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Labor Law—Collective Bargaining Agreements.—John Wiley & Sons, Inc. v. Livingston

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of power between the states and the federal government. The states retain the power to protect their citizens from the evils of alcohol while the federal government retains supremacy in international matters and control over the essential aspects of interstate commerce.

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Labor Law—Collective Bargaining Agreements.—*John Wiley & Sons, Inc. v. Livingston.*[1]—This action was brought by District 65, Retail, Wholesale, and Department Store Union, AFL-CIO, against John Wiley & Sons, Inc., under Section 301(a) of the Labor Management Relations Act.[2] The Union sought to compel Wiley to arbitrate under a collective bargaining agreement between the Union and Interscience Publishing, Inc. Interscience had merged with Wiley four months before the agreement was to have expired and no longer existed as a corporate entity. The agreement did not expressly bind successors of Interscience. Wiley closed the Interscience plant and moved the 80 employees of Interscience to its own plant where they were mingled with the Wiley force of about 300. None of the latter were unionized.

The district court assumed that the agreement survived the merger and that it bound Wiley, but denied the Union's petition on other grounds.[3] The court of appeals reversed and directed arbitration, holding that the merger did not *ipso facto* extinguish all rights of the Union and the employees arising out of the collective bargaining agreement.[4] The Supreme Court granted certiorari.[5] HELD: Wiley is compelled to arbitrate where (1) the merger did not change the nature of the business entity, (2) the transfer of employees was effected without difficulty, and (3) the Union made clear and maintained its position before and after the merger.

The Supreme Court reasoned that the preference for arbitration under the national labor policy is controlling. The shift from one corporate organization to another will in most cases be facilitated and industrial strife will be avoided if employees' claims continue to be resolved by arbitration rather than by tests of strength. This policy favoring arbitration would, in fact, be thwarted if employers could circumvent the duty to arbitrate by altering corporate structures. The Court concluded that these policy considerations are not overcome by the fact that Wiley did not sign the agreement since

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[1] 376 U.S. 543 (1964).

[2] 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

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

[3] Livingston v. John Wiley & Sons, Inc., 203 F. Supp. 171 (S.D.N.Y. 1962). The application was denied because the Union had failed to follow the grievance procedure established in the collective bargaining agreement.

[4] Livingston v. John Wiley & Sons, Inc., 313 F.2d 52 (2d Cir. 1963), noted 5 B.C. Ind. & Com. L. Rev. 193 (1963).

[5] 373 U.S. 908 (1963).

the common law principles of contracts should not strictly govern collective bargaining agreements.

Extending the preference for arbitration to the point of compelling nonsigners to arbitrate is not unreasonable in light of the development of national labor policy. The concept of a "national labor policy"[6] originated with the Supreme Court's interpretation of section 301(a) in *Textile Workers v. Lincoln Mills.*[7] The Court upheld the overwhelming majority of lower courts in finding that section 301 did more than confer jurisdiction on the federal courts to try cases involving labor organizations which affect commerce.[8] The Court found in section 301 a directive to the federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements. Included in that federal law is power to grant specific performance of promises to arbitrate grievance disputes.[9] The policy behind section 301 was expressed:

> Statutory recognition of the collective bargaining agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.[10]

The Supreme Court stated in *Lincoln Mills*, that the arbitration clause is a major element in the collective bargaining agreement. It is the *quid pro quo* for a no-strike agreement.[11]

Before 1960, arbitration clauses were interpreted and enforced according to standard principles of contract as required by *International Ass'n of Machinists v. Cutler-Hammer, Inc.*[12] Privity of contract was required to bind any employer, and courts would compel arbitration only if the agreement specified that the particular type of dispute was to be subject to arbitration.[13]

The turning point in national labor policy was the 1960 *Steelworkers* decisions[14] which made obsolete the strict contract approach of *Cutler-Hammer*[15] and described the role of arbitration in national labor policy. *United Steelworkers v. Warrior & Gulf Nav. Co.*,[16] the most significant of the *Steelworkers* cases, decreed that since arbitration clauses are the major factor in achieving industrial stabilization through the collective bargaining contract, all disputes must be held to come within the scope of grievance and arbitration provisions, unless specifically excluded.[17] The Court thus ex-

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[6] Supra note 1, at 544.

[7] 353 U.S. 448 (1957).

[8] Id. at 450-51.

[9] Id. at 451; see 93 Cong. Rec. 3656-57 (1947) (remarks of Congressmen Hartley and Barden).

[10] S. Rep. No. 105, 80th Cong., 1st Sess. 17-18 (1947).

[11] Textile Workers v. Lincoln Mills, supra note 7, at 455.

[12] 271 App. Div. 917, 67 N.Y.S.2d 317 (1947).

[13] Id. at 918, 67 N.Y.S.2d at 318.

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

[15] International Ass'n of Machinists v. Cutler-Hammer, Inc., supra note 12.

[16] United Steelworkers v. Warrior & Gulf Nav. Co., supra note 14.

[17] Id. at 581.

pressed a willingness to find an agreement to arbitrate where there is none, refusing to ignore only the parties' expressed intention to exclude certain matters from arbitration. At present, an allegation that there is a dispute as to the meaning or application of any of the terms of the collective bargaining agreement provides sufficient basis for federal courts to order arbitration.[18]

Special qualities of the collective bargaining agreement make this approach to arbitration clauses necessary. These agreements differ significantly from the ordinary commercial contract in several respects:[19]

> (1) There are three parties to the agreement—management, labor, and the union. Labor is further divided into individual workers with personal grievances. The complexity and diversity of the interests of these parties require the talents of a specialist to resolve disputes.
> (2) Similarly, the vast range of topics covered calls for expert interpretation when discord arises. Moreover, since the agreement must be kept simple enough to be understood by the workers, incomplete phrasing is inevitable. The arbitrator is best equipped to fill unavoidable gaps.
> (3) The agreement is in force for an extended period, not for a single transaction. Thus the number of unforeseeable problems which may arise is greatly multiplied over a period of time.

The result of collective bargaining then is not, strictly speaking, a contract of employment; it is rather a trade agreement governing the terms of the relationship between employer, employees, and union.[20] The *Warrior*[21] Court notes that it covers the entire employment relationship, calling it "a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."[22] Consequently, many provisions of the agreement must be expressed in general and flexible terms. Arbitration is the means of solving the unforeseeable by molding a body of law for all problems which may arise. In expressing a preference for arbitration, the *Warrior* Court took it as an alternative, not to litigation, but to industrial strife.[23]

When the *Wiley* case was decided, it was the furthest extension to date of the willingness of the courts to abrogate traditional contract theory to promote arbitration. However, obligating successor employers to honor the arbitration clauses of collective bargaining agreements of their predecessors where the agreement specifically provides for arbitration of the disputed matter is not much more extreme than finding agreements to arbitrate in contracts where none are expressed. The courts have had no trouble justifying the latter in terms of the goal of industrial peace.[24] The same purpose is served by balancing the former means of protecting workers from sudden changes

[18] Comment, 28 U. Chi. L. Rev. 707, 732 (1963).
[19] Cox, Reflections upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1490 (1959).
[20] J. I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944).
[21] United Steelworkers v. Warrior & Gulf Nav. Co., supra note 14.
[22] Id. at 578.
[23] United Steelworkers v. Warrior & Gulf Nav. Co., supra note 14.
[24] Ibid.

in the employment relationship against the prerogative of owners independently to rearrange their businesses.

The impact of the *Wiley* ruling is already apparent. The Court was careful to limit its decision to the circumstances of the case.[25] Under the following circumstances, the successor was required to arbitrate under the arbitration clause of its predecessor's collective bargaining agreement: (1) disappearance by merger (2) of a corporate employer (3) with a larger corporate employer (4) in which almost all of the employees of the smaller firm, half of whom are unionized (5) are mingled with the larger nonunionized force of the successor firm (6) without difficulty, and (7) without a significant change in the nature of the business entity and (8) where the Union made known its claims. Two cases have recently been decided in different circuits on the basis of *Wiley*.[26] They are of some help in evaluating the importance of the listed circumstances to courts which must in the future decide whether or not specific arbitration clauses are to bind successor employers.

The Supreme Court in *Wiley* said that the Union could have abandoned its right to arbitration if it had failed to make its claims clear.[27] The Court evidently found it important that the claims of the Union let Wiley know what to expect from the unionized Interscience employees. This consideration is not likely to be of much weight in future decisions. The purchasing or absorbing firm must certainly be aware of the existence of a collective bargaining agreement. It is natural to suppose that the union and covered employees will demand that provisions relating to settlement of grievances be honored by the successor employer. Arbitration was directed in *United Steelworkers v. Reliance Universal Inc.*,[28] despite the fact that the Union failed to demand that the collective bargaining agreement of the predecessor be honored by the successor until the transaction was completed.

The practice of enforcing arbitration clauses against non-signers is not limited to cases of merger. Both *Wackenhut Corp. v. International Union, United Plant Guard Workers*[29] and *United Steelworkers v. Reliance Universal, Inc.*,[30] involved sales of substantially all the assets of the predecessor to the successor. Arbitration was directed in each. Even the *Wiley* Court spoke generally in terms of cases in which *ownership* or corporate structure of the enterprise is changed.[31]

Considering the factor of geographical transfer, *Wackenhut*[32] and *Reliance*[33] pose stronger cases for arbitration than did *Wiley*. Where em-

[25] Supra note 1, at 551.

[26] United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964); Wackenhut Corp. v. International Union, United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964).

[27] Supra note 1, at 551.

[28] United Steelworkers v. Reliance Universal, Inc., supra note 26, at 893.

[29] Wackenhut Corp. v. International Union, United Plant Guard Workers, supra note 26.

[30] United Steelworkers v. Reliance Universal, Inc., supra note 26.

[31] Supra note 1, at 551.

[32] Wackenhut Corp. v. International Union, United Plant Guard Workers, supra note 26.

[33] United Steelworkers v. Reliance Universal, Inc., supra note 26.

ployees have undergone geographical or intra-plant transfer, working conditions and duties of individuals cannot remain perfectly static. Arbitration under the predecessor's collective bargaining agreement may then be inappropriate and should be denied if there is evidence that the transferred employees no longer wish to be represented by the petitioner union, or that the union represents an inappropriate bargaining unit. The former could easily result if another union can more effectively represent the employees, in their new situation.[84] The latter could occur if the new employer were forced to bargain with two or more unions representing different groups of employees from the same factory. In both *Wackenhut* and *Reliance*, there were no shifts of employees. The sale of assets in *Wackenhut* resulted in a change in ownership, with negligible effect on the workers.[85] The sale as a going concern in *Reliance* did the same.[86] The employment remained essentially unchanged; only the employer was new. In *Wiley*, however, there was a shift of workers to the successor's plant. In directing arbitration the Court depended upon the facts that the effects of the transfer were minimal, and it was made without difficulty.[87]

The relative sizes of predecessor and successor were not significant in *Wackenhut* and *Reliance* since the new owners' sizes made little difference to the workers so long as their jobs were unchanged. In *Wiley*, however, the transfer of employees made relative size an important consideration. The large size of Wiley contributed to the finding that the Interscience employees had been assimilated without difficulty in the sense that the workers could have been assigned their former duties without upsetting the internal structure of Wiley. Arbitration would probably not be directed against a successor who could not effect a transfer without assignment of different duties to the transferred employees.

Reliance indicates that the transfer and mingling in the *Wiley* fact situation may have so weakened the case for arbitration that the Court felt compelled to limit its ruling to enforcing the *arbitration clause* against a non-signer.[88] By way of dicta, both *Reliance* and *Wackenhut* propose that under the fact situations of those cases the entire agreement is binding upon the successor. The decrees provided only that arbitration proceed; but the *Reliance* court stated that the collective bargaining agreement remained the basic charter of labor relations after the change of ownership;[89] and the *Wackenhut* court said that under the *Wiley* rule the successor is bound by the collective bargaining agreement entered into by its predecessor.[40]

It is not clear from *Reliance* whether the court would apply its extended rule to the fact situation of *Wiley*, where there is a physical transfer of employees. Such a result should be avoided. Enforcing an arbitration

[84] NLRB v. McFarland, 306 F.2d 219, 220 (10th Cir. 1962).

[85] Wackenhut Corp. v. International Union, United Plant Guard Workers, supra note 26, at 957.

[86] United Steelworkers v. Reliance Universal, Inc., supra note 26, at 893.

[87] Supra note 1, at 551.

[88] United Steelworkers v. Reliance Universal, Inc., supra note 26, at 895.

[89] Ibid.

[40] Wackenhut Corp. v. International Union, United Plant Guard Workers, supra note 26, at 958.

clause against a non-signer is much different from enforcing the entire agreement against him. When a dispute is sent to an arbitrator, it is assumed that he will render the most equitable decision possible. Flatly enforcing other parts of the agreement such as fixed wage rates or seniority terms against the successor may not be a terrible burden on him where he takes over an intact operation. In cases, however, where employees have been moved into the successor's work force, inequities within the plant will soon lead to industrial strife. The existence of separate agreements covering workers whose duties and qualifications do not differ can lead at least to poor morale and at most to strikes.

Even if the *Reliance* court were to limit its broad holding to cases where no transfer of employees has taken place, it must be kept in mind that *Wiley* is not the basis for any case following the *Reliance-Wackenhut* dicta. The courts of the Third and Ninth Circuits seem to have forgotten in their zeal to enforce collective bargaining agreements against non-signers that the initial decision to abrogate contract theory and to compel a non-signer to arbitrate was founded on the policy favoring ***arbitration*** as a means of achieving industrial peace.

THOMAS J. CAMERON

Labor Law—Labor Management Relations Act—Sections 9(b) and 9(c)(5)—Extent of Organization as Controlling Factor.—*Metropolitan Life Ins. Co. v. NLRB.*[1]—Insurance Workers International Union, AFL-CIO, requested the National Labor Relations Board to certify it as bargaining representative for all twenty-three[2] debit agents at the Woonsocket, Rhode Island, district office of the petitioner, a nation-wide insurance corporation with over 1,000 district offices.[3] Woonsocket was one of eight district offices maintained in Rhode Island by petitioner, all of which are within greater Providence. The nearest district office to Woonsocket is twelve miles away, in Pawtucket. The Board certified the union, but petitioner claimed that the only appropriate certifiable units would be (1) all its offices in the United States, (2) all its offices in its New England Territory, or (3) all its offices in Rhode Island. Petitioner asserted that in certifying this unit, the Board treated as *solely* controlling the extent of employee organization, in violation of Section 9(c)(5) of the Labor Management Relations Act.[4] On petition to review and set aside the Board's order, the Court of Appeals for the First Circuit HELD: Order set aside and enforcement denied; the Board had violated section 9(c)(5) of the Act since extent of organization appeared to control the Board's decision, no other basis appearing therein.

A vague and ambiguous term, extent of organization can mean either the geographical extent to which a union has been organized, or the intensive

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[1] 327 F.2d 906 (1st Cir. 1964), cert. granted, 32 U.S.L. Week 3115 (U.S. Oct. 12, 1964) (No. 98).

[2] Brief for Respondent, p. 4.

[3] Brief for Petitioner, p. 6.

[4] 61 Stat. 143 (1947), 29 U.S.C. § 159(c)(5) (1958).