretion, to perhaps make for the parties an agreement that they did not make for themselves. Such broad discretion on the part of the arbitrator can be as equally deleterious as very little discretion. The problem is one of balancing the concept of a federal labor policy, which recognizes the important role of arbitration,[35] against the freedom of contract of the individual parties.

In *United Steelworkers of America v. Reliance Universal Inc.*,[36] a case involving facts similar to those in *Wackenhut*,[37] the question as to the degree to which the predecessor's collective bargaining agreement was binding on the successor employer was again raised, and answered differently. Martin Marietta Corporation, which had a collective bargaining agreement with the Steelworkers Union, was ordered by the Federal Trade Commission to divest itself of its plant and " 'all machinery, equipment, raw material, reserves, trade names, contract rights, trademarks, and good will. . . .' "[38] In accord with the Federal Trade Commission's order, Martin Marietta entered into a contract of sale with Reliance wherein Reliance expressly disclaimed any assumption of its predecessor's (Martin Marietta's) collective bargaining agreement.[39] Reliance continued the predecessor's operation "without significant change, employing substantially all of the operating, supervisory and managerial personnel who were formerly employed by . . . [the predecessor.]"[40] However, Reliance refused to honor the predecessor's collective bargaining agreement and, as a result, the union simultaneously struck and commenced suit to compel arbitration.

In considering the petition for an arbitration order, the court observed with reference to the nature and extent to which the predecessor's collective bargaining agreement bound the successor that *Wackenhut* viewed *Wiley* as "authority for making a pre-existing labor contract unqualifiedly binding upon a new proprietor in a situation . . . [such as that in the instant case.]"[41] But this court was not willing to go as far as *Wackenhut* and hold that "the collective bargaining agreement is unqualifiedly binding upon Reliance, as would have been the case if there had been an assignment or novation. . . ."[42] Rather, the successor (Reliance) was bound to arbitrate only those questions that its predecessor was bound to arbitrate under the contract, and the "collective bargaining agreement, as an embodiment of the law of the shop, remained the basic charter of labor relations at the [Reliance] plant after the change of ownership."[43] This state-

35. See United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).
36. 335 F.2d 891 (3d Cir. 1964).
37. See text accompanying notes 31-34.
38. 335 F.2d at 893.
39. Id.
40. Id.
41. Id. at 895 n.3.
42. Id. at 895.
43. Id.

ment taken alone intimated adherence to the *Wackenhut* view that the entire agreement bound the successor and the court, apparently cognizant of this ambiguity in its holding, attempted to clarify its position by stating that, in the arbitration proceeding, "the arbitrator may properly give weight to any change of circumstances created by the transfer of ownership which may make adherence to any term or terms of that agreement inequitable."[44]

Thus, the *Reliance* court held that the duty to arbitrate pursuant to the predecessor's collective bargaining agreement survived the purchase and bound the successor employer, but the collective bargaining agreement, in its entirety, did not. It would appear that *Reliance* better approximated the Supreme Court's position on arbitration and the vital role it plays in fashioning a federal labor policy than did *Wackenhut*. Yet a weakness is immediately apparent in the holding of the *Reliance* court. Is it realistic to tell the parties that the obligation to arbitrate survives but that the other provisions which the parties painfully negotiated for weeks or months may or may not be given any weight according to the sense of fair play possessed by the arbitrator? True, the arbitrator's discretion is subject to review, but this can be a rather small consolation to an employer or group of employees eager to know their rights. The *Reliance* court did limit the discretion of the arbitrator in that it was to be employed only vis-à-vis the change in circumstances,[45] but there is the genuine problem of determining whether the arbitrator's judgment is either based upon or warranted by such a vague criterion as "change in circumstances."[46] The importance of arbitration as a panacea for industrial strife should not be extended to the point where it becomes a substitute for collective bargaining.

III. Application of *Wiley* to Purchase of Assets Situation

It is interesting to note that *Wiley* involved a merger,[47] while both *Wackenhut*[48] and *Reliance*[49] involved sales of assets. In *Wiley*, the Court set forth the principle that:

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44. Id.

45. Id.

46. Id. See, e.g., note 57 infra. One problem, particularly relevant here, is the possibility that a union in a weak bargaining position at the time of the negotiation of its contract with the employer may, under the guise of change in circumstances, attempt an appeal to the arbitrator's discretion to obtain more favorable terms than it had achieved under its contract. Also, an employer who submits to arbitration, having resigned himself to being bound by the terms of his predecessor's collective bargaining agreement, may find that the arbitrator has taken cognizance of a change in circumstances and has formulated an award more onerous than the successor employer had either anticipated or believed warranted. Situations such as these are clearly to be avoided in that they promote rather than abate the possibility of industrial strife.

47. 376 U.S. at 544-45. In the language of the Court: "On October 2, 1961, Interscience merged with . . . [Wiley] and ceased to do business as a separate entity." Id.

48. Wackenhut Corp. v. International Union, United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964).

49. United Steelworkers v. Reliance Univ. Inc., 335 F.2d 891 (3d Cir. 1964).

It would derogate from "the federal policy of settling labor disputes by arbitration," . . . if a *change* in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established; this is so as much in cases like the present, where the contracting employer disappears into another by merger, as in those in which one owner *replaces* another but the business entity remains the same.[50]

This language seems clearly to cover a purchase of assets, yet the issue was raised in both *Wackenhut* and *Reliance*, where it was argued that since a merger was a "sort of succession" it was more reasonable to find the successor bound by the predecessor's collective bargaining agreement than in the case of "an outright sale."[51] However, the *Reliance* court observed that: "unless the original corporate operator and the corporation into which it merges were already related before the merger, a fact which does not appear in the Wiley opinion, the legal and equitable considerations involved in imposing a predecessor's obligations upon an independent successor are no different in a merger case than in a sale of business case."[52]

At this point, in view of the language of the Supreme Court in *Wiley*,[53] and the cogent statement by the *Reliance* court, the problem perhaps seemed academic. However, the problem was again raised in *McGuire v. Humble Oil & Refining Co.*,[54] but was disposed of by the court with a statement of its agreement with *Wackenhut* and *Reliance* that the "fact that . . . [the case at bar dealt with] a purchase and sale rather than a merger [did] not of itself make the principles of *Wiley* inapplicable."[55]

IV. The *Kimball* Case

A peculiar set of circumstances and an even more peculiar decision arose out of the case of *Piano and Musical Instrument Workers, Local 2549 v. W. W. Kimball Co.*[56] Kimball, after the collective bargaining agreement at its Illinois plant had expired, removed its plant to Indiana and commenced hiring new employees. Some ten months having elapsed since the removal to the new location, the union sought arbitration of certain seniority rights which it contended had accrued under the expired collective bargaining agreement. The court held that since the "difference" which was to be the subject matter of the arbitration arose subsequent to the expiration of the collective bargaining agreement, there was no "difference" which became a proper subject for arbitration.[57]

50. 376 U.S. at 549 (emphasis added) (citation omitted).

51. 335 F.2d at 894.

52. Id.

53. See note 47 supra.

54. 355 F.2d 352 (2d Cir. 1966).

55. Id. at 353. Accord, United States Gypsum Co. v. United Steelworkers of America, 384 F.2d 38 (5th Cir. 1967).

56. 333 F.2d 761 (7th Cir.), rev'd, 379 U.S. 357 (1964). The decision has been criticized in Christensen, Labor Relations Law, 1964 Ann. Survey Am. Law 155, 158-59.

57. It is difficult to glean from the opinion the precise underpinnings of this statement by the court. The court felt it relevant that in discussions between the union and Kimball

On appeal, the Supreme Court reversed in a terse opinion,[58] citing only *Wiley*[59] and one of the Trilogy cases.[60] The Supreme Court's reversal was a sound one particularly since in *Wiley* it noted the possibility that the parties could agree to "the accrual of rights during the term of an agreement and their realization

prior to the expiration of the contract that "[a]t no time during these discussions was the subject of the seniority status of . . . [the employees at the Illinois plant] discussed with respect to the availability of job opportunities at the . . . [Indiana] plant and at no time was there a request by any representative of plaintiff that [the Illinois] employees be offered employment at the . . . [Indiana] plant upon a seniority basis." 333 F.2d at 765. However, rather than supporting the court's "difference" argument, this language seems to lay the foundation for holding, in accord with the decision in Wiley, that "a union might abandon its right to arbitration by failing to make its claims known." 376 U.S. at 551. Thus, the court appears to have stated a valid argument but in support of the wrong proposition. See also Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962), cert. denied, 374 U.S. 830 (1963). The court in the Kimball case also attempted a distinction of Wiley based upon the statement by the Supreme Court that "there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without. . . . Although Wiley was substantially larger than Interscience, relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty." 376 U.S. at 551. The court felt that the lack of proximity of the two plants militated against the finding of a continuity of identity. 333 F.2d at 764-65. These so-called "guidelines" set forth by the Supreme Court have been cited by the courts and manipulated with varying degrees of accuracy and success. See, e.g., United States Gypsum Co. v. Steelworkers of America, 384 F.2d 38 (5th Cir. 1967); Bath Marine Draftsmen's Ass'n v. Bath Iron Works Corp., 266 F. Supp. 710 (D. Me. 1967); Monroe Sander Corp. v. Livingston, 262 F. Supp. 129, 135-137 (S.D.N.Y. 1966), modified, 377 F.2d 6 (2d Cir.), cert. denied, 389 U.S. 831 (1967); Retail Store Employees Union v. Lane's, Inc., 260 F. Supp. 655 (N.D. Ohio 1966); McGuire v. Humble Oil & Ref. Co., 247 F. Supp. 113 (S.D.N.Y. 1965), rev'd, 355 F.2d 352 (2d Cir.), cert. denied, 384 U.S. 988 (1966); Drivers Local 75 v. Wisconsin Employment Relations Bd., 29 Wisc. 2d 272, 138 N.W.2d 180 (1965), cert. denied, 384 U.S. 906 (1966). A review of these cases and the authorities cited therein will indicate that the aforementioned "guidelines" set forth by the Supreme Court offer little in the way of guidance. This is so because the Court was unable (as would be any other court) to fashion with any precision a set of rules to limit and describe such concepts as "continuity of identity" to apply to the multitude of situations that are possible in this area. Thus far relevant case law has given the impression that the problem is not of great moment and, when it does arise, it is usually in an ancillary capacity and does not form the basis upon which the case is decided. Insofar as the standards followed by arbitrators in succession cases are concerned, see Corona Feed Mills, 41 CCH Lab. Arb. Awards 1208 (1963); Associated Brewing Co., 40 CCH Lab. Arb. Awards 680 (1963); Isbrandtsen Co., 39 CCH Lab. Arb. Awards 592 (1962); Perfect Garment Co., 34 CCH Lab. Arb. Awards 108 (1960). See also NLRB v. John Stepp's Friendly Ford, Inc., 338 F.2d 833 (9th Cir. 1964), which held that a successor was not required to bargain with the representative union of his predecessor's employees if the successor has a substantial number of his own employees.

58. 379 U.S. 357 (1964).

59. 376 U.S. 543 (1964).

60. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960).

after the agreement had expired."[61] Whether or not such was the case was to be determined "by the arbitrator in light of the fully developed facts."[62]

V. Conflict with Another Union

A more recently developing problem that was not present in *Wackenhut* or *Reliance* and which the Supreme Court expressly noted did not exist in *Wiley*,[63] is the problem of conflict with another union.

The issue was squarely presented in the Second Circuit in the case of *McGuire v. Humble Oil and Refining Co.*[64] Humble purchased substantially all of the assets of Weber & Quinn, a retail coal and fuel oil enterprise,[65] and integrated thirteen of the twenty-four Weber & Quinn employees affected by the sale into its own three hundred fifty-five employees. Both predecessor and successor had presently existing collective bargaining agreements. Local 553 of the Teamsters Union represented the Weber & Quinn employees, while the Humble employees were represented by the Industrial Employees Association. The contract of sale contained an express disclaimer by Humble of any obligations that Weber and Quinn had to its employees "arising out of collective bargaining agreements or otherwise."[66]

When Local 553 sought arbitration with Humble of some twenty-six items of dispute arising out of its collective bargaining agreement with Weber & Quinn, Humble refused to submit to arbitration. In consequence, the union brought suit pursuant to section 301[67] to compel arbitration. Subsequently, Humble filed a petition for unit clarification with the National Labor Relations Board, and the Board granted the petition and ruled that the Weber & Quinn employees had been effectively merged into the bargaining unit represented by the Industrial Employees Association and that the Association was the exclusive bargaining representative of the Weber & Quinn employees.[68]

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61. 376 U.S. at 555. For example, a right to severance pay may accrue before the expiration of the contract but be payable at some future date.

62. 376 U.S. at 555.

63. "There is no problem of conflict with another union . . . since Wiley had no contract with any union covering the unit of employees which received the former Interscience employees." 376 U.S. at 551-52 n.5 (citation omitted).

64. 355 F.2d 352 (2d Cir. 1966), rev'g 247 F. Supp. 113 (S.D.N.Y. 1965), cert. denied, 384 U.S. 988 (1966), 66 Colum. L. Rev. 967 (1966). See also Owens-Illinois, Inc. v. District 65, Retail, Wholesale & Dep't Store Union, AFL-CIO, 276 F. Supp. 740 (S.D.N.Y. 1967).

65. The court of appeals treated the transaction as a sale of assets but found no grounds for distinguishing the case from Wiley on this basis alone. See notes 53-55 supra and accompanying text.

66. 355 F.2d at 354. The court gave this provision no effect other than noting its existence. Id. See also United Steelworkers of America v. Reliance Univ. Inc., 335 F.2d 891 (3d Cir. 1964).

67. Labor Management Relations Act (Taft-Hartley Act) § 301(a)(b), 29 U.S.C. § 185(a)(b) (1964).

68. Humble Oil & Ref. Co., 153 N.L.R.B. 1361 (1965). The Board made it clear that it was in no way ruling on the issue of the obligation Humble had with respect to the contract between Local 553 and Weber & Quinn.

In light of the unit clarification proceeding and the fact that two unions were present in *McGuire*, while only one was present in *Wiley*, the court refused to order arbitration and dismissed the union's complaint.[69] Judge Medina, speaking for a unanimous court, pointed out that the Supreme Court in *Wiley* expressly noted that no problem of conflict with another union was present,[70] while in *McGuire*, the "combination of the two unions, one representing *all* the employees and the other representing a minority, [would be] on its face an anomaly."[71] The result could easily be unrest and dissatisfaction among the vast majority of workers since it was not unlikely that Local 553 would press for an award giving the former Weber & Quinn employees preferential treatment in the matter of seniority, job security, working conditions and other benefits that would adversely affect the other Humble employees.[72] In other words, the court based this phase of its argument on the avoidance of industrial strife. Had this been the only basis for refusing to compel arbitration, the court's holding would have been questionable in view of the Supreme Court's recognition in *Wiley* that the fact that some of the predecessor's employees might receive preferential treatment over the successor's employees did not preclude arbitration.[73] However, the court in *McGuire* had another theory—"an order to Humble to arbitrate might force Humble to commit an unfair labor practice by 'bargaining' with a minority union when a majority union is in existence."[74] The source of the court's statement can be traced to the well-established concept that it is an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, i.e., the employer is under an "affirmative duty to treat only with the *true* representative, and . . . [under a] negative duty to treat with no other."[75] Thus the problem resolves itself into a question of just which union is the true representative of the Weber & Quinn employees for the purpose of processing grievances arising out of the contract negotiated between the predecessor and Local 553 which, under *Wiley*, now bound the successor.

The *McGuire* court assumed that the true representative was the Association,[76] and in so doing stressed the ruling of the Board in the clarification proceeding.[77]

69. 355 F.2d at 358.

70. Id. at 357. See note 61 supra.

71. 355 F.2d at 357 (emphasis added).

72. Id.

73. "Problems might be created by an arbitral award which required Wiley to give special treatment to the former Interscience employees because of rights found to have accrued to them under the Interscience contract. But the mere possibility of such problems cannot cut off the Union's right to press the employees' claims in arbitration. While it would be premature at this stage to speculate on how to avoid such hypothetical problems, we have little doubt that within the flexible procedures of arbitration a solution can be reached which would avoid disturbing labor relations in the Wiley plant." 376 U.S. at 552 n.5.

74. 355 F.2d at 358.

75. Virginian Ry. v. System Federation, 300 U.S. 515, 548 (1937) (emphasis added). See also NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44 (1937); Modine Mfg. Co. v. Local 1382, Grand Lodge Int'l Ass'n of Machinists, 216 F.2d 326 (6th Cir. 1954).

76. 355 F.2d at 357-58.

77. Id. at 358.

However, as the district court pointed out, the Board expressly refused to rule on Humble's obligations with respect to Local 553's contract with Weber & Quinn.[78] Particularly interesting in this connection is a lower court case where a newly certified union sought to continue an arbitration proceeding begun by the former union pursuant to its contract with the employer. The court held that the decertified union still had the right to process the grievance to fruition since the status of the newly certified union implied "future responsibilities" looking to the formulation of a new contractual relationship. It was not in a position to assert rights under a contract to which it was a "complete stranger."[79] Further, it is important to note that, in the *McGuire* case, Local 553 sought no more than a determination of what rights, if any, its members already had under the agreement negotiated between it and the predecessor.[80] The union did not seek to make any new agreement nor did it attempt to obtain any new rights beyond those granted by its collective bargaining agreement since this clearly was in the province of the Association.

In determining the true representative, the practical aspect of the problem should also be considered. The holding that Local 553 could not champion the new employees' rights under their prior agreement with Weber & Quinn necessarily implied that if any union could, it would have to be the Association. Thus, a conflict of interest problem was quite likely since the Association, the union chosen by the Humble employees long before the accretion of the Weber & Quinn employees, would be in a position of processing wage, seniority, pension fund rights and other grievances on behalf of the Weber & Quinn group to the detriment of the Humble employees. It is improbable, as a practical matter, that the Association would have the same interest in the Weber & Quinn employees that it normally would have in pressing claims of its own members.[81]

While not directly involving the two-union problem, the recent case of *United States Gypsum Company v. United Steelworkers of America*[82] is also relevant in this connection. There, the successor was called upon by a decertified union to arbitrate grievances arising out of the union's collective bargaining agreement with the predecessor. The successor resisted the union's demand and maintained that the formal decertification (by the National Labor Relations Board) "obliterated" any obligation of the successor to arbitrate with the union.[83] The court recognized that decertification could not ordinarily extinguish substantive

78. 247 F. Supp. at 122. See note 69 supra.

79. United Electrical, Radio & Mach. Workers of America v. Star Expansion Indus., Inc., 246 F. Supp. 400, 401 (S.D.N.Y. 1964). See also Local 1545, United Bhd. of Carpenters v. Vincent, 286 F.2d 127 (2d Cir. 1960); American Seating Co., 106 N.L.R.B. 250 (1953).

80. 355 F.2d at 355-56.

81. The district judge relied on this issue as heavily weighing in favor of Local 553's claim to representation. 247 F. Supp. at 125 n.9. However, it must be borne in mind that a union has a duty of fair representation, and an employee who feels that he has been the victim of invidious discrimination has the remedy of an unfair representation charge. See Humphrey v. Moore, 375 U.S. 335 (1964).

82. 384 F.2d 38 (5th Cir. 1967).

83. Id. at 44.

rights, but it was important in determining whether the union could champion those rights. In holding that the problem is one of judge-made balancing of competing factors, the court noted:

> On the one hand is the reflex to the statutory duty to deal only with the representative chosen by the majority. The duty to deal is strong. But no less stringent is the duty not to deal with one having only minority support. But to take the easy, almost mechanical, doctrinaire approach that loss of majority status extinguishes the union's power (duty) to act ignores other vital interests—indeed, interests which need protection and which will be lost unless an ardent advocate of them is available.
>
> Here we speak of the employees in terms of their bread and butter personal interest in "rates of pay, wages, hours of employment, or other conditions of employment" . . . embodied in the contract.[84]

The court noted that no competing union claimed to be the contemporary bargaining representative, but only as a factor bolstering the union's standing to champion a disputed right which it had obtained in the first instance via negotiations with the predecessor.[85]

The court raised the question of the potential industrial strife in the event that a union, long since rejected, sought to arbitrate disputes which arose years later out of the contract it had negotiated as a necessary incident of its right and duty to enforce the rights of its former members. However, the court felt it unnecessary at this point to go beyond holding that such potential claims "may be the subject for the arbitration now ordered. The arbiters may never make an award as to them. We should wait until enforcement proceedings or the issue is otherwise inescapably presented."[86] Thus the court demonstrated a much greater faith in the flexibility of arbitration than did the *McGuire* court.[87]

The purpose of the above discussion has been to point out that the basis upon which the *McGuire* court refused to order arbitration was not altogether firm or equitable. Had the Humble employees not been organized, the court most probably would have had to order arbitration in accord with the mandates of *Wiley*.[88] Yet the court felt that the presence of the Association warranted an entirely opposite conclusion. In so holding, the court demonstrated a clear lack of faith in "the flexible procedures of arbitration." The *McGuire* court believed that ordering arbitration would result in "a burdening of the collective bargaining relationship [which] is clearly to be avoided,"[89] but this statement was not so sufficiently explained so as to add meaningfulness to the decision. Apparently, the court was not willing to agree that the factors productive of industrial strife

84. Id. at 45 (footnote omitted).

85. Id. at 46.

86. Id.

87. It is curious to note that the court here made no mention of McGuire other than to cite Gypsum's position that it was an erroneous decision to the extent that it held Wiley applicable to a purchase of assets situation. Id. at 43 & n.9.

88. The court alluded to this possibility but thought it "better to avoid crossing that bridge until it is necessary to do so." 355 F.2d at 353.

89. Id. at 357.

in *McGuire* would be substantially mitigated in an arbitration proceeding where "the arbitrator may properly give weight to any change of circumstances created by the transfer of ownership which may make adherence to any term or terms of that agreement inequitable."[90] In the context of *Wiley* and its progeny, it is difficult either to interpret or to justify the reasoning of the court in *McGuire*.[91]

In a recent two union case, *Local 568, Southern Conference of Teamsters v. Red Ball Motor Freight, Inc.*,[92] the *Wiley* doctrine was raised but held to be inapplicable. Red Ball owned and operated two separate and autonomous terminals in Shreveport, Louisiana—the Airport Drive terminal and the Abbey Street terminal. The employees at Airport Drive were represented by the Union of Transportation Employees (UTE); those at Abbey Street, by the Southern Conference of Teamsters. Both unions had negotiated collective bargaining agreements with Red Ball that were in full force and effect when, on July 1, 1964, the two terminals were merged into a single corporate enterprise. In order to avoid any problems arising out of the union representation issue, Red Ball, UTE and the Teamsters entered into a written agreement whereby the National Labor Relations Board would conduct an election to determine which of the two unions would be the exclusive bargaining representative, and upon certification by the Board of the victorious union, its contract would apply to all of the employees. The Board conducted two elections, but because of certain Teamster objections, neither union was certified. Contemporaneously with the elections, Teamster employee grievances arose, and the union successfully obtained an arbitration award, which Red Ball refused to abide by.[93] As a result, litigation ensued wherein the Teamsters took the position that Red Ball was required to process grievances under the Teamster collective bargaining agreement until such time as the election was decided and the winning union certified. In support of this argument, the union maintained that the court should recognize the "preference of national labor policy for arbitration as a substitute for tests of strength between contending forces . . . ."[94] The court, unimpressed by this line of reasoning, recited the facts of *Wiley* and stated that: "The feature that distinguishes the present case from *Wiley* is that two unions are present here, whereas in *Wiley* there was only one."[95] Therefore, the court refused to enforce

90. United Steelworkers of America v. Reliance Universal, Inc., 335 F.2d 891, 895 (3d Cir. 1964).

91. However, it must be noted that certiorari was petitioned for and denied. 384 U.S. 988 (1966).

92. 374 F.2d 932 (5th Cir. 1967).

93. The grounds upon which Red Ball based its refusal, which are not relevant to the immediate discussion, were founded on the position that the contract between the three parties had by its terms suspended the operation of the collective bargaining agreement. Brief for Respondent at 4, 13-15.

94. 376 U.S. at 549, as cited in Brief for Appellant at 7-8.

95. 374 F.2d at 940. The case was apparently decided on the grounds that the obligation of the employer under the circumstances was one of strict neutrality. Id. at 938. However, the reasoning of the court is somewhat ambigious in that it concludes its decision with a discussion of avoidance of industrial strife. Id. at 941. It can be argued that the court felt

the arbitration award.[96] The implication of this reasoning is that the principles enunciated by *Wiley* are inapplicable to the two union situation. However, the Supreme Court in *Wiley* simply noted that there was "no conflict with another union."[97] To construe this statement as authority for denying enforcement of arbitration clauses in cases where two unions are present is surely unjustified since such a construction would indicate that resolution of the issue as to whether the successor will be bound by his predecessor's collective bargaining agreement is dependent on the rather arbitrary criterion of whether the successor's employees are represented by a union. Thus, discrimination against unorganized workers would result. Surely, this was not the intent of the *Wiley* Court. Yet *Red Ball*, and more particularly *McGuire*, were decided in such a fashion as to grant to the organized employees of the successor a measure of insulation from the effects of a change in corporate ownership, which was denied to the unorganized *Wiley* employees by the Supreme Court.

VI. THE *Monroe Sander* LITIGATION

Consistent with the relatively harsh line of reasoning set forth in the cases discussed above is *Monroe Sander Corp. v. Livington*,[98] the most recent court of appeals case on the subject. Monroe Sander, a subsidiary of American Petrochemical, was a manufacturer of paints and varnishes. Its employees were represented by District 65 under a collective bargaining agreement which expired in June, 1966. In January of that year, Monroe Sander informed the union that because of its inability to earn a profit, it was contemplating a complete shutdown or a consolidation of its operations with either another division of Petrochemical or one that was to be acquired in the future. In April of 1966, Petrochemical purchased the assets of Lacquer Specialities Incorporated, a manufacturer of products similar to those of Monroe Sander. The Lacquer employees were unorganized.[99] Approximately one week before the expiration of its collective bargaining agreement, District 65, having failed to obtain any positions for its members at the Lacquer plant,[100] served upon both Monroe Sander and

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that it was outlining a logical connection between the two ideas, i.e., employer neutrality would result in avoidance of industrial strife. However, it is difficult to judge with any degree of certainty the precise trend of the court's reasoning. It would seem that the industrial strife aspect was superfluous in that the employer's duty of strict neutrality under the peculiar circumstances of the case was the appropriate answer. See Welch Scientific Co. v. NLRB, 340 F.2d 199 (2d Cir. 1965); Note, The Employer's Duty of Neutrality in the Rival Union Situation: Administrative and Judicial Application of the Midwest Piping Doctrine, 111 U. Pa. L. Rev. 930 (1963).

96. 374 F.2d at 941.

97. 376 U.S. at 551-52 n.5. See note 63 supra.

98. 377 F.2d 6 (2d Cir. 1967), cert. denied, 389 U.S. 831 (1967).

99. Not only were the Lacquer employees unorganized, but in the language of the district court: "The Lacquer production employees do not belong to a union and have resisted organizers' overtures to them concerning union representation." 262 F. Supp. 129, 133 (S.D.N.Y. 1966) (footnote omitted).

100. The district court found that any employment opportunity for Sander employees

Lacquer a demand for arbitration pursuant to the arbitration clause in its contract with Monroe Sander.[101] Monroe Sander and Lacquer brought actions to permanently stay the arbitration proceeding demanded by the union.

The majority opinion of the Second Circuit, the same court that had previously decided *McGuire*, held that Monroe Sander was required to arbitrate the "general issue of whether the union is entitled to rights and benefits, especially jobs, at the . . . [Lacquer] plant . . . ."[102] Chief Judge Lumbard dissented in part and disagreed with the majority's holding that "the union's demand that workers employed at the Lacquer plant when Petrochemical acquired it should be discharged, if necessary, to provide jobs for at least some former Monroe Sander employees is arbitrable."[103] However, Judge Lumbard was in total accord with the decision of the majority that Monroe Sander was obliged to arbitrate with the union concerning rights and benefits under the collective bargaining agreement.[104]

Thus, the same court that was possessed by a great fear of the industrial strife that would result in *McGuire* owing to the presence of a union at the successor employer's plant had no qualms about ordering arbitration in *Monroe Sander* "[r]egardless of whether or not the same quantum of 'unrest and dissatisfaction' and a similar threat of compelling the successor to commit an unfair labor practice . . . ." were present here as were present in *McGuire*.[105] The dissent in *Monroe Sander* did find the industrial strife issue sufficiently compelling to withhold from the arbitrator the union's "demand for existing jobs at Lacquer" since this would lead to unrest and dissatisfaction among the Lacquer employees.[106] "Any contribution arbitration of this demand would make to industrial peace among former Monroe Sander employees would seem more than counterbalanced

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at the Lacquer plant was remote since the Lacquer production staff could handle "a substantial increase in workload without the need for additional employees." Id.

101. The court expressly disapproved of the union's broad phraseology in demanding "arbitration of the company's 'current breach' and 'threatened removal' during the term of the collective bargaining agreement." 377 F.2d at 10. But the court did not reverse since it found that neither Sander nor Lacquer were misled. Id. at 13.

102. Id. at 11.

103. Id. at 14 (concurring opinion). The basis for this point of departure was that the union's demand was of the type where the Wiley Court noted that arbitration should not be ordered since the demand was " 'so plainly unreasonable that the subject matter of the dispute must be regarded as nonarbitrable because it can be seen in advance that no award to the Union could receive judicial sanction.' " Id., citing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 555 (1964).

104. 377 F.2d at 14-15 (concurring opinion).

105. Id. at 13. True, in McGuire, there was a unit clarification proceeding in which the Board ruled that the employees of the predecessor had been effectively merged into the bargaining unit represented by the union at the successor's plant. But it is important to note that the Board refused to rule on the issue of whatever obligation the successor had with respect to the contract between the predecessor and its union. See note 68 supra & accompanying text.

106. 377 F.2d at 15 (concurring opinion).

by the distress it would cause the Lacquer employees."[107] Perhaps this awareness of the potential injury to a group of unorganized employees, which would not have resulted had they been organized, may act to stimulate judicial thinking in the area and will result in courts' viewing "industrial strife," "unrest" and "dissatisfaction" from the vantage point of the individual worker as well as that of the organized group.

VII. Conclusion

The most difficult problem caused by *Wiley* to date is the consistent refusal by the courts to extend its principles to the two union cases. The courts have unfairly distinguished between successor employers whose employees are organized and those whose employees are not. The rights of the employees of both the predecessor and successor are dependent upon whether the successor's employees can raise the cry of industrial strife with a unified voice. Consequently, it is incumbent upon employees to organize to evade this type of potentially ill effect that can result from a change in corporate ownership. True, there is a more serious problem of industrial strife where the employees of the successor are organized, but is it fair to distinguish solely on this basis? It would seem that a better solution to the problem would be for the courts to order arbitration where "within the flexible procedures of arbitration a solution can be reached which would avoid disturbing labor relations in the . . . [successor's] plant."[108]

One further problem for which there is no complete answer is the treatment to be given claims according to whether they arose prior to change in ownership, as a result of the change or subsequent to the change. The teaching of *Wiley* is that the successor is bound by the collective bargaining agreement, but the Supreme Court did not specify the extent and degree to which the successor is bound. Thus, the answers to the multitude of problems contained within the three above-named categories are to a large degree dependent on whether the court uses an approach similar to that taken by the *Wackenhut* court[109] or the *Reliance* court.[110] At the present time, there is very little case law on the point, and it is largely a matter of conjecture as to which approach the courts will take. However, by way of guidance, the *Wiley* Court did state that a union may not use arbitration to acquire new rights against the successor any more than it could have used arbitration to negotiate a new contract with the predecessor had the existing contract expired and renewal negotiations broken down.[111]

In sum, the problems raised by *Wiley*, although difficult and perplexing, are a necessary consequence of the development of a federal labor policy which is still in its formative years. Growth in this area of federal labor policy will be slow and painstaking, and progress will depend on the willingness of the courts to weigh the rights of the employees of the predecessor as against the rights of both the successor and its employees.

107. Id.
108. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551-52 n.5 (1964).
109. See notes 31-35 supra and accompanying text.
110. See note 36-46 supra and accompanying text.
111. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 555 (1964).