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SUCCESSOR COMPANIES: THE NLRB LIMITS THE OPTIONS—AND RAISES SOME PROBLEMS

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A COMPANY acquiring a unionized business faces two immediate labor-relations issues. First, is the successor company obligated to recognize and bargain with the predecessor's union? Second, assuming such obligation, must the successor also assume its predecessor's union contract?[1] Failure to answer these issues correctly may place the successor in violation of Sections 8(d) and 8(a)(5)[2] of the National Labor Relations Act.[3]

In most instances, these questions are resolved by practical, rather than legal, considerations. Economics, logic, and the realities of industrial relations generally require that the successor recognize its predecessor's union, if only to avoid labor turmoil.[4] No self-respecting union will permit itself to be ousted from an established collective bargaining relationship without some kind of struggle, merely because of a change in employer ownership, be it economic or legal. And the last thing most successors want at the time of a business takeover is labor trouble, whether in the form of a work stoppage, a picket line, or protracted litigation.[5] Further, where a predecessor's employees are accustomed to union benefits and representation, the successor may validly believe that attempting to operate

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1. An additional ancillary issue is whether the successor assumes its predecessor's legal and contractual liabilities in the area of labor-relations. This is discussed *infra.*

2. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees . . ."; section 8(d) defines the "duty to bargain."

3. Hereinafter cited as the Act.

4. As stated in Walker Bros., 41 Lab. Arb. 844, 850 (1963) (Crawford, Arbitrator): "The conduct of purchasers and the clear logic of the economic facts and the public policy governing union-management relations . . ." dictate that performance of the bargaining obligation lies with the successor employer.

5. Under most circumstances, it would not be illegal for a predecessor's union to strike or picket a successor refusing to recognize it since, as noted *infra,* such a refusal ordinarily constitutes a violation of Section 8(a)(5) of the Act. C.A. Blinne Construction, 135 N.L.R.B. 1153 (1962); Colony Materials, Inc. v. Rothman, 46 L.R.R.M. 2794 (D.D.C. 1960).

without a union will result only in employee unrest and future union organizational efforts, adversely affecting production and efficiency.

A successor recognizing its predecessor's union for the above or other practical reasons generally assumes the obligations of its predecessor's union contract based on similar considerations. By so assuming the contract, the successor also protects itself in two important respects for the contract term: Its major costs and obligations will not exceed those set forth in the contract; and, since most contracts contain a "no strike" clause prohibiting union strikes and employee work stoppages,[6] there are basic assurances against severe industral strife. If, on the other hand, the successor recognizes the predecessor's union without its union contract, it gives the union the opportunity to engage in collective bargaining for a new contract, and a sophisticated successor recognizes that, when a union bargains, it wants "more."[7] Under normal circumstances, it would be naive to expect a predecessor's union to settle for less than it had in its predecessor's contract, or even for the same thing. Moreover, without a contract in effect, the union is free to strike and otherwise exert economic force against the successor.

In spite of the above, there are occasions when a successor does not wish to recognize its predecessor's union and/or assume its predecessor's union contract, even at the risk of extreme labor unrest. Insofar as union recognition is concerned, a successor may have a corporate policy opposing unions, believing they adversely affect labor costs and management prerogatives.[8] Or, a successor operating other facilities which are not unionized or which are organized by another union, may fear that recognizing the predecessor's union will adversely affect labor relations at such other facilities.[9] Further, a

6. 91% of union contracts contain some type of "no-strike" clause, generally unconditional. *Collective Bargaining Negotiations and Contracts*, B.N.A. 77:1 (1970).

7. When Samuel Gompers, president of the American Federation of Labor and dominant figure in United States labor throughout the early years of this century, was asked what the labor movement wanted, he answered: "More." For a discussion of what labor means by "more," *see* SHULTZ & COLEMAN, LABOR PROBLEMS 67 *et seq.* (2d ed. 1957).

8. Of course, there are also employers who oppose unions as a matter of "principle."

9. *E.g.*, such a successor having unorganized employees may believe that recognizing the predecessor's union will give its non-union employees union ideas, or lead the predecessor's union to try to organize such other employees. Or, if the

successor may withhold union recognition as a bargaining lever, using it as a lure to secure bargaining concessions. Finally, a successor may sincerely believe that its predecessor's employees are dissatisfied with their union, and that they should be given a fresh opportunity to decide for themselves whether or not they want the union.

Even if a successor is willing to recognize its predecessor's union, there are occasions when it may not wish to assume its predecessor's union contract, believing it can negotiate desired changes. The successor may consider the contract's economic terms too harsh or its operational language too limiting. Or, it may believe that certain economic or managerial terms which suited the predecessor's business are not applicable to the new ownership. Alternatively, it may simply deem that it has the economic strength or will to negotiate a better deal than its predecessor.

Whatever the successor's motive for not recognizing its predecessor's union and/or assuming its union contract, the National Labor Relations Board,[10] in a series of decisions spanning 25 years[11] and climaxing only recently,[12] has severely limited the successor's options. First holding that a successor must generally recognize its predecessor's union, and finally requiring that it must ordinarily assume its predecessor's union contract, the Board has effectively barred a successor's choices in all but exceptional or unique situations.[13]

Thus, as early as the mid-1940's, the Board held that where a predecessor company is obligated to recognize and bargain with a union, such obligation "runs with the employing industry and is bind-

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successor deals with another union at one or more of its other facilities, it may deem that recognizing the predecessor's union will put it in a squeeze play between two competing labor organizations, each trying to outdo each other and prove their worth at the successor's expense. On the other hand, certain successors would not wish to see the same union that it has at some facilities at a new location, fearing that such would give one union a stranglehold over all its operations.

10. Hereinafter cited as the Board.

11. South Carolina Granite Co., 58 N.L.R.B. 1448 (1944), cited in the following paragraph, was one of the first in a long series of successorship cases.

12. William J. Burns International Detective Agency, Inc., 182 N.L.R.B. 50 (1970). See note 37, *infra*.

13. The cases and situations dealt with herein assume that the successor is a bona fide purchaser of the predecessor's business, not an *alter ego* thereof, and that the successor's acquisition is not a colorable transaction designed to evade union recognition.

ing on a *bona fide* successor company as well as on its predecessor."[14] A predecessor's obligation so to recognize and bargain with a validly recognized union was thereafter defined to include, *inter alia*, the obligation to continue dealing with such union unless the employer could establish a good faith doubt as to the union's continued majority status.[15] Accordingly, the Board's successorship doctrine[16] firmed into the presently established rule that a successor employer must normally recognize and bargain with the union representing its predecessor's employees unless the successor can establish that it had a good faith doubt as to the union's majority status at the time the union requested successor recognition.[17] The rule's purpose is to enhance "stabilized industrial relations"[18] by not requiring employees continually to demonstrate their union desires "in an employing industry which is periodically subject to a possible change of employers."[19]

The foregoing successorship doctrine contains two tempting loopholes for recalcitrant successors. First, the rule applies only if the "employing industry" remains the same after the acquisition; otherwise, the purchaser is not deemed to be a "successor" within the meaning of the law, thereby obviating successorship bargaining obligations.[20] Second, there is, in any event, no bargaining obliga-

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14. South Carolina Granite Company, *supra* note 11, *aff'd.* 152 F.2d 25 (4th Cir. 1945); Northwest Glove Co., Inc., 74 N.L.R.B. 1697 (1947).

15. *Cf.* Celanese Corporation of America, 95 N.L.R.B. 664 (1951).

16. With court approval.

17. NLRB v. Auto Ventshade, Inc., 276 F.2d 303 (5th Cir. 1960); N.L.R.B. v. Armato, 199 F.2d 800 (7th Cir. 1952); Witham Buick, 139 N.L.R.B. 1209 (1962); Firchau Logging Company, 126 N.L.R.B. 1215 (1960); Ugite Gas, Inc., 126 N.L.R.B. 494 (1960); Downtown Bakery, 139 N.L.R.B. 1352 (1962), *enf'd in part* 303 F.2d 921 (6th Cir. 1964); West Suburban Transit, 158 N.L.R.B. 794 (1966); N.L.R.B. v. Laystrom, 359 F.2d 799 (7th Cir. 1966); Diamond National Corp., 133 N.L.R.B. 268 (1961); Snow v. N.L.R.B., 308 F.2d 687 (9th Cir. 1962). During the year following a union's certification, neither a predecessor nor successor employer can refuse to recognize the union except for "unusual circumstances." Cruse Motors, 105 N.L.R.B. 242 (1953); Celanese Corp., *supra* note 15.

Moreover, if there is a valid collective bargaining agreement in effect at the time of acquisition, the successor may not, during the life thereof, assert a good faith doubt as to the union's majority status so as to relieve it of an otherwise existing bargaining obligation. Ranch-Way, Inc., 183 N.L.R.B. 116 (1970).

18. Cruse Motors, 105 N.L.R.B. 242, 246 (1953).

19. Maintenance, Inc., 148 N.L.R.B. 1299, 1302 (1964).

20. United Texas Petroleum, 153 N.L.R.B. 849 (1965); Tennsco Corp., 141 N.L.R.B. 296 (1963), *rev'd on other grounds*, 339 F.2d 396 (6th Cir. 1964).

tion if the successor can establish a good faith doubt of the union's majority status at the time of a bargaining request.[21]

However, except for unique situations, the Board has firmly closed these escape hatches by broadly construing the term "employing industry," and narrowly interpreting "good faith doubt." Thus, in determining whether the "employing industry" remains the same, the controlling standard in each case is "whether the employment enterprise substantially or essentially continues under the new ownership as before,"[22] with "substantial continuity in the employing enterprise."[23] This broad standard is squarely met if the acquiring company continues "essentially the same operation with substantially the same employee unit,"[24] or if there is a "basic similarity" between the selling and acquiring concerns.[25] If such standard is met, an acquiring concern is a "successor," inheriting its predecessor's bargaining obligations, regardless of whether the acquistion is accomplished by stock transfer, purchase or acquisition of assets, lease, or takeover of a bankrupt's assets.[26] Indeed, it makes no basic difference that the purchase contract specifically excludes the successor's assumption of its predecessor's liens, encumbrances, liabilities, obligations, good will, name, or even premises, or that the successor fails to hire a majority of the predecessor's employees.[27] Clearly, an employer, operating a purchased company with any kind of "basic similarity" and retaining a majority of predecessor employees, will be hard

21. Diamond National Corp., 133 N.L.R.B. 268 (1961); Mitchell Standard, 140 N.L.R.B. 496 (1963). Note, however, that the successor may not assert such a doubt if there is a current collective bargaining agreement in effect at the time of takeover. Ranch-Way, Inc., 183 N.L.R.B. 116 (1970).

22. Cruse Motors, *supra* note 18, at 247, a frequently cited statement.

23. Randolph Rubber Co., 152 N.L.R.B. 496, 499 (1965).

24. Maintenance, Inc., 148 N.L.R.B. 1299, 1301 (1964). This means that a majority of the successor's employee unit should be made up of the predecessor's employees; however, it is not necessary that the successor hire a majority of the predecessor's employees. Goldberg, *Successor Employer's Labor Obligations,* 63 NW. U.L. REV. 735, 793-94 (1969).

25. West Suburban Transit Lines, Inc., 158 N.L.R.B. 794, 797 (1966).

26. Maintenance, Inc., *supra* note 24; Johnson Ready Mix, 142 N.L.R.B. 437 (1963); West Suburban Transit Lines, *supra* note 25. *See also* cases cited *supra* notes 14 and 17.

27. In addition to cases cited at note 26 *supra, see* Colony Materials, Inc., 130 N.L.R.B. 105 (1961); Chemrock Corporation, 151 N.L.R.B. 1074 (1965). Two cases in which the Board went about as far as it ever has in finding successorship situations are West Suburban Transit Lines, *supra* note 25 and Johnson Ready Mix, *supra* note 26.

put to escape a successorship label.[28]

It is similarly difficult for a successor to establish a good faith doubt of a predecessor union's majority status in order to relieve it of a bargaining obligation. If the predecessor's union was validly recognized, a presumption of continued majority status arises at the time of the successor's acquisition.[29] The burden of proof is on the successor to rebut such presumption by establishing that it has "reasonable grounds" for doubting the union's majority status, "supported by objective considerations."[30] This is a heavy burden to sustain, for it is not satisfied by proof of even the following factors: Reports of employee dissatisfaction with the union, high labor turnover, poorly attended union meetings, and failure of employees to pay union dues.[31] There are not too many other approaches available to a successor whereby it can attack a union's majority status.[32]

Some determined employers have tried yet another method to avoid the successorship obligation: they have refused to hire the predecessor's employees, thereby claiming that the "employee unit" was wholly destroyed in the changeover, thus vitiating any bargaining obligation. This tactic, however, can backfire, often with disastrous results, for an employer's failure to hire its predecessor's employees in order to rid itself of its predecessor's union is clearly unlawful under the Act,[33] and subjects the employer to an order requiring reinstatement and back pay for wrongfully rejected employees.[34] A pur-

28. Two cases where the Board found no successorship involved purchasers acquiring prior business concerns in a shutdown condition, and not as going operations. United Texas Petroleum, *supra* note 20; Tennsco Corp., *supra* note 20.

29. West Suburban Transit Lines, *supra* note 25; Mitchell Standard Corp., *supra* note 21; Watertown Undergarment Corp., 137 N.L.R.B. 287, 303 (1962).

30. West Suburban Transit Lines, *supra* note 25; Celanese Corp., *supra* note 15; Laystrom Manufacturing, 151 N.L.R.B. 1482 (1965), *rev'd* 359 F.2d 799 (7th Cir. 1966).

31. Randolph Rubber Co., *supra* note 23; West Suburban Transit Lines, *supra* note 25; United States Gypsum Co., 143 N.L.R.B. 1122 (1963); United States Gypsum Co., 90 N.L.R.B. 964 (1950).

32. Two cases in which the Board found that successors had sustained their burden of proof seem to be unique situations which have, in effect, been so limited. Diamond National Corp., *supra* note 21; Mitchell Standard, *supra* note 21. The Courts do not always hold a successor to as strict a burden as the Board. *Cf.* N.L.R.B. v. Laystrom Mfg., 359 F.2d 799 (7th Cir. 1966).

33. Section 8(a)(3) of the Act makes it an unfair labor practice to discriminate "in regard to hire or tenure of employment . . . to discourage membership in any labor organization."

34. New England Tank Industries, 133 N.L.R.B. 175 (1961), *enf'd* 302 F.2d

chaser's wholesale refusal to hire its predecessor's employees raises an inference of unlawful motivation; it is difficult to explain why, "despite the presence of a pool of experienced workers," the successor "went to considerable lengths to replace union employees with entirely new workers."[35]

While the Board's established successorship rules have long required that a successor generally recognize its predecessor's union, they have not, until recently, obligated the successor to assume its predecessor's union contract. Accepting the theory of "privity of contract," the Board consistently held that a successor was not obligated to assume any union contract to which it was not a party.[36] Accordingly, a successor, although obligated to recognize its predecessor's union, had the choice of rejecting its predecessor's contract and negotiating a new agreement in lieu thereof.

However, the Board has now eliminated such option, holding in the recent *William J. Burns International Detective Agency, Inc.*,[37] case that, absent unusual circumstances, "national labor policy . . . requires the successor employer to take over and honor a collective bargaining agreement negotiated on behalf of the employing enterprise by the predecessor." This means that a non-consenting successor employer is now bound to its predecessor's contract as if it were a signatory thereto, and failure to honor the contract is violative of Sections 8(d) and 8(a)(5) of the Act. A successor's failure to adopt its predecessor's collective bargaining agreement may result

273 (1st Cir. 1962), *cert. den.* 371 U.S. 875 (1962); Piasecki Aircraft Corp., 123 N.L.R.B. 348 (1959), *enf'd* 280 F.2d 575 (3rd Cir. 1960), *cert. den.* 364 U.S. 933 (1961); Barney Wilkerson Construction, 145 N.L.R.B. 704 (1963); Alton-Arlan's Dept. Store, Inc., 150 N.L.R.B. 1303 (1965).

35. N.L.R.B. v. New England Tank Industries, 302 F.2d 273 (1st Cir. 1962). Further, failure of a successor to hire key union supporters may raise an inference of unlawful conduct. West Suburban Transit Lines, Inc., *supra* note 25.

36. Krantz Wire Mfg. Co., 97 N.L.R.B. 971 (1952), *aff'd* 199 F.2d 800 (7th Cir. 1952); Chemrock Corp., *supra* note 27, at 1079. *Cf.* West Suburban Transit Lines, *supra* note 25, at 799 n.8.

37. 182 N.L.R.B. 50 (1970). The Second Circuit Court of Appeals, in a decision rendered April 26, 1971, (— F.2d —), after this article was written, reversed that portion of the Board's *Burns* decision requiring that the successor employer honor its predecessor's contract, holding that the Board exceeded its powers by ordering the successor to so honor such contract. William Cavers, Regional Attorney for the 13th Regional Office of the National Labor Relations Board, has advised that the Board presently has under consideration the question of whether or not it will seek certiorari, but that it has not yet made a decision.

in liability for any benefits lost by employees as a result thereof.[38] *Burns* is undoubtedly a significant expansion of Board policy for never before had the Board required that a non-consenting successor[39] take on its predecessor's union contract, as well as its union.[40]

At first blush, *Burns* seems subject to easy criticism. On its face, it violates one of those cornerstones of Anglo-American jurisprudence, privity of contract. Further, it seems contrary to generally accepted assumptions of law and equity to require a non-consenting employer to assume a contract to which it was not a party and which it specifically excluded from a sales contract. Indeed, such a far-reaching Board holding could be expected to send shock waves through the labor-management community.

However, upon more mature consideration, it is difficult to fault the Board for its *Burns* decision. For one thing, the Board was not truly setting labor policy in this instance; rather, it was merely following labor policy previously set forth in court cases in which it was not involved. In 1964, the United States Supreme Court held in the celebrated case of *Wiley v. Livingston*[41] that where a small organized predecessor was merged into a large unorganized corporation, the surviving corporation was obligated to arbitrate grievances arising under the predecessor's collective bargaining agreement. Just a few months thereafter, basing its decision on the *Wiley* case, the Ninth Circuit Court of Appeals held that a successor which had purchased a predecessor's assets was obligated to honor the latter's collective bargaining agreement.[42]

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38. William J. Burns, *supra* note 12. As the other side of the coin, a successor employer may insist upon the union's adherence to the contract it negotiated with the predecessor. Kota Division of Dura Corp., 182 N.L.R.B. 51 (1970).

39. The standards for determining successorship in *Burns* are the same as those discussed *supra* in prior Board cases.

40. In Overnite Transportation Co., 157 N.L.R.B. 1185 (1966), *aff'd* 372 F.2d 765 (4th Cir. 1967), *cert. den.* 389 U.S. 838 (1967), the Board held, in effect, that a successor could not unilaterally change a predecessor's union contract without first bargaining such with the union. However, such bargaining obligation is far from requiring the successor to accept the contract, as such, since a successor could, under *Overnite*, change the contract after bargaining to an impasse with the union.

41. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964). This case arose under § 301 of the N.L.R.A. as a suit between private parties to enforce arbitration under a collective bargaining agreement.

42. Wackenhut Corp. v. Plant Guards, 332 F.2d 954 (9th Cir. 1964), also a § 301 action. The Third Circuit, in a case decided shortly after *Wackenhut*, declined to go quite as far in a similar proceeding, holding that where a successor

Even more important than the precise holding of *Wiley* is the principle for which it stands, for therein the Supreme Court decreed:

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. ". . . [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant."[43]

Thus, it was the Supreme Court which not only paved the road for the Board's *Burns* decision, but escorted the Board most of the way down it.

Further, it appears fair to state that with *Burns* the Board has "caught up with the exigencies of the collective bargaining community [and] recognized the realities of the employer-employee relalationship."[44] After all, *Burns* merely codifies what most employers and unions do in any event,[45] and it thereby fulfills the reasonable expectations of the union and employer involved. It also fulfills the expectations of the predecessor's employees. Having become accustomed to living by the contract as the law of the shop, they reasonably anticipate that such law will continue to govern their employment relationship in the future, just as it has in the past.

Permitting a successor to flout such reasonable expectations by rejecting a predecessor's union contract may result in industrial instability. Employees are carefully taught by both unions and employers that the union contract is, indeed, the shop law. It governs the actions of all parties: Employees as well as employers are expected to abide thereby.[46] Moreover, employees know they have secured their contractual rights through the give and take of collective bargaining, often ceding desired ends in order to obtain others. If

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acquired a predecessor's operations the predecessor's contract was the "basic charter" for the parties but that an arbitrator, taking into account changes caused by the new ownership, would be empowered to make alterations therein based on equity. Steelworkers v. Reliance Universal, 335 F.2d 891 (3rd Cir. 1964).

43. Wiley v. Livingston, *supra* note 41, at 550.

44. *In re* Interscience Encyclopedia, et al., 55 Lab. Arb. 210, 220 (1970) (Roberts, Arbitrator). Such case in the arbitral sequence to *Wiley*.

45. *See supra* note 4.

46. For example, an employee may be discharged for violating contract terms or reasonable plant rules; further, if an employee believes a contract right is being violated he must seek relief within the contract's procedures rather than through self-help. Elkouri & Elkouri, *How Arbitration Works*, B.N.A. 109, 350 *et seq.* (1967).

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

The *Burns* rule, on the other hand, can further the basic labor policy of avoiding "industrial strife."[47] With *Burns*, all parties know where they stand from the outset of their relationship. They are aware of their mutual rights and obligations. This ordinarily reduces confrontations and disputes, necessarily adding to labor stability. Further, a successor's refusal to honor a predecessor's union contract can lead to strikes and other labor unrest, hardly enhancing the Act's aim of minimizing industrial strife.

Finally, *Burns* protects those most needing protection. The successor, of course, can protect itself against much of the unfairness otherwise inherent in *Burns*. It can ascertain the terms of a predecessor's union contract before making an acquisition, and consider any burdensome terms in deciding whether to close the deal or to seek financial concessions from the predecessor. The employees, on the other hand, may have no protection without a contract. While there is, indeed, a breed of enlightened employers, there is also the employer who is enlightened only if legally or economically forced to be. Left to his own devices, such employer could deprive employees of valuable contractual gains, including wages, benefits and job security accumulated only after long, hard struggles.[48]

Policy considerations aside, *Burns* nevertheless raises various issues which should be recognized in order to avoid possible future liabilities. In addition to the obvious new rights and liabilities created by the decision, additional *underlying* obligations and responsibilities may be created as a result of *Burns*.

For example, *Burns* poses the question whether a successor may

47. The preamble to the Act.

48. Moreover, prior to *Burns*, an economically powerful successor had a golden opportunity to break a weak union altogether. A union, after all, is a political body. It must please its constituents or face ouster. If a successor were able to force a union to negotiate a contract containing lesser benefits than those set forth in its predecessor's contract, it could mean the union's demise. Under normal circumstances, employees would discard, or ignore, a union negotiating a poorer contract with a successor than it had with its predecessor.

continue to hire only those employees it deems acceptable from among the predecessor's work force. Previously, an employer acquiring another's operations assumed it could start from scratch in hiring and interviewing its predecessor's employees, retaining as new employees only those it thought acceptable. This is not to say that the successor does not generally intend ultimately to hire most of the predecessor's employees; indeed, the existence of such an available work force is often a major reason for an acquisition. However, the successor generally believes it can reject those predecessor's employees it believes unacceptable, hiring totally new employees from outside sources and selecting only the elite of the predecessor's work force for available positions.

The Board has, in the past, acknowledged a successor's discretion so to choose its own work force. Indeed, in a relatively recent case, the Board specifically stated:

> We do not hold . . . that the purchaser of an enterprise is legally obligated to refrain from making any changes in the employment status of his predecessor's employees or to continue their employment under existing terms and conditions of employment.[49]

Prior Board cases involving successorship issues recognize the successor's right to interview its predecessor's employees and, except where otherwise discriminatorily motivated, hire only those it deems acceptable.[50]

But *Burns* may have drastically changed the rules of the game, for a successor now generally assumes its predecessor's union contract. Such contract will almost certainly limit the successor's right to reject employees or to select employees for available jobs.[51] Thus, in the past, a successor frequently rejected those predecessor employees it considered did not meet its standards, basing its rejections on interviews or other considerations. Although such standards were

49. Chemrock Corporation, *supra* note 27 n.8. The N.L.R.B. there held that a successor employer could not refuse to bargain with the predecessor's union above the retention of the predecessor's employees. However, it specifically denied the allegations, contained in a dissenting opinion, that it was compelling a successor to hire the predecessor's employees.

50. West Suburban Transit Lines, *supra* note 25; Krantz Wire, *supra* note 36; Johnson Ready Mix, *supra* note 26.

51. The great majority of union contracts specify the procedures to be followed in choosing employees for available jobs, and 92% of all such contracts place some limitations on the right to discharge. *Collective Bargaining Negotiations and Contracts, supra* note 6, at §§ 40:1, 60:11.

often vague, the successor was under no greater burden to justify any such rejections than in the case of new hires. However, almost any union contract now assumed by a successor, as a result of *Burns*, will require that employees be discharged only for "fair" or "just cause,"[52] meaning, under the contract's grievance and arbitration procedures,[53] the employer has the burden of proving an employee has engaged in serious or repeated misconduct in order to justify a discharge.[54] Such a clause would, quite possibly, protect a predecessor's employees: They are technically the successor's employees at the time of the business transfer,[55] and the successor's failure to hire them is in effect a discharge. Thus, the successor's right to reject those predecessor employees it deems unacceptable without showing a justifiable reason therefor would be severely limited.

Even if a successor does not reject predecessor employees as unacceptable, it generally assumes its right to select the best employees for available jobs in the event it reduces operations when it takes over the business. But the prior union contract would almost certainly make employee seniority the sole or determining factor in deciding who should be retained in work force reduction,[56] or at least require that able senior employees be given job preference.[57] Since the predecessor's employees would, presumably, retain their full contractual seniority with the successor,[58] this could require the successor to retain the most senior employees or the most qualified senior employees, rather than the *best* employees. This would render its right of selection non-existent. Accordingly, an employer acquiring another's business in any manner, intending to operate it in essentially the same manner, should carefully examine the risks before rejecting or selecting among its predecessor's employees.

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52. *Id.*

53. Most all union contracts contain a grievance and arbitration procedure. *Id.* at § 51:6.

54. *How Arbitration Works, supra* note 46, at 417. The authors state: "Discharge is recognized to be the extreme industrial penalty . . . Because of the seriousness of this penalty, the burden is generally held to be on the employer to prove guilt of wrongdoing. . . ."

55. Chemrock Corporation, *supra* note 27.

56. *Supra* note 51.

57. *How Arbitration Works, supra* note 46.

58. *In re* Interscience Encyclopedia, Inc., *supra* note 44; P.M. Northwest, 42 Lab. Arb. 961 (1964). As a matter of logic, also, if a successor takes over the predecessor's contract, seniority accrued thereunder is also assumed.

A second underlying question raised by *Burns* is whether a successor's established pension plan will be applicable to the predecessor's employees. A successor acquiring another's operations may well have a retirement plan covering its own employees. Such plan would, commonly, grant retirement benefits based, *inter alia*, on the employees' length of service, or seniority, with the employer. Under *Burns* the possibility exists that a successor might find that its retirement plan, depending on the wording thereof, applies to its predecessor's employees, with full credit granted thereunder for the employees' past service with the predecessor. For example, a successor's plan may cover all "employees," with full credit for all "past service" or "seniority." Since a predecessor's employees become "employees" of the successor, with presumably full credit for their "past service" and "seniority" under the predecessor's contract, they could thus be covered under a literal reading of the plan.

This is not to say that all successor retirement plans would automatically or necessarily apply to a predecessor's employees. Many retirement plans exclude, by their terms, employees of newly-or after-acquired companies. Others define seniority with sufficient precision so as to exclude employees of predecessor operations or others not meant to be covered thereby, or otherwise limit their creditable service. A successor's retirement plan containing such exclusionary language[59] in advance of the acquisition of a predecessor would serve to eliminate predecessor employees therefrom.

A successor employer having a broadly defined retirement plan lacking such exclusionary language and otherwise "covering" its predecessor's employees, however, may find it difficult to amend its plan to exclude predecessor employees therefrom after a transfer has occurred. Where employees are represented by a union, as the predecessor's would be, a company may not unilaterally and without bargaining with the union modify existing employee benefit programs, including retirement plans, so as adversely to affect the rights of union employees covered by such plan.[60] This prohibition applies

59. The type of exclusionary language set forth above would not seem unlawful under the Act unless otherwise discriminatorily motivated.

60. Toffenetti Restaurant, 136 N.L.R.B. 1156 (1962), *aff'd* 311 F.2d 219 (2nd Cir. 1962); Leeds & Northrup, 162 N.L.R.B. 987 (1967), *aff'd* 391 F.2d 874 (3rd Cir. 1968); Beacon Journal, 164 N.L.R.B. 734 (1967); Southland Paper Mills, Inc., 161 N.L.R.B. 1077 (1966).

even though the retirement plan was, initially, unilaterally instituted on a voluntary basis by the employer, was never made part of the collective bargaining agreement, and was never negotiated by the union.[61] Thus, if it were held the successor's plan did apply to the predecessor's employees, the successor could not alter that plan without first bargaining each change with the union.

Accordingly, an employer anticipating acquisitions should modify any existing retirement plan in advance thereof to exclude employees of after-or newly-acquired employers, or to limit the creditable service of predecessor employees. It may well be too late to do so after an acquisition occurs.[62]

Still another issue raised by *Burns* is whether a successor must credit the seniority that its predecessor's employees accrued with its predecessor. The celebrated case of *Zdanok v. Glidden*[63] could have stood for such a proposition of vested seniority.[64] However, it had been thought that *Glidden* was formally overruled and interred,[65] amply disposing of any such theory. Accordingly, one was able to assume that a successor employer did not take on the seniority of its predecessor's employees unless it agreed to do so.[66] And, as previously noted, many successors, with implied Board approval, procedded on such assumption, considering predecessor employees to be new employees with seniority dating only from employment with the successor.

Such an assumption is no longer valid under *Burns*. Since a suc-

61. *Id.*

62. The Board, in a long line of cases, has held the maintenance and continuance of a retirement plan excluding employees therefrom based on union representation to be inherently unlawful. Melville Confections, Inc., 142 N.L.R.B. 1334 (1963), *aff'd* 327 F.2d 689 (7th Cir. 1964); Jim O'Donnell, Inc., 123 N.L.R.B. 1639 (1959); Dura Corp., 156 N.L.R.B. 285 (1965), *enf'd* 380 F.2d 970 (6th Cir. 1967); Channel Master Corp., 148 N.L.R.B. 1343 (1964); Jefferson Wire & Cable Corp., 159 N.L.R.B. 1384 (1966). It might be difficult for a successor to show that an amendment excluding unionized predecessor employees from its retirement plan does not fall within such prohibition.

63. Zdanok v. Glidden, 288 F.2d 99 (2nd Cir. 1961).

64. The *Glidden* holding could be cited for the proposition that seniority rights survived the termination of a collective bargaining agreement and/or a plant relocation. *Id.*

65. Proctor & Gamble Ind. Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181 (2nd Cir. 1962); UAW v. Robertshaw Controls, 405 F.2d 29 (2nd Cir. 1968).

66. *Cf.* Madison-White Motors, Inc., 41 Lab. Arb. 759 (1963) (Anderson, arbitrator).

cessor, consenting or not, assumes its predecessor's contract, it presumably assumes the seniority of the predecessor's employees thereunder. The predecessor's employees thus come to the successor with seniority intact. Accordingly, the predecessor employees' seniority is, in effect, vested insofar as vacation rights, job security provisions, work assignments and other contractual rights are concerned. Terminated employees could, depending on the contract, be entitled to pro-rata vacation, severance, and other benefits. Thus, a successor may now be taking on new and unexpected liabilities along with its predecessor employees' seniority.

Finally,[67] a question arises under *Burns* whether a successor assumes its predecessor's pre-existing contractual liabilities. A union contract, of course, typically establishes numerous employer obligations, with resulting liability for failure to fulfill them.[68] It is quite possible that a predecessor breached its union contract, thereby accruing unsatisfied contractual liabilities at the time of an acquisition. It appears that a successor should now be prepared to accept such pre-existing predecessor liabilities. Since a non-consenting successor assumes a predecessor's contract, it would, presumably, also assume accrued liabilities thereunder.[69] Indeed, any contrary holding would conflict with the *Burns* policy of protecting employees against ownership changes, for, if successors do not inherit such predecessor liabilities, employees would lose rights otherwise enforcible against the predecessor.[70] The Board already holds a successor liable for

67. "Finally," that is, for this article. This is not to say that other issues may not be raised by *Burns*. For example, the Board and courts have yet to struggle seriously with defining the "unusual circumstances" which will excuse a successor from the *Burns* requirements. *Cf.* Travelodge Corp., 182 N.L.R.B. 52 (1970); Avenue Meat Cutter, 184 N.L.R.B. 94 (1970).

68. In addition to creating minimum wage schedules, wage progressions, and wage increases, a contract generally spells out fringe benefit obligations, such as employee holidays, vacations, overtime rights, insurance benefits, retirement benefits, etc.; employee seniority rights in layoffs and promotions; and restrictions on various management rights.

69. *Cf.* Walker Bros., 41 Lab. Arb. 759 (1963) (Crawford, Arbitrator), holding that where a non-consenting successor assumed a predecessor's union contract as a result of a "successorship" clause, it was primarily liable for pre-existing liabilities accrued thereunder.

70. A successor could attempt to protect itself against unforeseen contract liabilities by providing in the purchase contract that the predecessor must reimburse it for such. However, in many instances the seller is no longer in existence after an acquisition.

pre-existing unfair labor practices committed by a predecessor;[71] it is but a short step to hold a successor likewise liable for its predecessor's pre-existing contractual obligations. Accordingly, a successor may well acquire more liabilities as a result of *Burns* than appear on the face of a contract.

In view of the above, it is clear that, with *Burns*, most major successorship issues have now been answered. *Burns* is the finishing touch in a long line of cases which have gradually, consistently, and firmly limited a successor's options *vis-à-vis* its predecessor's union. However, just as plainly, certain issues are now raised which call for rapid responses. Although such remaining issues may be peripheral, rather than central, to the area of successorship,[72] they create potentially important new rights and liabilities for the parties.

71. United States Pipe and Foundry Co., 164 N.L.R.B. 968 (1967), *aff'd* 398 F.2d 544 (5th Cir. 1968). There, the successor was charged with notice of the predecessor's unfair labor practices; however, close reading of the decision's rationale indicates this was not a central factor.

72. John H. Fanning, Board Member, recently stated in an October 19, 1970, address to the Connecticut Bar Association that as a result of *Burns* "there remain some peripheral issues still to be decided." 203 D.L.R., D-1, B.N.A. (Oct. 19, 1970).