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I. INTRODUCTION

Mergers, consolidations, and purchases of assets are important and frequent business transactions in our economy[1] and involve a great deal of planning and negotiating by the enterprises concerned. Until recently, the rights of employees and their representative labor unions generally were not considered to be a factor in these plans. In 1964, however, the Supreme Court, in *John Wiley & Sons, Inc. v. Livingston,*[2] held that common law privity-of-contract principles, which lower courts traditionally had invoked to preclude survival of employees' rights, did not necessarily apply to collective bargaining agreements. Wiley was a nonunion corporation that had merged with a smaller unionized firm whose collective bargaining agreement contained a broad arbitration clause.[3] The Court required Wiley to arbitrate the extent to which the agreement governed its responsibilities to the smaller company's employees whom Wiley had hired. This decision was soon extended by lower federal courts to situations involving purchases of assets.[4] The

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The views expressed herein are the author's and not necessarily those of the National Labor Relations Board or of the General Counsel.

1. 1,230 mergers involving the exchange of at least $700,000 in cash or securities for the assets or stock of another domestic corporation were completed in 1970. This figure does not include the acquisitions of subsidiaries or divisions of other companies, which would raise the total by as much as 25%. The figure also represents a 28% decline from the 1,712 similar transactions in 1969 and a 33% drop from 1968's boom of 1,829. This decline, however, appears to have been caused by the general state of the economy rather than by a growing disdain for mergers. It may be noted that of the 12 largest mergers during the year, 6 involved more than $100 million while none was below the $50 million mark. Mergers & Acquisitions, Press Release, Dec. 31, 1970, reproduced in part in The Philadelphia Bulletin, Jan. 11, 1971, at 33.

2. 376 U.S. 543 (1964). For a description of the legal developments that preceded *Wiley* see Vernon, *Business Combinations and Collective Bargaining Agreements,* 19 CATH. U. L. REV. 1, 2-4 (1969).

3. It covered "any difference, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement . . . ." 376 U.S. at 533.

4. *See* United Steelworkers v. Reliance Universal Inc., 335 F.2d 891 (3d Cir. 1964); Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964).

effect of *Wiley* and subsequent related cases has been to make the obligations of employers vis-a-vis their employees a significant consideration in planning business combinations and purchases. This article will examine the uncertain status of a new employer's obligation to his employees after a change in business ownership and will analyze the impact that recent decisions will have on these important transactions.

II. THE DEVELOPING CONCEPT OF SUCCESSORSHIP

The key factor in *Wiley* and related cases that determined if employee rights would survive was whether the purchasing or resulting business was classified as a "successor" employer, a status that results when "there is substantial continuity in the employing enterprise"[5] despite the change in ownership.[6] Since 1964, some uncertainty about the breadth of the *Wiley* decision has been eliminated by requiring successors[7] to go so far as to correct their predecessors' unfair labor practices;[8] in addition, the duty to bargain with the unions representing employees retained from the prior work force has been expanded.[9] A significant question that remained, however, was the extent that predecessors' labor agreements survived to bind successors. The Ninth Circuit, in *Wackenhut Corp. v. United Plant Guard Workers,*[10] concluded that *Wiley* required a successor be bound by a prior contract in its entirety, limited only by an artibrator's interpretation of its specific terms and the application of them to particular circumstances and events. Until recently, however, no other court has agreed with this assertion,[11] despite the argument that it was anomalous to hold that an

5. *See, e.g.*, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964); Michaud Bus Lines, Inc., 1968-1 CCH NLRB Dec. 29,583; Randolph Rubber Co., 152 N.L.R.B. 496, 499 (1965).

6. This general principle is not necessarily easy to apply to particular situations, even with established criteria of successorship. *See* notes 58-74 *infra* and accompanying text.

7. Successor questions generally reach the courts through suits under § 301(a) of the Taft-Hartley amendments (Act of June 23, 1947, ch. 120, tit. 111, 61 Stat. 156, codified at 29 U.S.C. § 185(a) (1964)) to the Labor-Management Relations Act (LMRA). This section gives federal courts jurisdiction over suits that involve violations of labor contracts. Successor questions were considered by the NLRB pursuant to § 8(a)(5) refusal-to-bargain charges (LMRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964)). *See* Vernon, *supra* note 2, at 6-7 n.32.

8. Perma Vinyl Corp., 164 N.L.R.B. 968 (1967).

9. Even if the predecessor's contract expires, the successor may not unilaterally discontinue carrying out its terms. Overnite Transp. Co. v. NLRB, 372 F.2d 765 (4th Cir.), *cert. denied*, 389 U.S. 838 (1967). *See also* Chemrock Corp., 151 N.L.R.B. 1074 (1965).

10. 332 F.2d 954 (9th Cir. 1964).

11. *See, e.g.*, United Steelworkers v. Reliance Universal Inc., 335 F.2d 891 (3d Cir. 1964); Retail Store Employes Local 954 v. Lane's of Findlay, Inc., 260 F. Supp. 655 (N.D. Ohio 1966). *But see* Ranch-way, Inc. v. NLRB, 77 L.R.R.M. 2689 (10th Cir. June 24, 1971).

arbitration clause survived a change of ownership, but that other contractual terms did not.[12] The National Labor Relations Board (NLRB), which had avoided the issue for several years,[13] finally faced it squarely in May 1970 in *William J. Burns International Detective Agency, Inc.*[14]

A. The Board's Decision Establishing the Burns Doctrine

In *Burns*, the Burns Agency replaced Wackenhut Corporation as the supplier of security guards at a California industrial facility. At the time of replacement, only two months of a three-year collective bargaining agreement between Wackenhut and the United Plant Guard Workers Local No. 162 had elapsed. Although aware of the representative status of the union, Burns retained 27 union men, and, in conjunction with fifteen of its own guards from other plants, began performing the same security services that Wackenhut had performed. When Burns thereafter rejected the Union's requests for recognition of and adherence to the contract in question, the NLRB issued a refusal-to-bargain complaint.

The Board concurred with the Trial Examiner's determination that Burns satisfied the successor employer test of "substantial continuity,"[15] because ex-Wackenhut employees constituted the majority of its work force and the nature of the business remained the same. The Board also noted that *Wiley* imposed a duty on successors to recognize and bargain with a predecessor's employees' union,[16] and asserted that this policy protects "the employees' exercise of the right to engage in collective bargaining through representatives of their own choosing . . . [and]

12. *See, e.g.*, Shaw & Carter, *Sales, Mergers and Union Contract Relations*, 19 N.Y.U. CONF. LAB. 357, 369-70 (1967); Note, *The Successor Employer's Duty to Arbitrate: A Reconsideration of John Wiley & Sons, Inc. v. Livingston*, 82 HARV. L. REV. 418, 422 (1968).

13. *See* Vernon, *supra* note 2, at 13-14.

14. 1970 CCH NLRB Dec. 28,082. For a discussion of the dissent see note 20 *infra*. There were 3 companion cases decided with *Burns:* Kota Division of Dura Corp., 1970 CCH NLRB Dec. 28,088 (Member Jenkins dissenting); Travelodge Corp., 1970 CCH NLRB Dec. 28,086; and Hackney Iron & Steel Co., 1970 CCH NLRB Dec. 28,089. *Hackney*, however, was the only case that involved a situation similar to that in *Burns*. In *Travelodge*, by the time the successorship question was raised, only a small number of the original employees remained and the building had undergone substantial remodeling and expansion. The Board held, under these circumstanees, that the refusal of the management to adhere to the union contract was justified. In *Kota* the Board held, under the rationale of *Burns*, that a successor could insist that the union adhere to the contract negotiated with the predecessor employer. 1970 CCH NLRB Dec. at 28,089. This decision may avoid problems for the unions concerned, since their memberships will not be able to demand that they immediately negotiate for higher wages and benefits. *But cf.* note 74 *infra*.

15. 1970 CCH NLRB Dec. at 28,083.

16. *See* NLRB v. Colten, 105 F.2d 179 (6th Cir. 1939).

further[s] the interests of industrial peace."[17] The Board said:

> [T]he obligation to bargain imposed on a successor-employer includes the negative injunction to refrain from unilaterally changing wages and other benefits established by a prior collective-bargaining agreement even though that agreement has expired . . . . In this respect, the successor-employer's obligations are *the same as those imposed upon employers generally* during the period between collective-bargaining agreements.[18]

The issue presented, therefore, was whether these principles could be extended to require a successor to assume his predecessor's entire labor contract. Emphasizing that the objective of collective bargaining was the fostering of industrial peace based on mutually approved contract terms and acknowledging that unilateral mid-term contract modifications were proscribed by section 8(d) of the Labor-Management Relations Act (LMRA),[19] the Board concluded that these considerations outweighed the absence of privity and held that Burns was bound by Wackenhut's collective bargaining agreement.[20]

The Board defended its holding by stating that its ruling could not be "equated with compelling Burns to agree to a bargaining proposal or make a concession it is unwilling to make,"[21] because the collective bargaining agreement was in force when Burns elected to assume Wackenhut's service functions and to hire its employees. The Board also maintained that there was no inequity in requiring a successor to assume his predecessor's labor contract since the successor "*stands in the shoes of his predecessor* [and] can make whatever adjustments the acceptance of such obligation may dictate in his negotiations concerning the

17. 1970 CCH NLRB Dec. at 28,084.

18. *Id.* (emphasis added).

19. 29 U.S.C. § 158(d) (1964).

20. There was one dissenting vote. Member Howard Jenkins, Jr. found no "clear statutory command" in § 8(d) of the Act, which refers to a "party" to a contract and not a successor, and no "binding judicial precedent" in *Wiley*, in which arbitration was required only with regard to rights that had "vested" through past performance by the employees that would support imposing an existing agreement on a successor employer. 1970 CCH NLRB Dec. at 28,085-86. Furthermore, Jenkins felt that the Board departed from the labor policy established by the Supreme Court because the parties would have no flexibility in working out their new arrangements through arbitration. This flexibility is particularly important for the survival of marginal or faltering enterprises whose future depends on rearranging the terms and conditions of employment. "Thus, to impose the agreement on the new relation may in many cases prove a source of friction and disruption, rather than provide the stability for which my colleagues hope." *Id.* at 28,086.

It may be argued, however, that the difficulty which *Burns* may impose on faltering companies searching for help does not outweigh the stability that the decision will provide in more fortunate business combinations and purchases. Furthermore, it is not wholly inconceivable that a union might agree with a successor to modify a contract that is a primary cause of the company's economic difficulties.

21. *Id.* at 28,085.

takeover of the business, [while] employees cannot make a comparable adjustment."[22]

The NLRB, therefore, placed successors in precisely the same contractual status as their predecessors had been with respect to their employees and unions. A successor could no longer bargain with the union until reaching an impasse and then simply implement its own proposed terms and conditions as an employer could do if no contract were extant.[23] *Burns* required that, in the absence of "unusual circumstances," the successor must assume the entire existing agreement.[24] A major issue of concern to both management and labor arising out of changes in ownership, then, was apparently resolved. It is anticipated, however, that efforts to circumvent it, as well as its application to novel situations, will provide the Board and courts with continuing problems in this area.[25]

22. *Id.* (emphasis added).

23. *See* NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949). *See also* S-H Food Serv., Inc., 1970 CCH NLRB Dec. 28,440.

24. 1970 CCH NLRB Dec. at 28,084. It should be noted that assumption of a collective bargaining agreement by a successor does not necessarily relieve the predecessor of all obligations under it. Local 82, Packinghouse Workers v. United States Cold Storage Corp., 430 F.2d 70, 73 (7th Cir. 1970). *See also* General Motors Corp., 5 CCH·LAB. L. REP. ¶ 23,264 (July 8, 1971) (concerns extent of a predecessor's obligation to bargain with respect to its decision to sell its business and with respect to the decision's effect on unit employees).

25. Attempts to circumvent *Burns* have been successful in the Second Circuit, where *Burns* itself has been reversed. William J. Burns Int'l Detective Agency, Inc. v. NLRB, 441 F.2d 911 (2d Cir. 1971). For a discussion of the reversal see notes 40-51 *infra* and accompanying text. It, however, is NLRB policy to follow its own precedents until directed by the Supreme Court to do otherwise. Insurance Agents' Int'l Union, 119 N.L.R.B. 768, 773 (1957), *rev'd on other grounds*, 260 F.2d 763 (D.C. Cir. 1958), *aff'd*, 361 U.S. 477 (1960).

It is anticipated that there will be numerous efforts to obtain the overruling of the Board's *Burns* doctrine from the Board itself which includes 2 new members in addition to Member Jenkins who dissented in *Burns*. These efforts, however, will probably be fruitless, despite the fact that the 2 new members, Edward B. Miller and Ralph Kennedy, are seen as bringing a new conservatism to the Board which is often equated by critics with a promanagement philosophy. Chairman Miller, furthermore, appears to require stricter standards of proof of employers' illegal conduct and interference with employees' protected activities in § 8(a)(1) cases and to demand a higher degree of proof of discriminatory intent in § 8(a)(3) cases than has the Board previously. For an example of Chairman Miller's philosophy see his dissenting opinions in National Tape Corp., 5 CCH LAB. L. REP. ¶ 22,565 (Dec. 17, 1970) (he maintained, contrary to the majority, that there was insufficient evidence to warrant findings of unlawful layoff and discharge of 6 workers); Texas Transp. & Terminal Co., 5 CCH LAB. L. REP. ¶ 22,588 (Dec. 24, 1970) (his dissent argued that there was not sufficient evidence to support a finding that the purpose of employer's wage increases was to discourage union organization). The Chairman also has shown in 8(a)(5) refusal to bargain questions, an apparent desire to allow the parties greater freedom in negotiating contracts. *E.g.*, Moore of Bedford, Inc., 5 CCH LAB L. REP. ¶ 22,621 (Jan. 7, 1971) (Chairman Miller argued that it is not illegal for an employer to unilaterally figure piece-work rates subject to a grievance procedure, so long as the rates are not purposely calculated to effectively eliminate piece-rate disputes from arbitration).

B. Post Burns Decisions

The *Burns* doctrine has been clarified in several subsequent Board cases. In *S-H Food Service, Inc.*,[26] for example, the Board decided that *Burns* required a successor to adhere to all terms of an existing labor agreement and not just to implement the contract "in many important respects."[27] This decision, however, was not unexpected in light of the *Burns* doctrine on assumption of a predecessor's agreement. A further consequence of *Burns* has been that a successor, like the original employer,[28] may not challenge a union's majority status during the term of a contract,[29] except for the 60- to 90-day period prior to the expiration of the contract, during which time representation petitions may be filed.[30] Consequently, a successor has been ordered to adhere to an agreement outstanding even when, following the change in ownership, "no employee tendered dues to the Union . . . , no meetings of the local were held . . . , membership in the Union had been required by the contract . . . , 90 percent of the employees had told [the president of the local] that they were no longer interested in the Union," and the new employer reasonably believed that the union was no longer a majority representative.[31] Once the contract has expired, of course, the new employer may overcome "the presumption of majority arising from [the] history of collective bargaining [and the pre-existing contract, by objectively demonstrating] that it has some reasonable grounds for believing that the union has lost its majority status."[32]

The Chairman, however, is "in basic agreement with the *Burns* decision, and believe[s] that the certainty afforded thereby is a wholesome aid to that kind of industrial relations stability which is one of the key objectives of the law." Address by NLRB Chairman Edward B. Miller, Labor Law Conference, Louisiana State University, Jan. 22, 1971, in 76 LAB. REL. REP. 89, 91 (1971). He noted that reaction to the decision is probably mixed among private parties. Some individuals from both management and labor feel that *Burns* provides employers with certainty of their obligations to employees and gives employees security, but others in both camps would prefer to be left free to arrive at their own arrangements through negotiation and not be bound by an existing agreement. *Compare* Bernstein, *Labor Problems on Acquisitions and Sale of Assets*, 22 N.Y.U. CONF. LAB. 81 (1970), *with* Abodeely, *The Effect of Reorganization, Merger or Acquisition on the Appropriate Bargaining Unit*, 39 GEO. WASH. L. REV. 488 (1971); Spelfogel, *Labor Liabilities in Purchases, Acquisitions and Mergers*, 21 LAB. L.J. 577 (1970).

26. 1970 CCH NLRB Dec. 28,440.

27. *Id.* at 28,441.

28. Oilfield Maintenanee Co., 142 N.L.R.B. 1384 (1963); Hexton Furniture Co., 111 N.L.R.B. 342 (1955).

29. Ranch-Way, Inc., 1970 CCH NLRB Dec. 28,433.

30. Deluxe Metal Furniture Co., 121 N.L.R.B. 995 (1958), *modified*, Leonard Wholesale Meats, Inc., 136 N.L.R.B. 1000 (1962).

31. Ranch-Way, Inc., 1970 CCH NLRB Dec. 28,433.

32. Barrington Plaza, 75 L.R.R.M. 1226, 1230 (Oct. 12, 1970); *accord*, United States Gypsum Co., 157 N.L.R.B. 652 (1966).

Burns also has been held applicable to the take-over of a firm that has signed a multi-employer contract. In *Solomon Johnsky,*[33] the predecessor employer owned four stores in one area and had negotiated a labor contract with the union that represented the employees of all these establishments. The buyer of one of these four stores learned of the contract during the purchase negotiations and, despite his opposition to the union, was required to assume this contract. Since the contract recognized the separate identity of each store, the Board disagreed with the Trial Examiner's conclusion that a separate single-store unit was inappropriate and found no "administrative impediment to the application of the basic contract terms dealing with wages, hours, and conditions of employment to the employees in that unit."[34] Similarly, when the predecessor employer had belonged to a multi-employer association that traditionally negotiated contracts for all association members, and when it had refused to sign the contract resulting from the most recent negotiations, the successor was ordered to remedy this unfair labor practice by executing the negotiated agreement and by reimbursing the employees who had suffered financially[35] from the refusal to abide by its terms.[36]

Burns should not be construed as having commanded absolute adherence to predecessors' contracts. Suceessors still may make agreements with their unions to alter terms,[37] may challenge the continuing majority status of a construction industry union under a collective bargaining agreement executed pursuant to section 8(f)(1) of the LMRA,[38] or, in extraordinary circumstances, even may avoid the

33. 74 L.R.R.M. 1610 (1970).

34. 74 L.R.R.M. at 1612.

35. Only those employees hired by the successor at the time of acquisition, and not those hired afterwards, were eligible to receive monetary awards. Teamsters Local 171 v. NLRB, 425 F.2d 157 (4th Cir.), *cert. denied,* 400 U.S. 902 (1970).

36. *Compare* Standard Plumbing & Heating Co., 1970 CCH NLRB Dec. 28,754, and *Solomon Johnsky, with* Travelodge Corp., 1970 CCH NLRB Dec. 28,086 (finding that an employer was not a successor was based, in part, on the absence of any offer to him to join his predecessor's multi-employer bargaining association).

37. S-H Food Service, Inc., 1970 CCH NLRB Dec. 28,440.

38. LMRA § 8(f)(1), 29 U.S.C. § 158(f)(1) (1964). This section provides: "It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement . . . ." In Davenport Insulation, Inc., 74 L.R.R.M. 1726 (1970), the Board said § 8(f)(1) "was intended to permit an employer in the construction industry to negotiate a contract with a union which has not established its majority status without either party running the risk of committing an unfair labor practice. But when a collective-bargaining agreement is

prior contracts altogether.[39] Successors generally, however, must follow the mandate of the *Burns* decision and adhere to the responsibilities imposed by their predecessors' agreements.

C. *Burns Reversed*

On April 26, 1971, the Second Circuit reversed the Board's decision in *Burns*[40] on the ground that the Supreme Court, in *H.K. Porter Co. v. NLRB*,[41] had ruled that specific contractual provisions could not be imposed by the Board on any party to collective bargaining. The *Wiley* case was distinguished because that successor was only ordered to fulfill its predecessor's obligation to arbitrate and because the holding was dictated by the paramount federal policy of encouraging arbitration. The Second Circuit, however, reasoned that there were no similar overriding policy considerations present in *Burns*. In addition, the importance of creating certainty for parties to corporate sales and combinations was deemed to be insignificant when compared with the serious inequities

entered into pursuant to that section, the contract can give rise to no presumption of continuing majority status. . . . [Thus,] since the contract with the predecessor employer has been entered into pursuant to Section 8(f), no duty is imposed upon the successor employer to honor its predecessor's bargaining obligation unless there is independent proof of the union's actual majority and of the successor employer's refusal to bargain." *Id.* at 1727 (footnotes omitted).

39. *See, e.g.*, Potter v. Emerald Maintenance, Inc., 76 L.R.R.M. 2119 (S.D. Tex. Nov. 5, 1970). In *Potter*, a contractor with a one-year maintenance contract from the Air Force, although realizing that he probably would not be able to extend his contract, entered a 3-year collective bargaining agreement with the appropriate union. In exchange for favorable terms during the first year, the employer agreed to onerous terms during the second and third years. In refusing to require a successor to adhere to the contract, the court said: "If the succeeding contractor is obliged to recognize and accept the Union and the terms of the contract made by the predecessor, it opens the door for an agreement between the earlier contractor and the Union whereby that contractor is able to secure favorable terms during the year of his tenure, the Union receiving its *quid pro quo* in terms far more favorable (to the Union) to which any succeeding contractor will be required to submit." *Id.* The court additionally noted that this could not be deemed "bona fide and arms' length collective bargaining" on the part of the original contractor and stated that the case presented "questions as to the binding effect of *Burns* [and] as to whether Emerald is a 'successor employer' to the earlier contractor, [that] should await a full consideration by the Board and the courts." *Id.* at 2120. *See also* the case discussed on pages 3-4 of General Counsel's *Report on Case-Handling Developments*, 76 LAB. REL. REP. 105, 106 (1971).

The Board thereafter held, in considering the merits of the unfair labor practiee charge, that successful bidders on federal services contracts are not bound by the collective bargaining agreements signed by prior employers performing the same work; these new employers, however, must recognize and bargain with the union representing the predecessor's employees. Emerald Maintenance, Inc., 5 CCH LAB. L. REP. ¶ 22,817 (Mar. 5, 1971). Thus, the policy considerations underlying *Burns* were not regarded as applicable in this situation. Coincidentally, the United States Government Accounting Office ruled during the same week that the "successor-employer" doctrine does not apply to support serviee contracts for government installations. *See* 76 LAB. REL. REP. 230 (1971).

40. William J. Burns Int'l Detective Agency, Inc. v. NLRB, 441 F.2d 911 (2d Cir. 1971).

41. 397 U.S. 99 (1970).

that might arise under the Board's holding; for example, a union that had made concessions to a failing predecessor to prevent the employer's bankruptcy would be bound to the same contract with an affluent successor. Finally, the Board's holding that, in the absence of "unusual circumstances," a successor would be bound to the predecessor's labor contract[42] was criticized because the Board thereby arrogated to itself the power to select the contractual provisions to be imposed on successors.

The Second Circuit's decision is subject to criticism on several fronts. First, while *H.K. Porter* acknowledged the obligation of a successor to recognize and bargain with the employees' representative even without a new showing of the union's majority status, the Second Circuit was unjustified in concluding that this was the extent of the successor's duty and that the contract which had resulted from the predecessor's recognition did not also continue. In *H.K. Porter* the Supreme Court reversed an order of the Board requiring an employer to include a dues checkoff provision in its contract with the union after the employer had improperly refused to negotiate the issue. The Court found that Congress had never intended the Board to "become a party to the negotiations and impose its own views of a desirable settlement."[43] In *Burns,* however, before there was any government intervention, a contract had been negotiated between the United Plant Guard Workers and Burns's predecessor. Thus, in seeking observance of terms previously agreed upon, the Board was not engaging in the interference proscribed by *H.K. Porter.*[44]

Secondly, besides failing to distinguish the *H.K. Porter* case properly, the Second Circuit also can be criticized for giving too narrow an interpretation to *Wiley.* In that case, the Supreme Court did more than recognize the importance of labor arbitration; it held that common-law privity-of-contract principles did not automatically apply to collective bargaining agreements. The Board legitimately relied on this aspect of *Wiley* in reaching its decision in *Burns,* but the Second Circuit appears to have reintroduced the privity concept.

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42. 1970 CCH NLRB Dec. 28,082.

43. 397 U.S. at 103-04.

44. The Supreme Court in *Wiley* recognized the distinction between the precontract situation of *Porter* and the midcontract situation of *Burns.* The Court stated that the precontract situation in that case could not "readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated." John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550 (1964). Nothing in *Porter* suggests that this has now been changed. *See also* Tex Tan Welhausen Co. v. NLRB, 434 F.2d 405 (5th Cir. 1970), *cert. denied,* 402 U.S. 973 (1971).

Thirdly, the court's policy argument that the Board's decision might prove inequitable to a union is not compelling. The Second Circuit decision would be equally inequitable to a union if it had exacted a favorable contract from an employer after hard bargaining and did not have the resources to revive the struggle against a powerful successor. Moreover, in deciding which decision is best from a policy viewpoint, greater attention should be paid to the fact that numerous practitioners were pleased with the certainty created in this area by the Board's decision.[45] Finally, although the Board's reservation of the power to decide the "unusual circumstances" in which portions of the labor contract will not outlast the succession is questionable, this weakness in the Board's holding should not override its other positive features.[46]

On June 24, 1971, the Board's *Burns* doctrine,[47] that a successor is bound by its predecessor's labor contract, was accepted by the Tenth Circuit in *Ranch-Way, Inc. v. NLRB.*[48] This conflict between the circuits and the significance of the issue were probably the principal reasons why the Supreme Court granted certiorari.[49] Since it is Board policy to follow its own precedents until directed by the Supreme Court to do otherwise,[50] it will continue to apply its *Burns* doctrine, unless the Court ultimately upholds the Second Circuit. Because the author feels that the Court should uphold the Board's decision and anticipates that it will,[51] the remainder of the article will discuss the implications of the Board's *Burns* doctrine.

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45. Bernstein, *Labor Problems on Acquisitions and Sale of Assets*, 22 N.Y.U. CONF. LAB. 81 (1970). *But see* Abodeely, *The Effect of Reorganization, Merger or Acquisition on the Appropriate Bargaining Unit*, 39 GEO. WASH. L. REV. 488 (1971); Spelfogel, *Labor Liabilities in Purchases, Acquisitions and Mergers*, 21 LAB. L.J. 577 (1970).

46. In any event, this flaw in the Board's reasoning may be resolved by the reconsideration of the concept of successorship that may be taking place. *See* note 66 *infra*.

47. In the remainder of this article, "*Burns* doctrine" will refer to the holding and rationale of the Board's decision rather than that of the Second Circuit.

48. 77 L.R.R.M. 2689 (10th Cir., June 24, 1971). The Board held that the successor was required to act in accordance with its predecessor's contract despite some question about the union's continuing majority status. Ranch-Way, Inc., 1970 CCH NLRB Dec. 28,433, *aff'd*, 77 L.R.R.M. 2689 (10th Cir. June 24, 1971). Two other related Board decisions, Interstate 65 Corp., 1970 CCH NLRB Dec. 28,927, and Bachrodt Chevrolet Co., 1970 CCH NLRB Dec. 29,087, are soon to be reviewed by the Sixth and Seventh Circuits respectively.

49. 40 U.S.L.W. 3162 (U.S. Oct. 12, 1971) (Nos. 71-123 & 71-198).

50. Insurance Agents' Int'l Union, 119 N.L.R.B. 768, 773 (1957).

51. It cannot be presumed that a more conservative Supreme Court than the one that decided *Wiley* will necessarily reverse the Board in this instance. Chairman Miller's agreement with the Board's decision shows that conservatism cannot be assumed to imply disagreement with *Burns*. For a discussion of Chairman Miller's position see note 25 *supra*. The Supreme Court will likely view the Board's decision as being consistent with established labor policies and as effecting necessary stability in labor relations. *See* Vernon, *supra* note 2, at 16.

D. *Ramifications of Burns*

Even though the Board in *Burns* and its companion cases has established specific and comprehensive guidelines for successors and their predecessors' unions, a number of questions remain: what further issues may arise in this area; what will be the ramifications of these decisions; and what kind of situations and litigation may be anticipated? At the very least, these decisions should eliminate most section 301(a)[52] suits to compel arbitration of existing contracts by successors; additionally, they should provide a basis for refusal-to-bargain charges under section 8(a)(5),[53] for example, when the six-month statute of limitations in section 10(b) of the LMRA[54] has passed.[55] More significantly, substantial efforts to avoid successorship status and thereby circumvent the *Burns* doctrine can be anticipated. Finally, questions will arise regarding the applicability of this doctrine to mergers and consolidations.

III. AVOIDANCE OF SUCCESSORSHIP

There undoubtedly will be attempts to circumvent the *Burns* doctrine by arranging business combinations so that the resulting enterprises cannot be deemed to be successors.[56] As noted previously, a firm is considered to be a successor "where there is substantial continuity in the identity of the employing enterprise"[57] after a change of ownership. This general criterion has had a few flourishes added to it. The Board has stated that "the key test in determining whether a change in the employing industry has occurred is whether it may

52. 20 U.S.C. § 185(a) (1964).

53. 29 U.S.C. § 158(a)(5) (1964).

54. *Id.* § 160(b).

55. For a comparison of the considerations involved in choosing between § 301(a) suits and § 8(a)(5) charges prior to *Burns* see Vernon, *supra* note 2, at 6-7 n.32.

56. After announcing on June 11, 1971 that the Board would seek review of the Second Circuit's decision in *Burns*, Chairman Miller noted a caveat: "Even if the Board's position is sustained, there remain very difficult questions of whether the facts in any particular case are sufficient to establish successorship." Address by Chairman Miller, Chairman of the NLRB, reproduced in D.L.R. No. 115, June 15, 1971, E-1, E-4.

57. Randolph Rubber Co., 152 N.L.R.B. 496, 499 (1965); *see* cases cited note 5 *supra*. *See also* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964); NLRB v. Valleydale Packers, Inc., 402 F.2d 768, 769 (5th Cir. 1968), *cert. denied*, 396 U.S. 825 (1969); NLRB v. Auto Ventshade, Inc., 276 F.2d 303, 305-06 (5th Cir. 1960); NLRB v. Colten, 105 F.2d 179, 183 (6th Cir. 1939).

reasonably be assumed that, as a result of the transitional changes, the employees' desires concerning unionization have likely changed."[58] The general standard, however, still looks to the similarity between the businesses in question. Therefore, when the new employer is "using substantially the same facilities and work force to produce the same basic products for essentially the same customers in the same geographic area,"[59] successor status is found to exist.[60] This concept is quite broad and even a court-appointed receivership trustee has been held to be a successor.[61]

Despite the breadth of its coverage, various efforts to avoid successorship can be expected. Since retention of the prior work force appears to be the most significant criterion of successorship,[62] new employers may decide not to hire employees of the previous company. A new employer has no affirmative duty to rehire these workers,[63] and he may refuse to do so unless this action is shown to be prompted by an antiunion motive.[64] Employers, therefore, probably will make greater efforts to find acceptable reasons for not rehiring members of the old work force if they want to avoid their predecessors' labor contract.

The importance of the employee-retention criterion in determining successorship status appears to have arisen from an analysis of employer-employee relationships and a desire to protect workers from changing working conditions.[65] Thus, if an employer hired his predecessor's workers, he was deemed to have assumed certain obligations to them and their union. Various practitioners, however, have contended that the type of business combination should be the

58. Ranch-Way, Inc., 74 L.R.R.M. 1389, 1391 (1970); *see* NLRB v. Armato, 199 F.2d 800 (7th Cir. 1952).

59. Ranch-Way, Inc., 74 L.R.R.M. 1389, 1391 (1970), *citing* J. Howard Jenks, 1968-2 CCH NLRB Dec. 25,261, and Maintenance, Inc., 148 N.L.R.B. 1299 (1964).

60. For a more comprehensive description of the criteria of successorship see Vernon, *supra* note 2, at 8-10.

61. *See, e.g.*, Interstate 65 Corp., 186 L.R.R.M. 1403, 1405 (1970), *citing* Marion Simcox, 1969 CCH NLRB Dec. 27,097. *But see* Gladding Corp., 5 CCH LAB. L. REP. ¶ 23,297 (July 22, 1971); Southland Mfg. Corp., 1970 CCH NLRB Dec. 29,044.

62. *See, e.g.*, Barrington Plaza, 1970 CCH NLRB Dec. 28,858; Builder's Realty & Mortgage Co., Inc., 1970 CCH NLRB Dec. 28,993; Tallakson Ford, Inc., 1968 CCH NLRB Dec. 29,667; Thomas Cadillac, Inc., 1968 CCH NLRB Dec. 29,396.

63. Milton H. Kantor, 1969 CCH NLRB Dec. 26,829, *citing* Tri State Maintenance Corp., 167 N.L.R.B. 933 (1967), *aff'd as modified*, 408 F.2d 171 (D.C. Cir. 1968).

64. *See, e.g.*, Barrington Plaza, 1970 CCH NLRB Dec. 28,858; Milton H. Kantor, 1969 CCH NLRB Dec. 26,829. *Burns* has not abrogated the employer's right to refuse, for nondiscriminatory reasons, to rehire his predecessor's work force, and it is not anticipated that the Board will now attempt to do so. *See* Builders Realty & Mortgage Co., 1970 CCH NLRB Dec. 28,993 (Trial Examiner's decision adopted by the Board).

65. *See, e.g.*, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964).

principal criterion for successorship, rather than the effect of the corporate action on the workers. In a merger, for example, the surviving corporation absorbs the liabilities as well as assets of a predecessor and therefore should also assume the liability of an extant collective bargaining agreement. In a *Burns*-type situation, however, where the new employer does not purchase all of the prior employer's assets or assume its liabilities, and where a third party such as Lockheed has the power to determine which company will hire the workers and provide services to it, successorship status should not be found.[66]

Employers also may take aim at other successorship criteria. Thus, they may attempt to make major changes in the operations and organizational structure of their new enterprise[67] or may decide to break up and destroy the identity of the collective bargaining unit so that it is no longer appropriate.[68] In addition, successors may choose to close down the acquired enterprise for a length of time,[69] remodel the premises,[70] change job classifications, change the methods of production, move the plant, interchange retained employees among departments, or similarly interchange supervisors or hire new ones.[71] With the possible

66. In fact, Burns will make this argument before the Supreme Court. 40 U.S.L.W. 3162 (U.S. Oct. 12, 1971) (Nos. 71-123 & 71-198). A recent Board case, Lincoln Private Police, Inc., 5 CCH LAB. L. REP. ¶ 22,924 (Apr. 12, 1971) may demonstrate a new acceptance of this view. In that case Chairman Miller and Member Kennedy joined Member Jenkins, who had previously expressed a narrower view of successors than other members. *See, e.g.*, Suffolk Mack, Inc., 74 L.R.R.M. 1666, 1668 (1970) (Member Jenkins, dissenting). They found that a new employer who had taken over a substantial part of a prior employer's guard service business and a significant majority of its employees was not a successor. They pointed out that the new employer had acquired many of the prior employer's clients by means of independent solicitation and had obtained 30% of its clients from new sources. They also noted that various other employers also had acquired clients and employees from the predecessor employer. Moreover, the new owner had obtained its own operating capital, purchased new uniforms and equipment, occupied different premises, and failed to purchase any of the defunct company's assets or hire any of the previous supervisory personnel. Taken together, these factors were deemed to outweigh the fact that the new employer continued substantial guard operations previously performed with some of the same employees. *Lincoln* suggests that the Board may be reconsidering its coneept of who is a successor. Those who disagree with the Board's *Burns* doctrine are looking for some change in this respect during the terms of the Board's new members.

67. *Cf.* NLRB v. Zayre Corp., 424 F.2d 1159 (5th Cir. 1970) (changes in internal organization and centralization of personnel and purchasing held insufficient to avoid successorship). *See also* NLRB v. DIT-MCO, Inc., 428 F.2d 775 (8th Cir. 1970) (acquisition and reorganization of subsidiary not sufficient to escape successor status when most employees carried over).

68. *See, e.g.*, NLRB v. Zayre Corp., 424 F.2d 1159, 1166 (5th Cir. 1970) (particularly the concluding sentence); Michaud Bus Lines, Inc., 1968 CCH NLRB Dec. 29,583; *cf.* NLRB v. Lloyd A. Fry Roofing Co., 435 F.2d 848 (5th Cir. 1970) (purchaser of one of 2 operations within a single plant charged with violation of § 8(a)(5) by not bargaining with union that used to represent workers from both operations). *See also* Travelodge Corp., 1970 CCH NLRB Dec. 28,086.

69. *See, e.g.*, Retail Store Employees Local 954 v. Lane's of Findlay, Inc., 260 F. Supp. 655 (N.D. Ohio 1966); *cf.* Builders Realty & Mortgage Co., 1970 CCH NLRB Dec. 28,993.

70. *Cf.* Travelodge Corp., 1970 CCH NLRB Dec. 28,086.

71. The range of possible actions is, of course, restricted by economic feasibility.

exception of an outright refusal to employ the prior work force,[72] it is expected that no single tactic will be sufficient to avoid successorship; however, several in conjunction may do so.

IV. MERGERS AND CONSOLIDATIONS

Litigation also can be expected when the extension of the *Burns* doctrine to mergers and consolidations is considered.[73] If the units of the original employers are maintained separately and distinctly in the new enterprise, *Burns* would appear to require the surviving employer to assume all labor agreements covering the separate units.[74] If the work forces are fully integrated, however, and the bargaining units are not so fragmented as to preclude successorship,[75] more complex problems arise.

When the two employee units to be integrated are unequal in size, and the smaller unit is organized but the larger is not, a *Wiley* situation is presented, and the employer's obligations should be limited to arbitration of the retained employees' rights that vested during the prior employment. If the larger unit is union-represented, then the smaller group, whether organized or not, will probably be deemed an accretion to the other,[76] and the employer, under *Burns*, necessarily will be bound

72. If an employer retains the predecessor's employees, however, but otherwise completely reorganizes the acquired company, including employee duties, he may argue that the retention of the workers alone should not be sufficient to create successorship. Since the predecessor's contract covered employees who were performing specific duties in a particular industrial structure, their mere retention and presenee at the new operation does not make the prior contract applicable to or appropriate for the new operation.

73. A merger involves "the absorption of one corporation by another, which retains its name and corporate identity with the added capital, franchises and powers of the merged corporation. It is the uniting of two or more corporations by the transfer of property to one of them, which continues in existence, the other being merged therein." 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7041, at 9-10 (rev. ed. 1961). A consolidation is "a combination by agreement between two or more corporations . . . by which their rights, franchises, privileges and property are united, and become [those] of a single corporation. . . . [It] signifies . . . the creation of a new corporation, and the termination of the existence of the old ones." *Id.* § 7041, at 8-9.

74. A problem may arise for a union representing the employees of a company that merges with or acquires another firm with workers that are represented either by another or by the same union and that have higher wages and benefits than those of the acquiring company's workers. The union representing the lower-paid men will then be under pressure to obtain immediately terms comparable to those enjoyed by the other unit.

75. *See* note 68 *supra* and accompanying text.

76. The employer might contend that he cannot determine who the majority representative of his employees actually is and decline to recognize any or either union. Assuming he is not taking steps to avoid successorship or unions, however, it is more likely that he will attempt to resolve any doubt as to the majority status of the larger group's union by filing a petition with the Board for clarification of the unit under § 9(b) of the LMRA. LMRA § 9(b), 29 U.S.C. § 159(b) (1964). *See, e.g.*, Humble Oil & Ref. Co., 153 N.L.R.B. 1361 (1965).

by the contract of the larger unit.[77]

If the integrating units are relatively equal in size, different considerations are involved. It has been held that upon the merger of these units, represented by different unions, the representative status of the respective unions is jeopardized. The employer, consequently, cannot even be required to arbitrate grievances pursuant to one union's contract, because section 9(a) of the LMRA[78] requires that he deal only with his employees' majority representative.[79] In this situation, as well as that in which only one of these units is organized, the representative status of the unions is terminated, and they either must seek recognition on the basis of signed authorization cards or obtain certification through Board election processes. Once majority status is proved by one of the unions, however, can it not demand, under *Burns,* that the employer adhere to that union's pre-existing collective bargaining agreement rather than negotiate a new contract? Under ordinary contract principles, impossibility of performance only suspends contractual obligations until the condition preventing fulfillment is dissipated.[80] In the labor situation, the condition preventing performance would be the loss of representative status under law. Therefore, once the section 9(a) requirement of majority status has been re-established, the obligations of the pre-existing contract should resume for the new employer who, under the *Burns* doctrine, "stands in the shoes of his predecessor." An employer, however, might contend that ordinary contract principles do not apply to collective bargaining agreements[81] and that the circumstances involved in regaining majority status create such a hiatus that the applicability of the prior contract to the new situation is precluded, particularly if a new Board certification is involved. Although the arguments on both sides are persuasive, the Board should hold, if confronted with this issue, that the pre-existing contract does not resume; the surviving contract would not reflect the interests of a substantial minority of employees and the stability of labor relations would be seriously jeopardized.

77. Even if the integration of the units destroys the appropriateness of the larger group as a collective bargaining unit and thereby excuses the employer from the existing contract *(See* notes 68 & 75 *supra* and accompanying text), the larger union will quickly be able to reestablish its majority representative status through Board election procedures.

78. LMRA § 9(a), 29 U.S.C. § 159(a) (1964).

79. Teamsters Local 568 v. Red Ball Motor Freight, Inc., 374 F.2d 932 (5th Cir. 1967).

80. P. CONWAY, OUTLINE OF THE LAW OF CONTRACTS 733-66 (3d ed. 1968); 6 A. CORBIN, CONTRACTS §§ 1320-33 (1962).

81. *See* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); 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).

V. A Short Conclusion

The law governing the obligations of successor employers under pre-existing labor contracts today has reached a state in which it is impossible to predict accurately the effects on labor relations wrought by changes in business ownership. The Board has taken the position that the continuation of a predecessor's collective bargaining agreement is the best way to accommodate the competing labor policies. The Tenth Circuit[82] has agreed, and the Ninth Circuit[83] has come to essentially the same conclusion, but the Second Circuit[84] considers this prohibited government intervention into the area of collective bargaining. Litigation undoubtedly will continue in this area either as the result of attempting to avoid designation as a successor or as tests of the *Burns* doctrine's application to mergers and consolidations. Action by the Supreme Court, affirming the Board's decision, would not end all the peripheral litigation, but would add a welcome and significant certainty to this area of labor relations.

82. Ranch-Way, Inc. v. NLRB 77 L.R.R.M. 2689 (10th Cir. June 24, 1971).
83. Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964).
84. William J. Burns Int'l Detective Agency, Inc. v. NLRB, 441 F.2d 911 (2d Cir. 1971).