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Business Combinations and Collective Bargaining Agreements

Richard G. Vernon

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RICHARD G. VERNON**

Introduction

Among the significant considerations to which parties intending to effect a business combination must give attention is the impact of the transaction on labor-management relationships.[1] In a merger, consolidation, or purchase-of-assets, thought must be given to the extent to which obligations created by an extant collective bargaining agreement will survive to bind the owner of the resulting company. The corporate parties to these combinations will naturally be concerned with certain specific questions in this area.

Will the subsequent employer be deemed a "successor?"[2] If he is a successor, must he then comply with all of the terms of the labor agreement? Particularly in a merger, what will be the consequences of integrating the predecessor's unionized employees into the purchaser's own nonunionized unit or unit represented by a different union? The proper determination and resolution of these and related questions is clearly important in ensuring the continued functioning of the acquired enterprise.

Acquiring employers and union representatives have often disagreed as to their contractual duties and rights. These disputes have produced a limited, but significant, number of decisions pertaining to business combinations. Most developments have been recent for it was not until March 30, 1964 that

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* This article is dedicated to the author's parents and to the memory of the late Professor Carlos Israels of the Columbia University Law School.

** Attorney, National Labor Relations Board, Office of General Counsel; B.A., Haverford College, 1965; LL.B., Columbia University, 1968; Member of the Pennsylvania Bar. The views expressed herein are the author's and not necessarily those of the National Labor Relations Board or of the General Counsel.

1. *See* Darrell, *The Use of Reorganization Techniques in Corporate Acquistions*, 70 HARV. L. REV. 1183, 1200 (1957).

2. The term "successor" or "successor employer" refers to a subsequent employer who is adjudged to be required to recognize obligations to and rights of the acquired company's employees under their prior collective bargaining agreement.

the Supreme Court in *John Wiley & Sons v. Livingston*[3] clarified several of the basic problems in this area. That decision also gave rise to several significant questions which subsequent cases have not yet entirely answered. There have, however, been various expansions of the *Wiley* principle which are relatively explicit, and there are, consequently, increasing indications of the labor responsibilities of the successor employers who emerge from business combinations.

The *Wiley* decision held that a successor employer may be obligated under his predecessor's collective bargaining agreement to arbitrate grievances of the predecessor's employees which have arisen as a result of a merger or, impliedly, other business combination, provided "the business entity remains the same" or there is a "continuity of identity."[4] It had a substantial effect on labor-management relationships in the business combination field, and for an understanding of both its significance and its evolution, a review of the rules and decisions predating *Wiley* is necessary.

Pre-Wiley *Law*

Prior to 1960, common law contract principles dominated judicial thinking in this area, and predecessors' collective bargaining agreements, treated as ordinary contracts, generally were held not to bind nonsigning successors to their terms.[5] In purchase-of-assets situations, for example, contract rules precluded the binding of unconsenting successors to their sellers' general contractual obligations.[6] Consequently, numerous courts held that purchasers, not having been parties to their sellers' collective bargaining agreements, were not obligated to adhere to them[7] except in unusual circumstances.[8] Most

3. 376 U.S. 543 (1964).

4. *Id.* at 549, 551.

5. *See* Patrick, *Implications of the John Wiley Case for Business Transfers, Collective Agreements, and Arbitration*, 18 S.C.L. REV. 413, 415 (1966) [hereinafter cited as Patrick].

6. *See* John Wiley & Sons v. Livingston, 376 U.S. 543, 550 (1964).

7. *See, e.g.*, United Steelworkers v. Reliance Universal Inc., 227 F. Supp. 843, 845 (W.D. Pa.), *rev'd*, 335 F.2d 891 (3d Cir. 1964); Machinists Local 954 v. Shawnee Indus., Inc., 224 F. Supp. 347, 351 (W.D. Okla. 1963); Office Employes Local 153 v. Ward-Garcia Corp., 190 F. Supp. 448, 449 (S.D.N.Y. 1961); International Ass'n of Machinists v. Falstaff Brewing Corp., 328 S.W.2d 778, 781 (Tex. Civ. App. 1959); Tarr v. Association of St. Elec. Ry. Employees, 73 Idaho 223, 227-29, 250 P.2d 904, 906 (1952).

8. Collective bargaining agreements had been held to be continuing obligations where the transaction was only intended to avail the seller of a means to avoid his obligations; the successor was merely the alter ego of the predecessor, as when the operation and organization of the acquired company were maintained in virtually the same form as before, and the buyer expressly or impliedly assumed the predecessor's obligations. *See* Note, *The Contractual Obligations of a Successor Employer Under the Collective Bargaining Agreement of a Predecessor*, 113 U. PA. L. REV. 914, 917 (1965) [hereinafter cited as *Successor Contractual Obligations*].

courts even declined to enforce clauses in collective bargaining agreements which sought expressly to bind purchasers to the contractual terms.[9]

Labor unions faced problems in mergers also. Although under general corporation principles "in the case of a merger the corporation which survives is liable for the debts and contracts of the one which disappears,"[10] no court apparently had had occasion to rule that a union could enforce a predecessor's labor agreement following a merger.[11]

In 1947, however, the Taft-Hartley Act was passed as an amendment to the Labor-Management Relations Act.[12] Section 301(a) of the Act provides a judicial forum for suits involving "violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . ."[13] Interpreting that section, the Supreme Court stated in *Textile Workers Union v. Lincoln Mills*[14] that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws."[15] Thereafter the federal courts began "to fashion a federal common law of industrial relations from the policies of the national labor laws."[16] The culmination of this development came in the *Steelworkers Trilogy*[17] which laid the foundation for the *Wiley* decision. In the *Trilogy* the Supreme Court viewed the collective bargaining agreement in a new light. It considered the agreement "more than a contract; it [was] a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . . [It covered] the whole employment relationship. It [called] into being a new common law—the common law of a particular industry or of a particular plant."[18] The collective bargaining agreement was to provide the framework of rules by which labor-management relationships would be governed.

In conjunction with this new view of labor agreements in the context of

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9. *See* Patrick, *supra* note 5, at 416.

10. *See* John Wiley & Sons v. Livingston, 376 U.S. 543, 550 n.3 (1964), *citing* 15 W. FLETCHER, PRIVATE CORPORATIONS § 7121 (rev. ed. 1961).

11. Most post-merger suits were instituted by ordinary creditors seeking to enforce prior obligations. *See Successor Contractual Obligations, supra* note 8, at 918. The absence of any prior labor decision on this issue is indicated by the *Wiley* Court's inability to cite any precedent for its holding, although the decision has been said to be a natural extension of the general merger-corporation rule cited in *Wiley, id.* at 915.

12. Act of June 23, 1947, ch. 120, 61 Stat. 136.

13. 29 U.S.C. § 185(a) (1964).

14. 353 U.S. 448 (1957).

15. *Id.* at 456.

16. Patrick, *supra* note 5, at 417.

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

18. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578-79 (1960).

federal labor law, the Supreme Court cited the role of arbitration in promoting national labor policies. *Lincoln Mills* had initially recognized that enforcement of general arbitration clauses in collective bargaining agreements for processing of employee grievances was the most effective means of achieving industrial peace. The *Trilogy* further emphasized the point: "Arbitration is the means of solving the unforseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties."[19] Thus arose a "federal policy of settling labor disputes by arbitration"[20] which had, by 1960, become so pervasive that courts would compel arbitration, under a general arbitration clause, of problems relating to all terms and provisions of a labor agreement except those expressly excluded from consideration in the arbitration clause.[21]

In view of these developments, labor unions began seeking to compel successors to at least arbitrate grievances arising under their prior contracts. Various lower federal courts, however, denied their claims, relying on the successor's absence as a party to the agreement which contained the arbitration clause.[22] "Prior to *Wiley*, no court had accepted the argument that the legal hiatus between a prior employer's express agreement to arbitrate and a subsequent employer's failure to adopt the agreement could be spanned by federal labor policy."[23] *Wiley* changed this.

Wiley

Wiley involved the 1962 merger of Interscience Publishers, Inc. and John Wiley & Sons, Inc., both large publishing firms, with the consequential discontinuance of the former as a separately operating entity. On the date of the merger, a collective bargaining agreement with a remaining term of four months was in effect between Interscience and District 65, Retail, Wholesale and Department Store Workers, the union representing 40 of its 80 employees. Although the Wiley employees were not organized, all but a few of Interscience's unionized workers were retained by and continued in the employ of Wiley.

Discussions between the union and both Interscience and Wiley before and after the consummation of the merger brought no agreement on the effect of

19. *Id.* at 581.
20. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).
21. *See* United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581-82 (1960).
22. *See, e.g.*, Livingston v. Gindoff Textile Corp., 191 F. Supp. 135 (S.D.N.Y. 1961); Office Employes Local 153 v. Ward-Garcia Corp., 190 F. Supp. 448 (S.D.N.Y. 1961).
23. Patrick, *supra* note 5, at 420.

the transaction on the labor contract or on the survival under it of the benefits of the union workers hired by Wiley. The union argued that Wiley, as successor to Interscience, was obligated to observe certain employee rights (specifically those in regard to seniority, employer pension fund payments, job security and grievance procedures, vacation benefits, and severance pay) which had vested under the Interscience contract. At the very least, the union believed, Wiley should be required to arbitrate these matters under the contract's general arbitration clause.[24] The company, however, maintained that the merger had terminated the agreement for all purposes, and that never having been a party to that agreement, it could not be bound by its terms. Out-of-court solution appearing hopeless, the union filed suit under Section 301 to compel the company to submit to arbitration.

The narrow but significant issue with which the Supreme Court was faced was "whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all by the agreement's arbitration provision."[25] Speaking for the Court, Justice Harlan stated:

> We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.[26]

Wiley, then, was required to arbitrate the extent to which it was bound by the terms of the Interscience collective agreement with regard to the former Interscience employees whom it had hired.

The Court focused on the role of arbitration in fostering industrial peace recognized in the *Trilogy*. Recalling those cases, the Court continued:

> 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.[27]

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24. The Interscience agreement's broad arbitration clause covered "any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement . . . ." John Wiley & Sons v. Livingston, 376 U. S. 543, 553 (1964).

25. *Id.* at 547. Since *Wiley* is the fountainhead of law in the field, and since subsequent decisions rely heavily on it and its policy, it is appropriate to reproduce pertinent sections at length.

26. *Id.* at 548.

27. *Id.* at 549.

Pointing to the respective interests of the conflicting parties and reiterating its faith in the arbitral process, the Court went on to discuss the value and role of the collective bargaining agreement in labor-management relations:

> Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstances . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed . . . . There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy.[28]

Thus, a federal policy of peaceful settlement of labor disputes compelled Wiley to arbitrate employee grievances based on its predecessor's contract. Arbitration was not, however, to be required after every business combination,

> 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.[29]

Where "substantial continuity of identity in the business enterprise" exists,[30] however, and the particular employee claims would have been arbitrable under the contract prior to the merger, the successor will be compelled to submit such claims to arbitration.[31]

Subsequent Cases[32]

Narrowly and carefully drawn, Justice Harlan's opinion in *Wiley* left several significant problems unresolved. Although subsequent judicial and NLRB

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28. *Id.* at 550-51.

29. *Id.* at 551.

30. The Court found "relevant similarity and continuity of operation across the change in ownership" were present in *Wiley*, *id.*

31. *See* discussion accompanying notes 43-56, *infra.*

32. It is appropriate at this point to explain that a union may also seek recourse against a successor who is unwilling to abide by the terms of its predecessor's labor agreement, other than by instituting suit under Section 301, by filing a Section 8(a)(5) refusal-to-bargain charge with the National Labor Relations Board [hereinafter NLRB]. If a successor is found to exist it will be required to *bargain* with the union over any changes it wishes to make in the terms of the predecessor's contract. Various questions

decisions have not provided complete answers to these questions, there have been important developments in several areas.

Other Business Combinations

One of the first problems considered subsequent to *Wiley* was whether its rationale extended beyond mergers. Upon analysis it becomes clear that it does apply to stock acquisitions.[33] The purchase-of-assets situation, however, has presented a little more difficulty. Prior to *Wiley* buyers were not generally obligated by their predecessors' labor contracts.[34] *Wiley* impliedly changed this, since the Court, after decrying the harm which would result from an abrogation of an arbitration requirement merely because of a change in corporate ownership, stated: "[T]his 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."[35]

In addition, several courts of appeals have considered this question directly and have applied the *Wiley* principle to asset purchases. In *Wackenhut Corp. v. Local 151, Plant Guard Workers*,[36] Wackenhut had bought all the assets of General Plant Protection Co., expressly assuming all liabilities of General Plant except its contract with the union. The unionized employees of General Plant continued, however, to work for Wackenhut, and the corporation retained rights and benefits comparable to those under the General Plant contract in all respects but those concerning wage increases, dues checkoff, and union shop requirements. The union sought to compel arbitration of these matters under its General Plant contract. Easily finding the requisite continuity of identity in the business, the court believed that, based upon the policy of the national labor laws,

> [w]hat the Supreme Court did [in *Wiley*] was to balance the

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are presented to a union in making the decision of whether to approach the courts: the different jurisdictional standards for approaching the respective bodies; the passing of the six-month statute of limitations of the National Labor Relations Act (as amended National Labor Relations Act Section 10(b), 29 U.S.C. Section 160(b) (1964)); the loss of the union's status as the legitimate representative of the predecessor's employees before or after the business combination is effected, thus possibly precluding its bargaining with the successor (*see, e.g.*, U.S. Gypsum Co. v. United Steelworkers, 384 F.2d 38 (5th Cir. 1967), *cert. denied*, 389 U.S. 1042 (1968)); and the different remedies available in the respective forums. Inherent in the availability of two forums are the different approaches and rationales which have arisen and been expressed by the judiciary and by the NLRB in resolving successorship cases. Although not totally disparate in their reasoning, each forum has developed a distinct body of law in considering several of the questions relating to *Wiley's* progeny.

33. *See* Shaw & Carter, *Sales, Mergers and Union Contract Relations*, 19 N.Y.U. CONF. LABOR 357, 358 (1967).

34. *See* notes 5-9 *supra* and accompanying text.

35. John Wiley & Sons v. Livingston, 376 U.S. 543, 549 (1964).

36. 332 F.2d 954 (9th Cir. 1964).

> rightful prerogative of owners independently to rearrange their businesses . . . against the necessity of affording some protection to the employees covered by a collective bargaining agreement containing an arbitration clause, from a sudden change in the employment relationship.[37]

It then held the *Wiley* doctrine applicable to the situation before it, and required Wackenhut to arbitrate the union claims.

In *United Steelworkers v. Reliance Universal Inc.*,[38] the Third Circuit considered a similar situation in which an FTC order requiring divestiture by Martin Marietta Corp. of its Bridgeville, Ohio plant resulted in the sale of the plant to Reliance Universal, Inc. Pointing to *Wiley's* assertion of the significance of labor arbitration, the court stated:

> *Wiley* was a merger case. In the present case the plant was sold as a going concern . . . . [T]he 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. We have no doubt that the result the court reached in the *Wiley* case would have been the same had the transfer there been accomplished by a sale of the business instead of by merger.[39]

It has been argued that the Supreme Court had not meant to have, and that the respective circuit courts should not have so applied the *Wiley* rule.[40] The Fifth Circuit has pointed out, however, that the application of the *Wiley* principle to purchases-of-assets is fairly well settled,[41] and even the critics of *Reliance* and *Wackenhut* will agree that it is.[42]

Criteria of Successorship

Despite their distinct approaches to the problems of successorship, both the courts and the NLRB have developed fairly similar criteria in determining whether it exists. It is a settled rule that it is for courts, rather than for arbitrators, to determine "substantial continuity of identity in the business enterprise before and after a change" so as to establish a subsequent employer as a "successor," bound to arbitrate grievances under his predecessor's labor agreement.[43] But what standards may a court employ in making that determination? The *Wiley* Court found the requisite "similarity and continuity of operation" in the situation before it "adequately evidenced by the

37. *Id.* at 958.
38. 335 F.2d 891 (3d Cir. 1964).
39. *Id.* at 894.
40. *See, e.g.*, U.S. Gypsum Co. v. United Steelworkers, 384 F.2d 38, 42-43 (5th Cir. 1967), *cert. denied*, 389 U.S. 1042 (1968); Shaw & Carter, *supra* note 33, at 366-69.
41. U.S. Gypsum Co. v. United Steelworkers, 384 F.2d 38, 44 (5th Cir. 1967).
42. *See, e.g.*, Shaw & Carter, *supra* note 33, at 369.
43. *See* John Wiley & Sons v. Livingston, 376 U.S. 543, 546-47 (1964).

wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty."[44] "Clearly, however, this is not the only factor to be considered . . . for, if that were the case, *Wiley* could be easily avoided by the successor corporation's refusal to hire the predecessor's employees."[45]

Although *Reliance* and *Wackenhut* employed virtually the same employee-hiring criterion as *Wiley*, other cases have gone beyond this. *Brotherhood of Pulp Mill Workers v. Great Northwest Fibre Co.*,[46] for example, pointed out in designating a successor that

> [t]he product manufactured by the defendant [successor] is so similar as to be considered . . . the same as the product manufactured by Pacific Pulp [the predecessor]. The plant is the same plant operated by the predecessor. The method of operation is similar to that of Pacific Pulp . . . .[47]

Hotel Employees Union v. *Joden, Inc.*,[48] added these factors: that there was no delay for alteration of the premises or in operation after the business changed hands, that the nature of the enterprise involved remained the same as before the change of ownership, and that the business appealed to the same clientele as it had previously.[49] And, in *Monroe Sander Corp. v. Livingston*,[50] where a union was seeking to compel arbitration to recover jobs which the employees of a recently closed subsidiary were denied at a newly purchased subsidiary, it was found significant that both plants were located in the same geographical area and that the jobs in each were quite similar.[51]

There are particular situations in which the courts could preclude arbitration without considering the applicability of these factors, for example, a

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44. *Id.* at 551.

45. Monroe Sander Corp. v. Livingston, 262 F. Supp. 129, 136 (S.D.N.Y. 1966), *modified*, 377 F.2d 6 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967). *See also* K.B. & J. Young's Super Markets, Inc. v. NLRB, 377 F.2d 463, 465-66 (9th Cir.), *cert. denied*, 389 U.S. 841 (1967); Note, *Obligations of Successor Employers: Recent Variations on the John Wiley Theme*, 2 GA. L. REV. 574, 585-86 (1968).

46. 263 F. Supp. 167 (E.D. Wash. 1965).

47. *Id.* at 169.

48. 262 F. Supp. 390 (D. Mass. 1966).

49. *Id.* at 396.

50. 377 F.2d 6 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967).

51. *Id.* at 12. A general guide for the courts has been suggested in a recent article:

> [T]here must be a judicial finding that the transfer of ownership has not so radically altered the employment setting as to render the prior collective bargaining agreement wholly unsuitable to continue to regulate the employee's rights and obligations . . . . [The similarities between the predecessor's and successor's businesses should] indicate that the old contract may have sufficient relevance to the successor enterprise to justify arbitration thereunder.

Note, *The Successor Employer's Duty to Arbitrate: A Reconsideration of* John Wiley & Sons, Inc. v. Livingston, 82 HARV. L. REV. 418, 427, 431 (1968) [hereinafter cited as *Successor Employers*].

massive voluntary reorganization necessary for the survival of an enterprise.[52] Apart from this and similar special situations, however, the courts will generally analyze the circumstances before them and determine whether a new owner is a successor in accordance with the standards set forth above.

In addition to those criteria established by the judiciary, the NLRB has, over several years, created a number of successorship criteria for refusal-to-bargain charges following changes in ownership, which it believed the Supreme Court had in mind deciding *Wiley*.[53] Thus, the Board considers:

> (1) whether there has been a substantial continuity of the same business operations; (2) whether the new employer uses the same plant; (3) whether he has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery, equipment, and methods of production; and (7) whether he manufactures the same product or offers the same services.[54]

The criteria established by the respective forums to determine successor status are, then, fairly similar.[55] The cases imply that the rehiring of a substantial number of the predecessor's employees[56] and the similarity of the new business to the old are the major factors considered.

Extent of Terms Carried Over

Another important issue largely left unanswered by the Supreme Court is the extent to which a predecessor's agreement survives to bind a successor. Does the entire contract automatically continue in effect, subject only to an arbitrator's interpretation of the terms, or may he decline to apply some of its provisions to a new owner? Justice Harlan touched upon this problem in

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52. *See Successor Contractual Obligations, supra* note 8, at 933-34; Patrick, *supra* note 5, at 426-27.

53. *See* Fanning, *The Purchaser and the Labor Contract—An Escalating Theory*, 1967 LABOR RELATIONS YEARBOOK 284 [hereinafter cited as Fanning].

54. *Id.* at 286. For a discussion of the recent developments concerning the specifics of several of these criteria, see Gordon, *Legal Questions of Successorship*, 3 GA. L. REV. 280, 283-91 (1969) [hereinafter cited as Gordon].

55. *But see* Brief of NLRB General Counsel at 14, Kota Div. of Dura Corp., Case No. 18-CA-2419 (NLRB, filed Feb. 16, 1968) [hereinafter cited as General Counsel's Brief], suggesting that Wiley would not have constituted a "continuing 'employing industry' " under Board criteria, since Wiley was considerably larger than Interscience had been. *Contra*, Willard, *Labor Law Aspects of Corporate Acquisitions*, 36 U. Mo. K.C.L. REV. 241, 243-44 (1968) [hereinafter cited as Willard].

56. The Board currently holds that "a majority of the purchaser's employee complement must consist of the predecessor's unit employees in order to support a bargaining obligation by the purchaser on a successorship theory; otherwise such a bargaining obligation will be found only if the union has actual majority status among the purchaser's employees." Gordon, *supra* note 54, at 290. *See also* Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw. U.L. REV. 735, 793, 804 (1969); Willard, *supra* note 55, at 242; *Successor Employers, supra* note 51, at 430-31.

replying to the contention that the Interscience agreement could not cover post-merger claims: "It would be inconsistent with our holding that the obligation to arbitrate survived the merger were we to hold that the fact of the merger, without more, removed claims otherwise plainly arbitrable from the scope of the arbitration clause."[57] But he did not further expound his views.

Wackenhut was one of the first cases to consider this question, and its decision has been a center of controversy ever since. The court there 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, *a collective bargaining agreement* containing an arbitration provision, entered into by the predecessor employer *is binding* upon the successor employer . . . . It follows that under the rule of *Wiley*, Wackenhut is bound by the collective bargaining agreement entered into by General Plant, and is bound thereunder to arbitrate the union grievances . . . . (emphasis added).[58]

This has been interpreted by the Third Circuit in *Reliance* (although it rejected the concept) as stating that a labor contract is automatically and unqualifiedly binding on a successor,[59] limited only by an arbitrator's interpretation of its specific terms and application of them to particular circumstances and events.[60]

It is possible, however, that the Ninth Circuit did not really mean to extend *Wiley* so far. The actual issue before it was limited to whether the purchaser was bound by the prior arbitration clause, and the result of the decision was only to require the company to arbitrate grievances under the provision. In any event, the *Wackenhut* concept has not been accepted elsewhere.

The *Reliance* court was confronted with the argument that the union's contract with Martin Marietta Corp. was "unqualifiedly binding on Reliance, as would have been the case if there had been an assignment or novation substituting Reliance as a party to the instrument."[61] Although taking note of the Ninth Circuit's concept, it declined to read *Wiley* so broadly and stated its own view:

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57. John Wiley & Sons v. Livingston, 376 U.S. 543, 554 (1964).

58. Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954, 958 (9th Cir. 1964).

59. United Steelworkers v. Reliance Universal Inc., 335 F.2d 891, 895 n.3 (3d Cir. 1964).

60. *See* Patrick, *Implications of the John Wiley Case for Business Transfers, Collective Agreements, and Arbitration*, 18 S.C.L. REV. 413, 429 (1966) [hereinafter cited as Patrick].

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

> [*Wiley*] merely reasoned and decided that federal labor law imposed upon a succeeding proprietor a duty to arbitrate those questions which his predecessor was bound to arbitrate under his labor contract . . . . In any event, we find implicit in the guarded language of the *Wiley* opinion, recognition and concern that new circumstances created by the acquisition of a business by a new owner may make it unreasonable or inequitable to require labor or management to adhere to particular terms of a collective bargaining agreement previously negotiated by a different party in different circumstances . . . . [A]n arbitrator . . . may properly consider any relevant new circumstances arising out of the change of ownership, as well as the provisions of and practices under the old contract, in achieving a just and equitable settlement of the grievance at hand. The requirements of the contract remain basic guides to the law of the shop, but the arbitrator may find that equities inherent in changed circumstances require an award in a particular controversy at variance with some term or terms of that contract.[62]

Thus, although guided by the contractual terms, the arbitrator was to possess the power to preclude inequities which might arise from a literal application of the terms to a successor.[63]

A late 1966 district court case, *Retail Stores Employees Local 954 v. Lane's of Findlay, Inc.*[64] also considered the problem. In that situation, a contract between the union and Gallaher Drug Company, owner of a large retail drug chain, was extant when Lane's bought from the company certain of its Findlay, Ohio store's equipment and supplies, assumed its lease, but took no other of its assets or liabilities. Lane's then closed the store, made certain changes in its operations, and subsequently re-opened with all new employees. Thereafter, the union, unable to obtain enforcement of the prior contract, brought suit against Lane's for specific enforcement.

The district court maintained, however, that *Wiley* did not command enforcement and had only decided that the successor's duty to *arbitrate* survived a transfer. Noting Justice Harlan's reliance on a national labor policy which recognized arbitration as a "substitute for tests of strength between

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62. *Id.*

63. Nearly 95 percent of all collective bargaining agreements contain arbitration clauses. Although about 60 percent of these place some explicit restriction on the arbitrator's power or on the scope of arbitration itself, most terms and problems are not eliminated from consideration (only arbitration of wages is excluded by as many as 20 percent of all arbitration provisions). Furthermore, a significant number of labor contracts with general arbitration clauses are similar to that in the Interscience contract (noted above at note 24), which, not excluding any specific provisions from arbitral consideration, necessarily encompass all the terms of and problems arising under their respective contracts. BUREAU OF NATIONAL AFFAIRS, INC., BASIC PATTERNS IN UNION CONTRACTS 51:7-9 (5th ed. 1961).

64. 260 F. Supp. 655 (N.D. Ohio 1966).

contending forces, occupying a central role in resolving disputes and avoiding industrial strife,"[65] the court rejected the union's pleas. To grant specific enforcement, it believed, would be to usurp the function of the arbitrator to whom the *Wiley* Court had specifically delegated the responsibility of determining the merits of each situation and of applying the terms of the surviving contract. It was, therefore, not for a court to pass on the merits itself by broadly granting specific enforcement:

> [I]t ill-behooves a court to read into a Supreme Court decision limitations which are not there . . . . [T]he fact that the Supreme Court was presented with the opportunity to invest the courts [solely] with the duty to resolve the successorship issue, but declined to do so, cannot be ignored. For this reason . . . the union's demand for specific enforcement of the entire collective bargaining agreement must be denied.[66]

It has been argued that it is anomalous to hold, as *Reliance* did, that an arbitration clause survives a transfer but that the other contractual terms are not necessarily carried over.[67] It is also contended that the delegation of a broad power to an arbitrator to decide the applicability of various parts of a contract will, in effect, constitute a power to rewrite the agreement for the parties. Furthermore, it is maintained that an arbitral award based on principles of equity, as *Reliance* advocated, may be at variance with a specific contractual provision and therefore unenforceable. But the mere possibility of an unenforceable arbitral decision seems to be a poor rationale for misreading the words of the Supreme Court. *Wiley* had stated "[W]e 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."[68] In view of this delegation and of the Court's express disinclination to bind the company by itself determining the merits of the arbitrable issues, the arguments advocating the automatic survival of a predecessor's entire agreement in a Section 301 suit under current court case law are sufficiently rebutted.

Although the NLRB arguably "should be given primary responsibility for determining generally the issue of contract survival, as a means of avoiding lack of uniformity or unpredictability,"[69] it has so far carefully avoided imposing contractual terms on successors, despite several opportunities to make

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65. *Id.* at 657, *citing* John Wiley & Sons v. Livingston, 376 U.S. 543 (1964).
66. Retail Store Employees, Local 954 v. Lane's of Findlay, Inc., 260 F. Supp. 655, 658 (N.D. Ohio 1966).
67. *See, e.g.*, Shaw & Carter, *supra* note 33, at 369-72; *Successor Employers, supra* note 51, at 422.
68. John Wiley & Sons v. Livingston, 376 U.S. 543, 552 n.5 (1964).
69. *Successor Employers, supra* note 51, at 428 n.28.

a definite ruling and despite the arguments of its own General Counsel.[70] It has limited its decisions to rulings that particular employers were successors and were, therefore, obligated to bargain in good faith[71] with their predecessors' unions with regard to any changes intended or made in the terms of the labor contracts covering the predecessors' employees.[72]

The moment of decision for the Board on this question of contract survival has apparently arrived, however, for it is currently considering five cases[73] which squarely present the issue.[74] In *Chemical Workers Union v. NLRB*[75] the Court of Appeals for the District of Columbia Circuit, reviewing the Board's order in *Hackney Iron & Steel Co.*,[76] remanded the case to the Board specifically for "further consideration of the question of whether the employer should be called upon to observe the terms of the collective bargaining agreement in effect at the time of the acquisition."[77] The General Counsel is pursuing his previous contention that predecessors' labor contracts carryover, in entirety, to bind successors in the other cases as well.[78]

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70. The General Counsel announced in 1965 that he had authorized issuance of several refusal to bargain complaints under Section 8(a)(5) "not only on the basis that the employer involved succeeded to the bargaining obligation of the predecessor company, but also on the ground that under *Wiley* and related court cases, such 'successor' was bound to honor those terms . . . which were not 'unreasonable or inequitable' under the circumstances." Gordon, *supra* note 54, at 308. The cases arising pursuant to this policy are listed in the General Counsel's Brief, *supra* note 55, at 10.

71. *See* discussion of successors' duty to bargain, p. 16 *infra.*

72. See Gordon, *supra* note 54, at 316-18, for an explanation of the Board's reluctance to impose a predecessor's contract on a successor and of the difficulties involved in establishing such a rule. But the suggestion has been made that the "practical distinction . . . between such a ruling and the present position of the Board may be difficult to find . . . [since,] [w]hen a duty to bargain exists, and the union has sought bargaining, the employer is *not* free to make unilateral changes in wages, hours and other conditions of employment without bargaining with the union." Willard, *supra* note 55, at 246. This view, however, is not entirely accurate. If a contract does not carry over to bind a successor, he may fulfill his statutory duty by bargaining in good faith to impasse, after which he may unilaterally implement changes he had proposed to the union during negotiations. If the contract does carry over, however, bargaining to agreement with the union will be necessary under Section 8(d) of the Act before changes can be made.

73. Kota Div. of Dura Corp., Case No. 18-CA-2419 (NLRB, filed Feb. 16, 1968); Travelodge Corp., Case No. 21-CA-7694 (NLRB, filed April 22, 1968); Hackney Iron & Steel Co., Case Nos. 23-CA-2505 and 23-CA-2554 (NLRB, filed May 1, 1968); William J. Burns Int'l Detective Agency, Inc., Case No. 31-CA-776 (NLRB, filed June 4, 1968). These cases have been consolidated and oral hearing before the Board, an unusual event, was held on April 23, 1969.

74. Kota Div. of Dura Corp., Case No. 18-CA-2419 (NLRB, filed Feb. 16, 1968), however, involves the extent to which a union is required to observe the contract it signed with a predecessor employer, once a successor has assumed the business.

75. 395 F.2d 639 (D.C. Cir. 1968).

76. 167 N.L.R.B. No. 84 (1967).

77. Chemical Workers Union v. NLRB, 395 F.2d 639, 641 (D.C. Cir. 1968).

78. In brief summary, the General Counsel is arguing:

> Reason and logic would appear to dictate the continued applicability of other clauses of the agreement [*i.e.*, clauses other than an arbitration provision] in

It is possible that the Board may attempt again to avoid a disposition of this difficult problem. It is more probable, however, that it will have to make some sort of definitive ruling and choose from among several alternative solutions.[79] In the opinion of this writer the Board will go beyond *Wiley* and hold, like the Third Circuit in *Reliance*, that where a subsequent employer is deemed a successor, additional contract terms will continue in effect between the successor and the union. The national labor policies on which the *Wiley* decision was predicated are significant,[80] and it is anticipated that the Board's decision will be based on these policy considerations. Specifically, the probability of ensuring industrial peace through continued imposition of contractual obligations on both management and labor and the need to protect employees from diminution of their rights by a business transaction in which they had no voice, after having been assured of these rights by the contract negotiated with their predecessor employer, warrant such a holding.

Successor employers will not be unduly burdened by such a ruling. Many problems may be avoided by their inviting union representatives into sale or merger negotiations to discuss the labor relations aspects of the impending business combination. Other difficulties arising after consummation of the transaction may be susceptible to arbitration, assuming, as is likely,[81] that the predecessor's contract has an arbitration clause.

We must await the *Kota* decision and those in the probable suits for enforcement of the Board's orders before there can be greater certainty in this

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> the absence of special circumstances arising from the transfer of ownership making it unreasonable or inequitable to exact performance of certain clauses. For it would be illogical and inconsistent with the basic considerations underlying the policies of our national labor laws upon which *Wiley* is bottomed to hold that the arbitration clause continues and the other clauses of the contract do not.
>
> The need to protect employees from the impact of sudden changes in ownership in which they had no voice stressed in *Wiley* extends to all the provisions of the agreement. The objective of industrial peace is promoted by full contractual stability. The unique attributes of a collective bargaining contract as an instrument of government speak against a hiatus resulting from a termination of the contract upon takeover by a successor. The thrust of *Wiley* . . . extends beyond arbitration. In sum, *Wiley* updates the [NLRB's] "employing industry" concept by applying it to contract continuity. It seems a short but reasonable and logical step wholly consistent with the Act's policies for the Board, in recognition of *Wiley's* scope, to incorporate contract continuity as an administrative corollary of the "employing industry" concept in enforcing the statutory command to bargain collectively.

General Counsel's Brief, *supra* note 55, at 12-13.

79. For a discussion of the alternative solutions from which the General Counsel has proposed that the NLRB choose see Gordon, *supra* note 54, at 312-14.

80. It must be remembered that although the holding in *Wiley* appeared to be very limited, this was a result of the narrow issue posed by Interscience's union which, after completion of the merger in question, constituted only a minority representative of the enlarged employee unit.

81. *See* discussion, *supra* note 63.

area. The final disposition of this issue may have to be made by the Supreme Court. If the Board holds as is suggested above, however, it does not seem unreasonable to predict that that Court, in view of the national labor policies it recognized in *Wiley*, will affirm the Board's decision.

Successors' Duty to Bargain

The issue of a successor's duty to bargain was not undertaken by the Supreme Court in *Wiley*. There, Justice Harlan stated:

> [W]e do not suggest any view on the questions surrounding a certified union's claim to continued representative status following a change in ownership . . . . This Union does not assert that it has any bargaining rights independent of the Interscience agreement; it seeks to arbitrate claims based on that agreement . . . not to negotiate a new agreement.[82]

The Board has restricted its rulings in the business combination field to obligating successors to bargain in good faith with their predecessors' unions over changes in the terms and conditions of employment of the predecessors' workers.[83]

Where a simple purchase-of-assets is involved, there is little doubt of the buyer's responsibility. The rule, as clearly stated in *Overnite Transportation Co. v. NLRB*,[84] is settled that "if the transfer of assets and employees from one employer to another leaves intact the identity of the employing enterprise, then the former's duty to recognize and bargain with an incumbent union devolves upon the latter as 'successor employer.' "[85] If such an employer refuses to deal with the union, the latter may file a Section 8(a)(5) refusal-to-bargain charge[86] with the NLRB. Upon determining the purchaser to be a successor under the criteria discussed previously, the NLRB will require him to bargain with the union and refrain from instituting changes with respect to wages and working conditions without first engaging in such bargaining.

Where a commingling of separate groups of employees is effected, however, the problem is greater. A subsequent employer may rightfully decline to bargain with an incumbent union where his own employees are not organized if he has a good faith doubt of the continued majority status of the union.[87] Where his own employees are represented by another union, more-

82. John Wiley & Sons v. Livingston, 376 U.S. 543, 551 (1964).
83. *See* text accompanying note 72, *supra.*
84. 372 F.2d 765 (4th Cir.), *cert. denied*, 389 U.S. 838 (1967). *See also* Chemrock Corp., 151 N.L.R.B. 1074 (1965).
85. Overnite Transp. Co. v. NLRB, 372 F.2d 765, 768 (4th Cir. 1967).
86. Labor-Management Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964).
87. *See* Platt, *The NLRB and the Arbitrator in Sale and Merger Situations*, 19 N.Y.U. CONF. LABOR 375, 388-89 (1967); Gordon, *supra* note 54, at 291.

over, he may not violate his duty of neutrality by dealing with either organization, unless, of course, he believes that one, generally of his own employees, is clearly a majority representative.

Clarification of such situations, however, is possible. The employer himself may petition under Section 9(c) of the Labor Act[88] for a Board hearing and, if a representation question is determined to exist, for an election to determine his bargaining opponent. More often, however, the initiative will be taken by the union. It may attempt to compel the employer immediately to deal with it on threat of a Section 8(a)(5) charge. As indicated previously, this is the usual way by which *Wiley* situations reach the Board.[89] An alternative for the union is filing a representation petition under Section 9(c) calling upon the Board to find at its hearing that the employer is obligated to deal with it and perhaps determine that its contract constitutes a bar to a representation claim and petition for election by any competing union. Again, if the Board determines that the business changes have created a representation question, particularly where there are competing unions, it may then direct an election to be held among the employees in order to ascertain their exclusive bargaining representative.

Arbitrators' Criteria

The *Wiley* Court, in its final determination, signified its faith in the peacemaking ability of arbitration by leaving the resolution of specific issues and grievances to the discretion of the arbitrator.[90] The question arises, however, as to what criteria an arbitrator should or may apply in deciding the issues in controversy remanded to him for resolution. Guidelines are scarce.

Just as *Wiley* left the arbitrator free to consider all the circumstances surrounding the entire transaction and to formulate a solution which would be neither unreasonably harsh for the parties concerned nor violative of the Interscience contract, other courts have declined to be definitive in remanding for arbitration. The Third Circuit in *Reliance*, for example, merely pointed to *Wiley's* carefully guarded language as recognizing that circumstances changed by an acquisition or merger could make unreasonable or inequitable a command of literal adherence to particular terms of a predecessor's agreement. Thus, it left the arbitrator free to study the facts and to determine the equities.[91]

In view of the need for flexibility in arbitration, however, and of the requisite time-consuming, close scrutiny of the facts by an arbitrator, a lack of ju-

88. Labor-Management Relations Act § 9(c), 29 U.S.C. § 159(c) (1964).
89. *See* Fanning, *supra* note 53, at 286.
90. John Wiley & Sons v. Livingston, 376 U.S. 543, 555 (1964).
91. United Steelworkers v. Reliance Universal Inc., 335 F.2d 891, 895 (1964).

dicially-imposed criteria is not surprising;[92] the arbitrator must have a good deal of freedom in effecting conciliation.[93] Considering all the circumstances of the particular transaction before him and its resulting effect on the parties, as well as reviewing the historical relationship between the union and the predecessor, the arbitrator may interpret the terms of the agreement and balance the interests of the parties involved in applying them.

Precisely because the scope and effect of each arbitral decision are so specifically confined to its facts and determined by the equities of the particular situation few general guidelines have developed even among arbitrators themselves. In each situation the arbitrator must apply his discretion in determining, for example, that the continuity of operations is sufficiently extensive to bind the successor to all the terms of the prior contract or, on the contrary, that the business changes are so extensive that no employee rights survive.

Arbitrators are not, of course, entirely unbridled in their power for, as the Supreme Court has stated:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[94]

Thus, they may not rewrite the contract for the parties, disregard limitations on their jurisdiction or authority contained in the agreement, or make awards contrary to federal and state statutes or public policy.[95] However, the courts' expansion of the scope of arbitrators' authority and disinclination to overturn their decisions indicates the increasing difficulty in avoiding the results of such determinations.[96]

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92. "[C]ourts generally lack sufficient expertise to engage in the necessarily detailed study of the new employment setting and the particular terms of the predecessor contract to determine which are suitable for the new setting." *Successor Employers*, *supra* note 51, at 426.

93. Courts may in the future provide precedent for determining the merits of particular situations in cases where an agreement has no grievance provision or where no resort is had to arbitration and where, consequently, remanding to an arbitrator is not possible. *See* Patrick, *supra* note 60, at 440.

94. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

95. *See* Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751 (1965).

96. *See* Patrick, *supra* note 60, at 417-18. The great independence of arbitrators was described and emphasized by the Supreme Court in *Enterprise Wheel & Car* when it declined to reverse an ambiguous arbitration order: "The refusal of courts to review . . . an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration

Without specific rules to guide arbitrators, decisions in this area, as in arbitrations in ordinary, noncombination situations, must continue to be based virtually entirely on the arbitrator's view of the merits and of the best means for achieving industrial peace.

Conflicting Union Representatives

One of the most interesting problems not covered by *Wiley* concerns the survival of unionized employees' rights under a predecessor's collective agreement when their integration following a business combination brings them into conflict with a successor's employees' extant union. There were no confrontations between separate unions in *Wiley*, *Wackenhut*, or *Reliance*, and the problem did not concern the courts until *McGuire v. Humble Oil & Refining Co.* arose in 1966.[97] In that case Weber & Quinn, a small coal and fuel oil company with 24 employees, all represented by Teamsters Local 553, was purchased by Humble Oil whose 335 employees were represented by Industrial Employees Association, Inc. Thirteen Weber & Quinn employees voluntarily joined Humble and were integrated into the company's operations, while the other 11 either declined employment or failed Humble's physical examination. Local 553 subsequently demanded that Humble arbitrate various grievances under the Weber & Quinn collective agreement and, on refusal, instituted suit.

During the pendency of the action, Humble filed a petition with the NLRB under Section 9(b) of the Act[98] for clarification of the appropriate bargaining unit. The Board ruled that the 13 employees, having been effectively integrated into the Humble operations and unit, could no longer be considered a separate bargaining entity and that, consequently, the Association was the exclusive bargaining representative of all 348 employees.[99] Following this ruling the case reached the courts.

In view of the presence of a second union representing the buyer's employees and of the NLRB ruling and certification, the Second Circuit believed the situation to be entirely different from that in *Wiley* and reversed the district court's order of arbitration.[100] The court did not believe that the industrial peace on which *Wiley* was predicated would be advanced by compelling arbitration under such circumstances:

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would be undermined if courts had the final say on the merits of the awards." 363 U.S. 593, 596 (1960).

But, it has been suggested that there is a growing movement toward greater judicial review of arbitral awards. Patrick, *supra* note 60, at 441-42.

97. 355 F.2d 352 (2d Cir.), *cert. denied*, 384 U.S. 988 (1966).

98. Labor-Management Relations Act § 9(b), 29 U.S.C. § 159(b) (1964).

99. Humble Oil & Ref. Co., 153 N.L.R.B. 1361 (1965).

100. 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).

> If the judgment below should be affirmed and the arbitration proceedings commence, there would be an obvious conflict between the interests of the Humble employees as a whole and the interests of the 13 Humble employees who formerly worked for Weber & Quinn. If it be assumed that in the arbitration proceeding Local 553 would continue to represent the former employees of Weber & Quinn, it is not unlikely that they would press for an award giving these employees preferential treatment in the matter of seniority, job security, working conditions and other benefits that would adversely affect the other Humble employees. The result might well be unrest and dissatisfaction among the vast majority of workers in the plant. Such a burdening of the collective bargaining relationship is clearly to be avoided, as a matter of national labor policy.[101]

Furthermore, the court saw a danger of its compelling Humble to commit an unfair labor practice. Since an employer under Section 9(a) of the Labor Act[102] may bargain with the representative only of a majority of the employees in a unit, "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."[103] It found, therefore, no duty on the part of Humble to submit to arbitration of the Local's grievances, and the Supreme Court declined to review the decision.

Although several commentators have indicated their support of this decision,[104] it does seem to be subject to certain legitimate criticism. While the potential clash of union interests might appear to justify the court's fear of industrial strife, the decision seems to overlook the *Wiley* Court's reliance on the flexibility of arbitration as the most effective means of insuring peace where the interests of separate groups (a union group v. an unrepresented group in *Wiley*) might conflict.[105]

It is possible that the court, because of its fear of compelling an unfair labor practice, failed to appreciate the significance of the Board's action on Humble's Section 9(b) petition. The NLRB's clarification ruling specifically

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101. *Id.*, 355 F.2d at 357.

102. Labor-Management Relations Act § 9(a), 29 U.S.C. § 159(a)(1964).

103. McGuire v. Humble Oil & Ref. Co., 355 F.2d 352, 358 (2d Cir. 1966).

104. *See, e.g.*, Shaw & Carter, *Sales, Mergers and Union Contract Relations*, 19 N.Y.U. CONF. LABOR 357, 372 (1967); Fanning, *The Purchaser and the Labor Contract —An Escalating Theory*, 1967 LABOR RELATIONS YEARBOOK 284, 288.

105. *See* discussion accompanying notes 25-31, *supra*. *But see* Note, *Obligations of Successor Employers: Recent Variations on the John Wiley Theme*, 2 GA. L. REV. 574, 586-87 (1968). This article also suggests an approach for peacefully resolving situations involving conflicting union representatives. That is, the successor could arbitrate the demands of the predecessor union under the contract existing between the successor and its own union, assuming that the successor's contract was comprehensive enough to serve as a basis of arbitration for the issues raised by the predecessor union. *Id.* at 588.

declined to assert any view on the question of Humble's contractual obligations to the Local, deciding only the representation question.[106] It did not preclude Humble from arbitrating with the Local[107] and consequently, would probably have declined to find an unfair labor practice had arbitration ensued. Furthermore, arbitration with a minority union, at least to the extent it constitutes discharge of pre-merger obligations, is not necessarily inconsistent with recognition of a majority union. But even if it were so considered in this situation, it has not been established that the rationale of the rule against bargaining with a minority union is applicable to a business combination:

> In the past, unfair labor practices have been found when the employer bargains with a union seeking to act as the exclusive representative following its decertification and the certification of another or attempting to adjust grievances under a contract negotiated by another union which is still the certified representative.[108]

Not only were such factors absent in the *McGuire* situation, but the need for employee protection from a sudden change in the employment relationship, to which *Wiley* adverted, would seem to militate against an unfair labor practice finding. Besides, had arbitration commenced and had the Association filed a charge with the Board, a stay could have been ordered pending the resolution of the unfair practice question by the Board, the tribunal which, as the Second Circuit seemed to believe, has primary responsibility under Section 10(a) of the Act[109] for the determination of unfair labor practices.

Teamsters v. Red Ball Motor Freight, Inc.,[110] a two-union case not involving a change of ownership, gives support to the *McGuire* rationale.[111] Red Ball merged two of its trucking terminals, closing one and stationing all the employees in the other. Since separate unions represented the two groups of workers, Red Ball sought to preempt any labor difficulty by agreeing with both organizations to request that the Board conduct an election to determine the exclusive bargaining representative of the combined group. Objections by the Teamsters, the union at the closed terminal, caused two elections to be set aside and before a third could be held that union sought to

106. Humble Oil & Ref. Co., 153 N.L.R.B. 1361, 1362-63 (1965).
107. *Id.*
108. 66 COLUM. L. REV. 967, 972-73 (1966).
109. Labor-Management Relations Act § 10(a), 29 U.S.C. § 160(a) (1964).
110. 374 F.2d 932 (5th Cir. 1967).
111. Two other cases are also pertinent. The Second Circuit impliedly reaffirmed its *McGuire* rationale in Owens-Illinois, Inc. v. Retail, Wholesale & Dep't Store Union, 393 F.2d 932 (2d Cir. 1968), *aff'g* 276 F. Supp. 740 (S.D.N.Y. 1967). Furthermore, Chief Justice Burger, while sitting on the Court of Appeals for the District of Columbia, foreshadowed *McGuire's* reference to and reliance on *Wiley's* footnote in National Ass'n of Broadcast Technicians v. FCC, 346 F.2d 839 (D.C. Cir. 1965).

arbitrate various grievances under its old agreement. When Red Ball refused to comply with the arbitrator's award, a suit commenced.

The problem for the Fifth Circuit was to determine whether the Teamsters' contract continued to exist as a binding document and, therefore, whether its arbitration provisions were enforceable. It found that the merger removed each union from its status as a unit's exclusive bargaining representative, and, since an employer statutorily could not bargain with any but his employees' exclusive representative, Red Ball could not be compelled to violate its Section 8(a)(2) duty of neutrality[112] by dealing with the Teamsters alone. More importantly, after distinguishing the *Wiley* situation by noting the presence of two unions and the *McGuire* case by noting the lack of a designated employee representative, the court further analyzed the particular circumstances before it in terms of the industrial peace to which *Wiley* had addressed itself. It believed that if the arbitral disposition of one union's grievance were extremely favorable to it, it would give rise to a complaint by the opposing union, thus initiating a series of alternating complaints and requests for arbitration by the respective unions and ensuring conflict between the two labor groups.

Although this decision may be open to the same criticisms to which *McGuire* has been subjected, particularly its lack of faith in the arbitral process,[113] it has, in conjunction with *McGuire*, raised the question of the applicability of the *Wiley* rationale to the two-union situation. Perhaps the Supreme Court agreed with these two decisions by implying in *Wiley* that the confrontation of two unions might give rise to a conflict too difficult for even arbitration to resolve.[114] Perhaps the courts will compel arbitration in two-union situations which do not involve the unusual circumstances of *McGuire* and *Red Ball*.

The *McGuire* and *Red Ball* decisions are well-reasoned and the Supreme Court may be required to make the final resolution of this issue. In view of the arguments posed above and of the Supreme Court's express recognition of the merits of arbitration, however, it is predicted that the Court will compel arbitration where conflicting unions with at least comparatively equal-sized memberships[115] are merged. Further case law is required before a substantially clear principle may be distilled from this particular area.

112. Labor-Management Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1964).

113. It has been argued that the courts in these two cases failed "to take account of the many employee grievances that do not involve the relationship of the employer to the other employees." Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 NW. U.L. REV. 735, 766 (1969).

114. John Wiley & Sons v. Livingston, 376 U.S. 543, 551 n.5 (1964).

115. The Supreme Court declined to review the *McGuire* case with its two disparately-sized unions. It was never presented with the *Red Ball* situation in which, apparently, comparatively-sized memberships were involved.

Conclusion

In addition to the major problems left undetermined by the *Wiley* Court, lower courts have addressed themselves to other, less significant issues. For example, a successor may be held responsible for remedying his predecessor's unfair labor practices;[116] the expiration of a predecessor's contract before the consummation of a sale or merger may not eliminate his successor's duty to arbitrate;[117] and, a disclaimer by a successor of the assumption of his seller's agreement will not abrogate his duty of arbitration.[118] Other issues may yet arise. It has not yet been determined what criteria will apply when a subsequent employer seeks to bind a union to his predecessor's agreement. The Board's decision in *Kota* will probably resolve this issue by holding that a union, as well as a successor employer, is bound to its predecessor's contract. Nor has it been decided whether the rationale of *Textile Workers v. Darlington Mfg. Co.*[119] will apply to a merger or other combination which is not effected for "genuine business reasons" as *Wiley* impliedly commanded.[120] It does not seem unreasonable to predict that it will be so applied.

Even after these questions are answered, others will inevitably arise in this challenging and complex area. We may look forward to interesting decisions which will further delineate the respective rights of labor and management subsequent to the effecting of business combinations.

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116. Perma Vinyl Corp., Dade Plastics Co., and U.S. Pipe & Foundry Co., 164 N.L.R.B. No. 119 (1967), *aff'd*, 398 F.2d 544 (5th Cir. 1968). *See* Gordon, *Legal Questions of Successorship*, 3 GA. L. REV. 280, 292-308 (1969), and Goldberg, *supra* note 113, at 813-33 for comprehensive discussions of this area.

117. *See* Overnite Transp. Co. v. NLRB, 372 F.2d 765 (4th Cir.), *cert. denied*, 389 U.S. 838 (1967).

118. *See, e.g.*, United Steelworkers v. Reliance Universal Inc., 335 F.2d 891 (3d Cir. 1964); Brotherhood of Pulp Mill Workers v. Great Northwest Fibre Co., 263 F. Supp. 167 (E.D. Wash. 1965).

119. 380 U.S. 263 (1965).

120. John Wiley & Sons v. Livingston, 376 U.S. 543, 545 (1964).