Labor Law Successorship under the National Bituminous Coal Wage Agreement and the Union's Campaign for Job Security

Thomas P. Geis
Crowell & Morning

Ward L. Smith
Crowell & Morning

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Labor and Employment Law Commons, and the Oil, Gas, and Mineral Law Commons

Recommended Citation

Available at: https://researchrepository.wvu.edu/wvlr/vol90/iss3/9

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
LABOR LAW SUCCESSORSHIP UNDER THE NATIONAL BITUMINOUS COAL WAGE AGREEMENT AND THE UNION'S CAMPAIGN FOR JOB SECURITY

THOMAS P. GIES*
WARD L. SMITH**

I. INTRODUCTION

Article I of the National Bituminous Coal Wage Agreement of 1988 ("Wage Agreement" or "NBCWA") contains a broadly-written successorship provision. In addition to the "successors and assigns" language found in most collective bargaining agreements,1 Article I imposes an affirmative duty on each signatory employer to insure that the obligations of the Wage Agreement are assumed by the purchaser of any coal mining operation covered by the NBCWA. Certain provisions in Article 1A of the Wage Agreement attempt to protect the job security of employees represented by the United Mine Workers of America ("UMWA" or "Union") in connection with the wide variety of coal lands leasing, contracting and licensing arrangements that characterize the industry. These provisions have become increasingly important as the continued depressed state of the industry has increased unemployment in the coal fields, particularly among unionized employees.2 As part of the recent negotiations for the 1988

---


1. A typical successorship provision states that the collective bargaining agreement shall be binding on the signatory employer, and its "successors and assigns." Such language does not impose an affirmative obligation on the seller to ensure that the contract is assumed by the purchaser. See, e.g., Howard Johnson Co. v. Detroit Local Joint Exec. Bd., 417 U.S. 249, 258 n.3 (1974).

2. Press accounts estimate that as many as one-third of UMWA members are unemployed. Coal Week, Oct. 13, 1986, p.1. UMWA membership has declined from more than 500,000 to less than 200,000 active members since 1940. N.Y. Times, Nov. 2, 1986, p. E-5, col. 1. The share of coal that is mined by UMWA members has declined from 70% to 50% in the last ten years. N.Y Times, Oct. 28, 1986, p. A-20, col.2.
Wage Agreement, the parties agreed to new job security provisions that impose additional obligations on signatory employers concerning operations not covered by previous wage agreements.

These contractual provisions impose obligations on coal industry employers that extend well beyond the statutory obligations imposed by the Labor Management Relations Act ("Act"). Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain with a labor organization representing its employees. In some instances the purchaser of a business may be found to be a successor employer obligated to assume its predecessor's bargaining obligations. However, section 8(a)(5) of the Act generally does not require the successor employer to assume the predecessor's collective bargaining agreement.

The Wage Agreement's successorship and job security provisions are a response to the Supreme Court's decisions in NLRB v. Burns Int'l Sec. Serv. and Howard Johnson Co. v. Detroit Local Joint Exec. Bd. These contractual provisions have been difficult to apply in a number of frequently recurring situations, particularly in cases involving the transfer of mining rights to coal reserves or inactive coal-producing facilities. The economic pressure on cost-conscious operators resulting from the continued depressed state of coal prices

---

5. Section 8(a)(5) has generated a considerable body of case law setting out the standards for determining whether a purchasing employer will be found to be a successor. See, e.g., NLRB v. Burns Int'l Sec. Serv., 406 U.S. 272 (1972). These standards are discussed in more detail infra note 17 and accompanying text. Successorship is a fact-specific determination, made by the Board after a review of the "totality of the circumstances." Under these standards, a business transaction and the purchaser's resulting operation often can be structured in such a way as to preclude a finding of successorship. See, e.g., Border Steel Rolling Mills, 204 N.L.R.B. 814, 823 (1973) (predecessor's operation was completely integrated into new employer's overall operations, resulting in an insufficient community of interest among the predecessor's employees to retain a separate bargaining unit for them); Norton Precision Inc., 199 N.L.R.B. 1003, 1007-08 (1972) (change in production methods, type of market supplied, method of doing business, and kinds of products produced substantially altered nature and character of employer to preclude successorship finding); Georgetown Stainless Mfg. Corp., 198 N.L.R.B. 234, 237-38 (1972) (changes in machinery, methods and pace of production, and product support conclusion that new employer is not a successor).
has exacerbated this controversy, as many industry employers seek to operate inactive mines without the additional financial burdens imposed by the Wage Agreement. The new job security provisions added to the 1988 Wage Agreement raise a new set of uncertainties for employers.

This article evaluates the existing state of labor law successorship in the coal industry, with particular emphasis on cases interpreting Article I of the Wage Agreement as it is applied to transactions involving inactive coal properties, and on the job security provisions of Article II of the 1988 NBCWA. Part II of this Article summarizes the basic principles of labor law successorship, which provide the necessary background for a full understanding of the scope of Articles I and II of the Wage Agreement. Part III of this Article reviews the successorship provisions of Article I of the Wage Agreement in detail, and discusses the various interpretations given its provisions by arbitrators, the courts, and the National Labor Relations Board (“Board”). Part III also reviews the related provisions of Article 1A of the NBCWA, as they apply to various forms of leasing and contracting of coal producing properties. Part IV of this Article examines the new job security provisions of Article II of the 1988 Wage Agreement, which establish a new procedure for staffing at non-signatory operations of signatory employers. Part V of this Article argues that some courts and arbitrators have improperly extended the reach of the contractual successorship and job security obligations, and suggests an interpretation of Articles I and II of the Wage Agreement that is more harmonious with the overriding objectives of federal labor law policy.

II. THE LABOR LAW OF SUCCESSORSHIP

The statutory labor law of successorship is derived from the obligations imposed by Section 8(a)(5) of the Act.\(^8\) Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain with a labor organization representing its employees. The successorship doctrine has been developed by the Board and the courts to define
the labor relations obligations of the purchaser of a business in order to ensure that business transactions are not carried out for the purpose of evading the bargaining obligations imposed by Section 8(a)(5). The development of the law of successorship has focused on determining whether or not a particular purchaser is a "successor" and, if so, defining the nature of the labor relations obligations assumed as a result.  

The Supreme Court's decision in *NLRB v. Burns Int'l Sec. Serv.* is the cornerstone of statutory labor law successorship. In that case, Burns International Security replaced another contractor, Wackenhut, which had provided security protection for Lockheed Aircraft. Wackenhut's employees were covered by a collective bargaining agreement with the United Plant Guard Workers. Burns retained 27 of the Wackenhut guards and supplemented them with 15 of its own guards from other locations; hence, a majority of Burns' new workforce was composed of Wackenhut personnel previously represented by the Plant Guards. When Burns hired the former Wackenhut employees, however, it provided them with membership cards in the American Federation of Guards, the union representing Burns' employees at other locations. Wackenhut's union demanded recognition and insisted that Burns honor the union's collective bargaining agreement with Wackenhut. Burns refused, and the Plant Guards filed unfair labor practice charges alleging that Burns was Wackenhut's successor and thus obligated to recognize the Plant Guards and to assume Wackenhut's collective bargaining agreement.

The Board held that Burns had violated Section 8(a)(5) of the Act, both by refusing to recognize and bargain with the Plant Guards and by refusing to honor the pre-existing collective bargaining agreement. The Board concluded that Burns was bound to the Wack-
enhut contract "as if it were a signatory thereto," even though there had been no merger (or even sale of assets) between Burns and Wackenhut. On appeal, the Supreme Court affirmed the judgment of the United States Court of Appeals for the Second Circuit that the Board had exceeded its power in requiring Burns to assume Wackenhut's labor contract.

The Supreme Court's decision in *Burns* resolved two issues that are critical to the labor law of successorship. First, the Court held that the Board could not force Burns to adopt the Wackenhut collective bargaining agreement. The Board's conclusion, the Court held, was inconsistent with the Act's fundamental policy of free and un fettered collective bargaining. The Court concluded that requiring a new employer to take over an existing contract might inhibit the alienability of businesses, and also would violate Section 8(d) of the Act. While the Court acknowledged that an employer might voluntarily adopt an existing labor agreement, it held that Section 8(a)(5) did not mandate such adoption.

The Court then concluded that the Board properly had ordered Burns to bargain with Wackenhut's union. The Court found "substantial continuity" in the business enterprise, noting that Burns performed the same duties in the same location and in the same manner as had Wackenhut. Significantly, Burns had voluntarily chosen to hire Wackenhut's workforce, and these employees constituted a majority of Burns' workforce. On this basis, the Court concluded that a majority of Burns' workforce should be deemed to desire continued representation by their prior union representative. As a result, the Court sustained the Board's conclusion that Burns was a successor employer obligated under Section 8(a)(5) of the Act to recognize Wackenhut's union as the collective bargaining representative of its

12. *Id.* at 350.
14. 29 U.S.C. § 158(d) (1982). Section 8(d) stipulates that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession."
16. *Id.* at 277-81.
employees. This resolution of the successorship question has come to be known as the "continuity of the enterprise" test.\textsuperscript{17}

In \textit{Howard Johnson Co. v. Detroit Local Joint Exec. Bd.},\textsuperscript{18} the Supreme Court established another important tenet of the successorship doctrine in holding that a successor employer cannot be required to arbitrate the extent of its obligation to hire its predecessor’s employees. In 1972, Howard Johnson bought the personal property and assets of a motor lodge from a predecessor, which had signed two separate collective bargaining agreements with a union. Both labor contracts provided that they would be binding on the employer’s "successors, assigns, purchasers, lessees or transferees."\textsuperscript{19}

Howard Johnson refused to recognize the union or assume either of the seller’s labor agreements. Instead, it began to hire new workers. In response, the union filed suit in state court seeking a temporary restraining order barring Howard Johnson from "locking out" and compelling the company to arbitrate its contractual responsibilities to hire the predecessor’s employees. The defendants removed the case to federal court, claiming that it properly was a Section 301 action.\textsuperscript{20} The district court ordered Howard Johnson to arbitrate the issue of its obligations to the unionized employees, but refused to order the company to rehire all these employees.\textsuperscript{21} The Supreme Court ultimately reversed, concluding that Howard Johnson was neither obliged to hire the previous employees nor to arbitrate its alleged responsibility to do so.\textsuperscript{22} The Court reasoned that because only nine

\begin{footnotesize}
\begin{enumerate}
\item This test has been applied by the Board and the Courts in making successorship determinations in a wide variety of factual circumstances. See, e.g., Border Steel Rolling Mills, 204 N.L.R.B. 814 (1973) (where predecessor unit has been integrated into larger unit, no separate bargaining is required); \textit{Howard Johnson}, 417 U.S. 249 (asset sale without continuation of a majority of predecessor’s employees; no successorship); Industrial Catering Co., 224 N.L.R.B. 972 (1976) (though location of business remained the same, lack of majority and changes in business operation precluded successorship); Valley Nitrogen Producers, 207 N.L.R.B. 208 (1973) (purchaser used same facilities, equipment, inventory, customers and a majority of predecessor’s employees; successorship found).
\item \textit{Howard Johnson}, 417 U.S. 249.
\item \textit{Id.} at 251.
\item 29 U.S.C. § 185 (1982). Section 301 of the Act conveys jurisdiction on federal courts to hear cases claiming a breach of a collective bargaining agreement.
\item \textit{Howard Johnson}, 417 U.S. at 260-62.
\end{enumerate}
\end{footnotesize}
of Howard Johnson’s 34 employees were former union members, a majority of its workforce was not made up of the previously unionized employees and thus there was insufficient “continuity” in the workforce to justify arbitration under the predecessor contract.23

The underlying question resolved in Howard Johnson thus was whether a new employer has an obligation to hire the former employees of its predecessor. The Court held that no such obligation existed, even though the predecessor’s labor contract contained a successorship provision.24

The Court’s decision in Howard Johnson raised questions about the continued vitality of the Court’s earlier decision in Wiley & Sons v. Livingston.25 Wiley held that, in a case involving a merger between two companies, the resulting business entity could be compelled to arbitrate a dispute arising under the predecessor’s collective bargaining agreement. The tension between Wiley and Howard Johnson remains unresolved, although the Court in Howard Johnson suggested that the differing results reached in the two cases might be due to the complete disappearance of the predecessor corporation in Wiley and the union’s lack of remedy against the company with whom it had an agreement.26

The Supreme Court added an additional dimension to the successorship question in its decision last year in Fall River Dyeing & Finishing Corp. v. NLRB.27 The case arose after a New England textile manufacturer fell on hard times in February, 1982, and laid off all but a skeleton crew of its employees. Six months later it closed its business entirely. One of the company’s former executives then formed Fall River and purchased the predecessor’s assets and part

23. Id. at 264. The Court’s reliance on this factor was the principle justification for its conclusion that there was no continuity of the enterprise as that term was used in Burns, 417 U.S. at 263. The Court acknowledged that the successorship inquiry may lead to different results in different cases, concluding that an employer “may be a successor for some purposes and not for others.” Id. at 263 n.9.

24. Id. at 261-62. Howard Johnson also established that an employer violates Section 8(a)(3) of the Act if it discriminates on the basis of union activity or membership in making its hiring decisions. Id. at 262 n.8.


of its inventory. Fall River began operations in September 1982, some seven months after the original layoff. Fall River used many of the same facilities and manufacturing processes as its predecessor. Fall River hired its own work force from newspaper advertisements, although it did hire many of the predecessor’s former supervisors and employees.

Only one month after Fall River began operating — but several months before it reached anything approaching full production — the union that had represented the predecessor’s workers requested recognition from Fall River. At the time recognition was requested, a large majority of Fall River’s employees had worked for that firm. Fall River denied the union’s request. Once full production was achieved, employees of the predecessor no longer constituted a majority of Fall River’s employees, and Fall River continued its denial of the union’s demand for recognition.

Fall River’s refusal to honor the union’s demand for recognition was held unlawful by the Board.28 The Board agreed with Fall River that the union’s initial demand for recognition was premature insofar as it preceded any substantial production by Fall River. Nonetheless, the initial bargaining demand was held to have “continuing effect” which required recognition if, once Fall River hired a “substantial and representative complement,”29 a majority of the workers continued to consist of the predecessor’s employees. The Board found that a “substantial and representative complement” was hired by January 1983, and that a majority of the work force at that time still consisted of the predecessor’s employees. Fall River’s refusal to recognize the union at that time thus was held unlawful, even though the predecessor’s former employees no longer constituted a majority by the time Fall River attained full production.30

29. The Board makes its determination of successorship at the time a “substantial and representative complement” of employees is hired; if the new employer is determined to be a successor employer at that point, it inherits its predecessor’s duty to bargain. Spruce Up Corp., 209 N.L.R.B. 194 (1974). The Board’s application of this standard involves an inquiry as to “whether the job classifications designated for the operation were filled or substantially filled and whether the operation was in normal or substantially normal production.” E.g., Premium Foods v. NLRB, 709 F.2d 623, 628 (9th Cir. 1983).
30. Fall River, 272 N.L.R.B. at 840-41.
The Supreme Court upheld the Board’s decision. In doing so, the Court reaffirmed the *Burns* proposition that an employer is free to rearrange the business and hire its own work force upon a change in ownership:

We observed in *Burns* that, although the successor has an obligation to bargain with the union, it is ordinarily free to set initial terms on which it will hire the employees of a predecessor, and it is not bound by the substantive provisions of the predecessor’s collective-bargaining agreement. We further explained that the successor is under no obligation to hire the employees of its predecessor, subject, of course, to the restriction that it not discriminate against union employees in its hiring. Thus, to a substantial extent the applicability of *Burns* rests in the hands of the successor. If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated.

In determining whether the new employer has made a conscious decision to maintain generally the same business, the Court approached the issue from the viewpoint of the employees. According to the Court, Fall River did not alter the basic nature of the business; it continued to employ personnel on the same equipment and in the same job classifications as had its predecessor, and it continued to employ many of the same supervisors as had its predecessor. The substantial diminution in the size of the workforce and alterations in customers and marketing strategy were disregarded because they had no impact upon the employer-employee relationship. Similarly, the seven-month hiatus in operations did not preclude a finding of successorship, as the Court stated that such a hiatus is a determining factor only when there are other indicia of discontinuity. Indeed, since Fall River had kept on a skeleton crew during the hiatus, the Court reasoned that employees may have viewed the hiatus as substantially less than seven months. As a result of these facts, the Court concluded that the Board had properly found Fall River to be a successor.

32. *Id.* at 2234 (citations omitted). The Court also acknowledged the tension between *Burns* and *Wiley* as to the issue of workforce continuity, endorsing the decision of the Board holding that an employer will be held to be a successor if a majority of its employees were employed by the predecessor. *Id.* at 2237 n.12.  
33. *Id.*  
34. *Id.* at 2237.  
35. *Id.*
The *Fall River* Court's emphasis on the employees' perspective as the critical viewpoint for determining successorship reveals a different point of emphasis than that adopted in *Burns*. The Court in *Burns* was principally concerned with the ability of a new employer to restructure its operations, recognizing that a substantial discontinuity between the new employer and the predecessor militates against a finding that the new employer should be obligated to assume the predecessor's bargaining obligations.\(^{36}\) The *Fall River* Court, on the other hand, concluded that a temporary hiatus followed by minor changes in operations will not defeat a successorship finding, if the basic nature of the employer-employee relationship remains unchanged.\(^{37}\) To the extent that *Fall River* represents a shift in emphasis with regard to the successorship inquiry, it may make it more likely that buyers of coal-producing facilities will be found to be successor employees.\(^{38}\)

The sale of a business in which the employees are represented by a labor organization raises two other labor relations obligations that should be mentioned in any discussion of successorship. First, a selling employer may be obligated to bargain with its incumbent union over the effects of the decision to sell. In *First Nat'l Maint. Corp. v. NLRB*,\(^{39}\) the Supreme Court reaffirmed the rule that an employer has a duty to bargain over the effects of a sale of part of its business despite having no duty to bargain over the decision.\(^{40}\) Second, a

\(^{36}\) *Burns*, 406 U.S. at 277-81.

\(^{37}\) *Fall River*, 107 S. Ct. at 2237.

\(^{38}\) *Burns*, 406 U.S. at 280-81. See, e.g., UMWA Local 1329 v. NLRB, 812 F.2d 741 (D.C. Cir. 1987) (vacating decision of Board concluding that the purchaser of two coal mines was not a *Burns* successor; court noted absence of evidence of a possible change in employee attitude toward representation by the UMWA as a critical factor in the successorship analysis).


\(^{40}\) The employer's obligation to engage in effects bargaining requires that the union must be given the opportunity to engage in "meaningful" effects bargaining, through adequate prior notice of the employer's decision. *First Nat'l Maint. Corp.*, 452 U.S. 666. See, e.g., Metropolitan Teletronics, 279 N.L.R.B. 134 (1986) (employer did not provide union with meaningful opportunity to engage in effects bargaining when it relocated its operation before notifying the union of its decision). The duty to bargain includes an obligation to respond to certain requests for information made by the union. See generally, NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). Unions frequently make such requests in the course of effects bargaining, and an employer violates Section 8(a)(5) of the Act if it ignores the union's requests for information relevant either to the bargaining or to the administration of the labor contract. See, e.g., Coalite, Inc., 278 N.L.R.B. 40 (1986); United Graphics, Inc., 281 N.L.R.B. 70 (1986).
purchaser that is determined to be a successor may be liable for the unfair labor practices of its predecessor, regardless of whether it agrees to assume that liability. 41

III. CONTRACTUAL LABOR LAW SUCCESSORSHIP IN THE COAL INDUSTRY

Burns and Howard Johnson established that the parties to a business transaction may arrange the transaction in such a way as to relieve the purchaser of the seller's labor relations obligations. The pattern of leasing, contracting, and licensing that typifies the coal industry created numerous opportunities for industry employers to avoid the collective bargaining obligations of their predecessors. These pressures, when added to the fact that layoffs are an unfortunate way of life in the coal industry, led the UMWA to seek contractual protection of its hard-fought representational position in the coal fields.

A. The Assumption and Notice Provisions of Article I of the 1988 Wage Agreement

The 1988 Wage Agreement imposes contractual obligations on signatory employers in successorship situations that go beyond the bargaining obligations of the Act. The principal successorship clause of the 1988 Wage Agreement is Article I, which states in part that:

This Agreement shall be binding upon all signatories hereto, including those Employers which are members of signatory associations, and their successors and assigns. In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement. Immediately upon the conclusion of such sale, conveyance, assignment or transfer of its operations, the Employer shall notify the Union of the transaction. Such notification shall be by certified mail to the Secretary-Treasurer of the International Union and shall be accompanied by documentation that the successor obligation has been satisfied. Provided that the Employer shall not be a guarantor or be held liable for any breach by the successor or assignee of its

obligations, and the UMWA will look exclusively to the successor or assignee for compliance with the terms of this Agreement.\footnote{National Bituminous Coal Wage Agreement of 1988, art. I (emphasis added) [hereinafter NBCWA of 1988].}

The assumption and notice provisions of Article I require that any transaction involving operations "covered by this Agreement" must include the express commitment of the purchaser to assume the obligations of the Wage Agreement, as well as the selling employer's obligation to notify the Union of any such transaction. Article I language in previous wage agreements has been subject to numerous disputes between operators and the union as to its intended scope.

I. The "sale or conveyance" clause.

The threshold issue in many disputes regarding the scope of Article I of the Wage Agreement is whether the transaction fits within the "sold, conveyed, or otherwise transferred" language of Article I. This language, which has been standard in previous industry wage agreements, has received a broad reading by arbitrators called upon to interpret it in particular circumstances.\footnote{Like most collective bargaining agreements, Article XXIII of the NBCWA provides that all disputes as to the meaning and application of the contract shall be resolved through the grievance procedure, which culminates in final and binding arbitration. As a result, most disputes over the meaning of Article I are submitted to arbitration. Arbitration awards may be challenged in an action to vacate under Section 301 of the Act, but a reviewing court will be very reluctant to vacate an arbitrator's decision so long as the award draws its essence from the collective bargaining agreement. See United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364 (1987).} Arbitrators generally have disregarded the form of a disputed transaction and found that there has been a "sale or conveyance" within the meaning of Article I whenever there is some "linkage" between the prior and subsequent employers. The necessary linkage generally has been found whenever there was direct dealing between the prior and subsequent employers, whether that dealing was in the form of negotiations, sale of assets, or common ownership.\footnote{Standard Pocohantas Coal Corp., Arb. Rev. Bd. No. 78-16 (Sept. 21, 1979) (former operator made direct contractual arrangements with another operator to take over the operations; second operator obligated to assume Wage Agreement by virtue of its successorship and leasing provisions).}

One recurring situation in which linkage has not been found is represented by the facts in \textit{Gopher Mining Co.}\footnote{Gopher Mining Co., Arb. Rev. Bd. No. 35 (July 10, 1975) (Lynch, Arb.).} There, the owner
of coal lands leased the property to a mine operator. After the operator had abandoned the mine for economic reasons, the landowner leased the land to a second mining operator. The arbitrator ruled that the second lessee was not required to assume the wage agreement of the prior lessee, even though the prior lessee had been a signatory employer.46

These decisions suggest that, where direct negotiations of any sort occur between the prior and subsequent mine operators, sufficient linkage will be found to make the subject transaction a "sale or conveyance" under Article I.

2. Is a particular coal-producing facility an "operation" for purposes of Article I?

Transfers of inactive coal mines have caused the most difficulty with respect to interpreting the scope of the term "operations" as used in prior wage agreements and in Article I of the 1988 Wage Agreement. UMWA v. North Am. Coal Corp.47 apparently was the first judicial interpretation of the term "operations" as used in Article I of the Wage Agreement, in the context of the sale of an inactive facility. In North Am. Coal Corp., the union challenged the sale of an inactive tipple as violative of Article I of the then existing wage agreement. The defendant seller argued that its sale of the tipple was not a sale of an "operation" covered by the NBCWA because all activity at the facility had ceased approximately fourteen months before the sale.48 The court agreed with this contention and granted summary judgment for the company.49 The court was careful to confine its decision to the facts presented, "particularly the announce-

46. Id. See also Past Coal Co., Arb. Dec. No. 84-30-84-23 (April 9, 1985) (Allen, Arb.). Past Coal is typical of many of the arbitral awards on this issue, as the Union argued that the successorship provisions of Article I required the employer (a new lessee) to follow the recall provisions of Article XVII of the contract by honoring the panel of the former lessee. The arbitrator rejected this argument, finding no linkage between the current lessee and its predecessor, which had simply abandoned operations.

47. UMWA v. North Am. Coal Corp., No. C-2-79-242 (S.D. Ohio Mar. 21, 1980). The UMWA has the right to bypass the contractual grievance-arbitration procedure in cases involving successorship and bring such claims directly to federal court. See NBCWA of 1988, art. XXVII.

48. Id., at slip op. at 5.

49. Id.
ment of the closing and the duration of the cessation of operations."\(^{50}\) In addition, the court noted that at the time of its decision the buyer of the tipple had not commenced operations at the mine or tipple. Under those circumstances, the court concluded that the sale of the tipple was the sale of a physical asset only, which did not constitute the sale of operations as contemplated by Article I.\(^{51}\)

The North Am. Coal Corp. reasoning was adopted by the district court in \textit{UMWA v. United States Steel Mining Co.},\(^{52}\) the only reported decision reaching this conclusion. There, the district court stated:

Based on a careful reading of the 1984 NBCWA and the entire file, this court is convinced that, as a matter of law, a mining 'operation,' for purposes of Article I of the 1984 NBCWA, refers to a mine site or facility where active coal mining operations are being conducted. That is, an 'operation' connotes a mine that is actively producing coal and operating as a coal mine. Thus, a mine that has ceased to function as an active coal mine is not an 'operation,' assuming the mine was closed in good faith. The mine closure and subsequent sale must be carefully scrutinized to determine whether the mine was closed and later sold in good faith or as an attempt to circumvent or evade the collective bargaining agreement. This utmost scrutiny is essential because a mine closure cannot be used by employers as a subterfuge to escape their obligations under the collective bargaining agreement. If there is even the slightest hint that a mine has been closed to circumvent the collective bargaining agreement and undermine the successorship clause, a court should not accord weight to the fact that the mine has been closed prior to the sale.\(^{53}\)

Applying this standard, the court held that the sale of a mine that had been closed for six months was not the sale of an "operation" that required the seller to abide by the successorship provisions of Article I, where the evidence showed that the mine had been closed in good faith for legitimate economic reasons.\(^{54}\)

The district court's analysis in \textit{United States Steel Mining Co.} has been adopted by at least one arbitrator in a successorship dispute. In \textit{Barbour Coal Co.},\(^{55}\) a signatory to the 1984 NBCWA sold a coal

\(^{50}\) Id. at 6.

\(^{51}\) Id.

\(^{52}\) UMWA v. United States Steel Mining Co., 636 F. Supp. 151 (D. Utah 1986), appeal docketed, No. 86-1795 (10th Cir. May 29, 1986). This case has been scheduled for oral argument in May, 1988.

\(^{53}\) Id. at 153-54.

\(^{54}\) Id. at 154.

tipple that had been closed for approximately two years to a non-signatory of the 1984 Wage Agreement. Citing *United States Steel Mining Co.*, the arbitrator found that the sale of the tipple was not the sale of an "operation" and that the successorship provisions of the 1984 NBCWA contract therefore did not apply to the sale. The arbitrator stated that "the primary reason Barbour is allowed to sell the tipple here is that the tipple is an unnecessary and unused facility. If the tipple was still being used, changing of the ownership would not have removed the tipple from the Wage Agreement." The arbitrator stressed that there was no evidence that the sale had been undertaken in order to circumvent the provisions of the contract.  

*United States Steel Mining Co.* and *North Am. Coal Corp.* thus stand for the proposition that an inactive coal producing facility is not an "operation" within the meaning of Article I, at least in situations where there is no evidence that the parties to the sale attempted to evade the requirements of Article I. The existence of such evidence has caused other courts to reach the opposite conclusion. In *UMWA v. Eastover Mining Co.*, the Union asserted both breach of contract and tortious interference with contractual relations in bringing suit against both the selling and purchasing employers. The purchaser in *Eastover* rejected the seller's initial sales proposal, which had contained language binding the purchaser to the labor contract. The purchaser's counteroffer, which became the sales contract, deleted the obligatory language, reserved the purchaser's right to contest coverage under the labor contract, and expressly excepted the

56. *Id.*, slip. op. at 4-6.  
57. *Id.* at 6.  
58. *Id.* Not all arbitrators have taken the position that the transfer of a shut-down coal-producing facility is beyond the reach of the Wage Agreement. See, e.g., BethEnergy Corp., Arb. Dec. No. 84-30-86-229 (Nov. 24, 1986) (Render, Arb.) (in a case involving a coal lease and an interpretation of Article IA(f) of the 1984 NBCWA, the arbitrator concluded that the term "operations" in that provision was broad enough to include coal lands on which no active mining had occurred, such that the successorship provisions of Article I were violated by the lease of surface mining rights). This decision is discussed in more detail *infra.*  
labor contract from the seller’s leases and contracts to be assumed by the purchaser.

The district court’s conclusion that the purchaser had tortiously induced the seller’s breach of Article I relied on the fact that the purchaser first approached the seller with terms that fell short of the seller’s obligations under the successorship clause. The court found further evidence of the purchaser’s tortious intent in that, prior to the sale, the purchaser had conferred with a management consulting firm about how to circumvent the successorship clause. The consulting firm apparently recommended that the mine be idled for a short time in order to facilitate a transfer without complying with the provisions of Article I. Finally, the court rejected the purchaser’s contention that its insistence on these sales terms was justified. Balancing the interests of the plaintiff and the defendants, the court concluded that “as a matter of policy, [the defendant’s] interest . . . in negotiating freely as a prospective purchaser wanes when compared to the interests represented by UMWA.”

The court also found that the seller’s failure to notify the Union of the sale and to require the purchaser to assume the contract constituted a breach of its obligations under Article I. The district court was persuaded by the fact that the seller, in its first draft of the purchase documents, had interpreted Article I as requiring it to obtain the purchaser’s assumption of the NBCWA. As a result, the court refused to accept as good faith arguments the seller’s attempts to argue otherwise, stating that, “[t]he intention was to evade, rather than enter into a meaningful contract.”

The district court’s opinions in Eastover can be seen as a legitimate response to a seemingly transparent attempt to sell a coal mine without complying with Article I of the Wage Agreement. What is more significant about Eastover is that the court interpreted Article I in an extremely broad manner, and concluded that, as applied to

---

61. Id. at 1147-48.
62. Id. at 1148.
63. Eastover I, 603 F. Supp. at 1045.
64. Id. at 1044.
a seller, it would apply to all sales of mines, whether the mine was active or inactive, and even if the purchaser was not a Burns successor. 65

At least one other district court has suggested that a seller may violate Article I of the Wage Agreement as a result of the sale of an inactive mine. In UMWA v. Pickands-Mather & Co., 66 the district court refused to grant summary judgment to the selling employers in a case arising out of a joint venture between Pickands-Mather and Carolina Power, which resulted in two mining operations (Leslie and McInnes) under the management of a Pickands-Mather subsidiary called Roberts. Carolina Power bought out Pickands-Mather’s interest following the cessation of mining operations in early 1983, and decided to sell the assets. In the interim, Roberts had become signatory to the 1981 Wage Agreement. Leslie and McInnes subsequently terminated their management contract with Roberts and sold their assets to an affiliate of A.T. Massey by the name of Sidney. Sidney did not assume the 1981 Wage Agreement, and the Union filed suit under Section 301 of the Act, asserting a violation of Article I by both the sellers and the purchasers.

The district court’s opinion contains a lengthy discussion of successorship principles, which concludes by granting the motion to dismiss filed by A.T. Massey and its subsidiaries (the “Buyers’ Group”). 67 The court decided that it lacked subject matter jurisdiction under Section 301 over non-signatory parties, where the contract did not set forth the “rights or duties” of the non-signatory. 68 After

---

65. Id. at 1044-47. As discussed infra, the Eastover court’s expansive reading of Article I must be harmonized with the Supreme Court’s development of labor law successorship in cases such as Burns and Fall River.


67. Id., slip op. at 18.

68. Id. at 13. This analysis is arguably inconsistent with the overriding objective of Article I of the Wage Agreement that non-signatory coal operators do indeed have contractual “rights and duties,” namely to assume the contract. The district court nonetheless concluded that, as a jurisdictional matter, the Union could not bring an action against the non-signatory Buyers Group, relying on the Sixth Circuit’s decision in Service Hosp., Nursing Home & Public Employees Union v. Commercial Property Serv., 755 F.2d 499 (6th Cir.), cert. denied, 474 U.S. 850 (1985). In that case, the union attempted to invoke Section 301 jurisdiction over a non-signatory employer based on a series of cases allowing a third-party beneficiary to a collective bargaining agreement to bring an action under Section 301. The Sixth Circuit rejected this theory, using the “rights or duties” analysis cited by the district court. Published by The Research Repository @ WVU, 1988 17
dismissing the Section 301 claim, the court dismissed for lack of subject matter jurisdiction the Union’s pendant claim of tortious interference against the Buyer’s Group.69 The court applied the successorship principles of Burns and Howard Johnson in rejecting the Union’s claim that the labor agreement constituted an “equitable servitude.”70

The district court reached a different result with respect to the claims made against Pickands-Mather (and its subsidiaries) and Carolina Power. Concluding that further discovery was needed with respect to the Union’s alter ego and single employer arguments, the court refused to grant the motion to dismiss filed by the Pickands-Mather companies.71 The court similarly rejected Carolina Power’s motion to dismiss, concluding that the Union had stated a claim of tortious interference against the utility.72

The district court’s opinion in Pickands-Mather thus suggests that a prospective seller of an inactive coal-producing facility may well face liability for failure to comply with the requirements of Article I of the Wage Agreement, even in the absence of the sort of evidence of intent that compelled the result in Eastover. Of course it can be argued, as the Union did, that the parties to the Pickands-Mather case were simply trying to be more clever than the parties in Eastover. In any event, both cases suggest that the analysis of the district court in United States Steel Mining Co. is far from settled authority.73

Read in this light, the Pickands-Mather decision means that a non-signatory beneficiary may institute suit under Section 301 if its rights and duties are stated in the contract, not that Section 301 jurisdiction is available against a non-signatory. The district court’s contrary conclusion in Eastover that it had jurisdiction under Section 301 of the Act to hear a claim asserted against a non-signatory employer reflects a division among the circuits as to the reach of Section 301. See Dougherty v. Parsec, Inc., 824 F.2d 1477, 1480 n.2 (6th Cir. 1987) (Gilmore, J., dissenting). The new provisions of Article II of the NBCWA of 1988 that extend contractual obligations to non-signatory operations suggests the district court might reach a different result under the new Wage Agreement.

69. Id. at 14.
70. Id. at 14-17.
71. Id. at 19-20.
72. Id. at 21.
73. One of the principal arguments raised by the Union on appeal in United States Steel Mining is that the district court’s decision would, in effect, result in a forfeiture of the union members’ panel rights. Enforcement of panel rights in recall situations is a frequently litigated issue under the Wage Agreement See, e.g., Local Union No. 2487 v. Blue Creek Mining Co., 806 F.2d 1552 (11th Cir. 1987) (employer ordered to arbitrate panel rights grievance filed against sister company; Art. XVII(k) of the Wage Agreement treats affiliated companies “as one and the same Employer for panel rights purposes).
A finding that a transaction violates Article I of the 1988 Wage Agreement can subject both buyer and seller to substantial liability. Article I provides, by its terms, that the seller violates the contract if it does not require the purchaser to assume the contract and notify the Union of the transaction. Article I further provides that, in the event the seller carries out these obligations, the seller is not a guarantor and cannot be held liable for the purchaser's subsequent breach of the Wage Agreement. Article I thus suggests the allocation of liability in situations in which a sales transaction did not comply with the notice and assumption provisions of Article I.74

The leading case outlining the nature of the seller's liability in such circumstances is the Fourth Circuit's en banc decision in *UMWA v. Allied Corp.* 75 In *Allied Corp.*, two mines were sold by Allied, one to Armco and one to Shannon Pocahantas. Both companies agreed to assume Allied's obligations under the NBCWA, with the notable exception of Allied's obligations to provide health and other non-pension benefits to its retired miners. 76 The district court issued an injunction requiring Allied to continue these benefits unless and until it could negotiate an agreement by which its successors undertook to make the payments. The Fourth Circuit upheld the district court's injunction obligating Allied to continue meeting these NBCWA obligations indefinitely for the duration of the Wage Agreement, or until it convinced its successors to undertake those obligations. 77 The Fourth Circuit's holding in *Allied Corp.* that the seller's liability could be open-ended would seem equally applicable in an Article I successorship case. The decision also suggests the measure of dam-

74. In addition to possible liability for damages, the Union may seek to enjoin a transaction if the seller does not require the purchaser to assume the Wage Agreement. See, e.g., Local Lodge No. 1226 v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981).
76. Id. at 415. Article XX of the Wage Agreement establishes pension and benefit plans for the benefit of UMWA members. The plans are funded by employer contributions based on tonnage of coal produced. Under the 1974 Plan, employers are primarily responsible for providing pension and benefit coverage via private insurers, with the 1974 Plan responsible only if the employer goes out of business or otherwise is legally freed from its pension obligations. In *Allied*, the predecessor employer remained in business and, since it had breached its Article I obligations, remained liable for pension payments. Cf. Dist. 29, UMWA v. 1974 Benefit Plan and Tr., 826 F.2d 280 (4th Cir. 1987) (1974 Plan must provide benefits where employers remain in business but is not liable for payment of benefits).
77. Id. at 421.
ages to be assessed against a buyer that refuses to assume the obligations of the Wage Agreement.

B. The Coal Lands Provision

Article 1A of the 1988 Wage Agreement contains several provisions that are relevant in any discussion of successorship and job security. The first is Section 1A(f), which provides:

As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. This section will immediately apply to any new operations upon the Union’s recognition, certification, or otherwise properly obtaining bargaining rights. 78

Article 1A(f) has been broadly interpreted by some arbitrators to mean that the contract extends to operations managed by affiliated companies. In *Nueast Mining Corp.* 79, for example, the arbitrator concluded that the employer was obligated to assume the Wage Agreement by virtue of a “sister” company’s execution of the contract, even though the mine in question had not been put into operation by the purchaser. The purchaser was required to give backpay to UMWA members who had previously worked at the mine for non-operational reclamation work that had been contracted out by the purchaser.

The scope of the “affiliates” language in Article 1A(f) is, however, far from settled. In *A.T. Massey Coal Co.*, 80 the Fourth Circuit reversed the district court’s decision requiring Massey and all of its affiliated companies to submit to arbitration under the 1984 Wage Agreement. According to the Fourth Circuit, the district court improperly ignored the rule that the existence of a contractual obligation to arbitrate is an issue for judicial rather than arbitrable

---

78. NBCWA of 1988, art. 1A(f).
The union's claim rested on its interpretation of Article 1A(f), which was rejected by a majority of the Fourth Circuit panel. The second issue raised by Article 1A(f) is the "after-acquired" language in that provision, a matter that was interpreted in the Lone Star Steel series of cases. Lone Star arose under the 1974 Wage Agreement, and, among other issues, involved the employer's challenge to the provisions of Article 1A(f) in the Wage Agreement requiring that newly acquired operations would be subject to the Wage Agreement. The Board concluded that this provision of Article 1A(f) was not an unlawful "after acquired" clause in violation of Section 8(b)(3) and Section 8(a)(3) of the Act. The appellate court vacated that part of the Board's decision, concluding that it was unlawful for the union to bargain to impasse over a provision which effectively expanded the scope of the bargaining unit, as such provisions are non-mandatory subjects of bargaining.

Another unresolved issue under Article 1A(f) concerns the sorts of transactions to which the provision applies. The Union, for example, has argued that Article 1A(f) of the Wage Agreement requires the lessee of coal lands to assume the obligations of the NBCWA. In BethEnergy Mines v. UMWA, the employer sued to vacate an arbitrator's award concluding that a lease of coal lands obligated the

81. Id. at 146-47.
82. See id. at 147 (Hall, J., dissenting) (disagreeing with majority's ultimate conclusion that an agreement to arbitrate has not been established). As of this writing, this case is still pending at the district court level, following the Union's amendment of its complaint. The Fourth Circuit correctly decided that the issue of arbitrability is properly one for the courts, thus making arbitration decisions like the one in Nueast Mining of questionable value.
85. Lone Star Steel Co., 639 F.2d at 558-59. The court found objectionable the language in Article 1(f) automatically applying the entire contract, including its noneconomic provisions, to other appropriate units at other locations, as not vitally affecting employees in the existing unit. Id. at 557.
lessor to insure the lessee's assumption of the Wage Agreement. Relying on the Fourth Circuit's decision in Clinchfield Coal Co. v. District 28, UMWA, the magistrate recommended that the arbitrator's award should be vacated, because the arbitrator failed to apprehend the distinction between "coal operations" and "coal lands."  

C. The Leasing and Licensing Provision

Section 1A(h) of the 1988 Wage Agreement contains the "leasing and licensing" provision, which states:

The Employers agree that they will not lease, sublease or license out any coal lands, coal producing or coal preparation facilities where the purpose thereof is to avoid the application of this Agreement or any section, paragraph or clause thereof. Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory operator hereto shall not be permitted unless the licensing out does not cause or result in the layoff of Employees of the Employer.

This Article was interpreted in the Clinchfield Coal Co. cases. The courts have enforced arbitrators' decisions holding that the licensing of an operation covered by the Wage Agreement violates Article 1A(h) if it results in the layoff of employees covered by the Wage Agreement, even if the employees work at a separate location.  

IV. New Job Security Provisions in the 1988 Wage Agreement

The recently ratified 1988 Wage Agreement contains new job security language that may affect business decisions to dispose of or

---

87. See BethEnergy Corp., and discussion supra note 58.
90. Article IA(h) of the 1984 Wage Agreement contained a detailed procedure requiring lessees and licensees to make offers of employment to laid-off employees of signatory employers. This procedure has been revised and included in the new Article II(B) of the 1988 Wage Agreement.
92. Big Bear Mining Co. v. UMWA, 579 F. Supp. 1072 (S.D. W. Va. 1983). In Big Bear, UMWA members were laid off at the Big Bear Mine #4, while the employer simultaneously licensed out operation of Eagle Mine #5. Big Bear then purchased the coal mined at Eagle Mine #5. Though none of the laid off miners had worked at Eagle Mine #5, the arbitrator held that their layoff was caused by the licensing out of Eagle Mine #5, and ordered that Big Bear offer reinstatement to the laid off miners.
acquire mine properties. While the successorship language of Article I was left unchanged, an entirely new Article II, entitled Job Opportunity and Benefit Security ("JOBS"), was added to the contract. Nominally, JOBS is completely distinct from the successorship provision of Article I: it contains language that, "[n]othing in the JOBS program shall be construed to diminish any rights . . . established in . . . the successorship clause . . . ." However, its new provisions, which affect both job security at non-signatory operations and leasing and licensing activities at signatory operations, create significant new obligations for industry employers.

A. Obligations at Non-Signatory Operations.

The JOBS provisions create significant new obligations with respect to an employer's non-signatory operations. The obligations under this article attach to "any existing, new or newly acquired non-signatory operations"; in other words, a signatory to the 1988 Wage Agreement now has contractual obligations related to all of its mining operations, both signatory and non-signatory.

The essential aspect of the obligations required by JOBS is that, for operations falling within its scope, an employer must fill the first three of every five new jobs from the employer's panels of laid-off miners from its signatory operations.95

The JOBS provisions represent an attempt to extend job security protection to UMWA miners by extending panel rights to coal properties that may be acquired by a signatory employer whether or not the acquisition is found to be subject to Article I of the Wage Agreement. As a result, the JOBS provisions could well have the effect of extending panel rights to inactive properties acquired by a signatory employer. To that extent, the JOBS provisions represent an attempt by the Union to bypass the limitation to the scope of Article I recognized in cases such as United States Steel Mining Co.

One of the most important questions left unanswered by this part of Article II concerns the scope of the signatory employer's obli-

---

94. NBCWA of 1988, art. II.
95. Id.
gations to hire three of five employees at non-signatory operations in those situations in which the non-signatory mines are operated by a separate division or subsidiary of the signatory employer. The use of separate corporate subsidiaries at different mining operations is very common in the coal industry. Under the Board’s single employer doctrine, the labor relations obligations of an employer do not extend to an affiliated business entity, absent evidence of common ownership, common management, common control of labor relations, and integration of operations.96 The single employer determination, much like the successorship issue discussed above, is a very fact-intensive matter in which the Board considers the totality of the circumstances.97

Article II refers to non-signatory operations of the “Employer”, with no mention of other operations that may be managed by some other business entity with a financial relationship with the employer. Employers organized to do business in this fashion can be expected to rely on the single employer doctrine and assert that Article II does not extend beyond the non-signatory operations of the signatory employer.98 The Union is just as likely to assert that the obligations of the JOBS provisions extend to all operations that are related by common ownership to the signatory employer, and/or its corporate parent. In addition to urging a broader reading of the JOBS provisions,99 the Union can be expected to rely on other provisions in the Wage Agreement that purport to extend contractual coverage to affiliates of the signatory employer.100 It obviously remains to be seen which interpretation of Article II will prevail in the inevitable litigation over this issue.

The JOBS provisions represent substantial job security gains for the union. The “three out of five” requirement will virtually guar-

98. See, e.g., American Bell, Inc. v. Federation of Telephone Workers of Pa., 736 F.2d 879 (3d Cir. 1984).
99. The bargaining history of the 1988 Wage Agreement reflects the Union’s unsuccessful attempt to get management to agree to a broader definition of the term “employer,” virtually guaranteeing that the Union’s attempt to expand the scope of the JOBS commitment will be resisted by coal operators.
100. E.g., NBCWA of 1988, art. IA(h).
antee that a majority of employees hired at a covered non-signatory operation will have UMWA loyalties. As a result, the Union will promptly demand recognition at such locations and seek to extend the Wage Agreement to such operations. 101

The JOBS provisions also may affect the willingness of a non-signatory employer to consider the purchase of mine property, albeit for different reasons. Under the 1984 Wage Agreement, a non-signatory purchaser merely needed to evaluate the likelihood that the purchase would be deemed an Article I transfer and that the purchaser would be obligated to assume the obligations of the Wage Agreement at that operation. In the worst case, where the non-signatory purchaser eventually would be required to assume the Wage Agreement, only the purchased operation would be affected. The situation may be different under the 1988 Wage Agreement. A prospective purchaser now must be aware that, if it is forced to assume the Wage Agreement at a single operation, it will in effect have given the UMWA a toehold at the remainder of its operations. 102 This possibility dramatically increases the risk to a potential non-signatory purchaser that wishes to maintain non-union operations. Under the 1988 Wage Agreement, a single transaction that is held to require compliance with Article I could enmesh that operator’s entire set of operations in the provisions of the Wage Agreement. 103

Article II represents the Union’s latest attempt to bring about contractually-mandated extensions of the 1988 Wage Agreement to new operations developed by signatory employers. The requirement

101. This obligation is not as extensive as the obligation created under the so-called “Island Creek Contract,” the 1987 EESP. The EESP was an interim agreement entered into by the UMWA and several coal companies in which the Union granted certain reductions in pension payment obligations in return for job security provisions. Signatories of the EESP agreed to staff new and non-signatory operations wholly with UMWA members, including, if necessary, miners with no previous employment relationship with the signatory. For each operation, signatories also agreed either to assume the obligations of the EESP or to voluntarily recognize the union subsequent to a check of union authorization cards. 1987 Employment and Economic Security Pact between Island Creek Corp. and the UMWA, Memorandum on Employment Opportunity and Job Security § I(C). By its terms, the EESP expired when the 1988 NBCWA was ratified by the union. Id., Memorandum on the term of the 1987 EESP and Commitment to the Successor National Agreement.
102. NBCWA of 1988, art. I.
103. Article II purportedly applies regardless of whether the purchaser is found to be a successor to the previous operator. This is true both for Burns successorship and contractual successorship.
that three of each five openings at a non-signatory operation must be filled by employees on the signatory employer’s panels virtually guarantees that the Union will seek to extend the NBCWA to all such operations. Despite the disclaimer language in Article II in which the parties disavow any intent to extend the bargaining union,\textsuperscript{104} the staffing requirements of Article II raise unanswered questions under Section 8(a) of the Act.\textsuperscript{105} In practical effect, Article II of the 1988 Wage Agreement will work very much like a so-called “after acquired” clause.

The conditions by which parties can agree to such provisions in collective bargaining were established by the Board’s decision in \textit{Houston Div. of Kroger Stores}.\textsuperscript{106} In that case, the Retail Clerks Local 455 and the Meat Cutters Local 408 sought to represent employees in a grocery store that had been transferred into a division of Kroger covered by such a clause. The Board first held that the “after acquired” provisions meant than an employer may recognize the union after it shows majority support, but that the employer could refuse to recognize the union voluntarily and, instead, require an election.\textsuperscript{107} On appeal, the United States Court of Appeals for the District of Columbia reversed, reasoning that the Board’s initial interpretation would reduce the contractual provision to a nullity.\textsuperscript{108} The court remanded the case to the Board to determine whether the contractual provision was permissible under Section 7 of the Act as a waiver of the employer’s right to demand an election when faced with a union’s showing of majority support.\textsuperscript{109} On remand, the Board concluded that such clauses are valid if they “require recognition

\textsuperscript{104} Article II(A)(7) provides that “[n]othing in this section shall operate to extend the bargaining unit as of the date of this Agreement nor expand the rights of the Union with regard to the non-signatory operations, except for the job opportunities made available under this section.”

\textsuperscript{105} 29 U.S.C. §§ 158(a)(2) & (b)(3) (1982). Section 8(a) lists specific restrictions on employer activity that, if undertaken, constitute unfair labor practices. When an employer recognizes and bargains with a union prior to proof of majority status, it has interfered with the employees’ right to choose their own collective bargaining representative in violation of the Act.


\textsuperscript{107} Kroger Stores, 208 N.L.R.B. at 931.

\textsuperscript{108} Kroger Stores, 510 F.2d at 805-06.

\textsuperscript{109} \textit{Id.} at 806-07.
upon proof of majority status by a union."\(^{110}\) Because the union had presented proof of its majority status, the Board concluded that Kroger committed an unfair labor practice in violation of Section 8(a)(5) in refusing to bargain with the unions with respect to employees at the new locations.\(^{111}\)

*Kroger* and its progeny make it clear that, in the absence of evidence of majority support, an employer is under no obligation to extend a labor contract to a new location. Indeed, under such circumstances, recognition of the union would be an unfair labor practice in violation of sections 8(a)(1), 8(a)(2) and 8(a)(3) of the Act.\(^{112}\) The policy underlying these decisions is the Board's recognition that an automatic extension of a collective bargaining agreement to a new facility may violate the Section 7 rights of that facility's employees to determine for themselves, generally by secret ballot election, if they wish to be represented by the union.\(^{113}\)

Article II's staffing requirements represent a novel attempt to obtain automatic extension of a collective bargaining agreement.\(^{114}\) Article II is, in effect, a type of "two-step" after-acquired clause. It requires, first, that the employer offer preferential hiring rights at its non-signatory locations to laid-off Union members. These preferential hiring rights will often result in the Union asserting that a majority of the workforce desires UMWA representation. The majority showing will, presumably, lead the Union in many cases to demand that the Wage Agreement be automatically extended to the new location.

\(^{110}\) *Kroger Stores* 219 N.L.R.B. at 389.


\(^{112}\) See Bristol Consolidators, Inc., 239 N.L.R.B. 602, 604-05 (1978) (a contract provision providing that any newly opened warehouse would be represented by the union "provides no defense to Respondent Company's recognition of Local 564 without giving the employees a say in the selection of the bargaining representation"). *Accord* Dura Corp., 153 N.L.R.B. 592 (1965) (violation to extend contract to new plant).

\(^{113}\) *See*, *e.g.*, UFCW Local 576, 267 N.L.R.B. 891 (1983).

\(^{114}\) Article II is, in this regard, a response to the Board's decision in *Lone Star Steel Co.* in which the Board found the "after acquired" language of Article IA(h) to be violative of Sections 8(a)(3) and (b)(3) of the Act. The language of the current Article IA(h) has been modified to make it clear that it does not become effective absent a showing of union majority status.
Despite the disclaimer language in Article II(A)(7), it remains to be seen if this provision will survive legal challenge. Depending on the facts of a particular situation, the Union’s efforts to enforce this provision in Article II might constitute an unfair labor practice. Likewise, quite apart from the nature of the Union’s enforcement action, a preferential hiring scheme such as that set forth in Article II may be challenged as analogous to a more sophisticated form of illegal hiring hall. Enforcement of this provision would seem particularly unfair in the case of non-signatory operations managed by affiliates of the signatory employer, in the absence of evidence of an intent to avoid the Wage Agreement. Even if the affiliate and the signatory employer are not found to be single employers, the Union’s attempt to enforce Article II could be found to violate both Section 8(b)(3) and Section 8(b)(4) of the Act.


Major changes also were made in the leasing and licensing provisions of the NBCWA. Although the Article I(A)(h) distinction between “coal lands” and “coal operations” was left unchanged, the
remainder of the leasing and licensing provisions were amended, re-shaped, and added to Article II. The substance of the leasing and licensing provisions is very similar to the requirements of JOBS. According to the new language of Article II(B), a signatory employer must, as a predicate to leasing or licensing any of its coal lands or operations, require the lessee or licensee to agree initially to offer all job positions to members of the signatory employer’s panels. Article II(B) also contains provisions that describe the signatory’s obligations when the lessee or licensee is itself organized by the UMWA or any other union. These provisions allow the lessee or licensee, in some situations, to continue using its current employees. This “escape” provision, however, does not apply when the operation in question was at any time a signatory operation; at such operations, all jobs must be offered to the signatory’s employees.

As with Article II(A), the preferential hiring provisions of Article II(B) may be subject to legal attack.

V. TowARD A MoRE LOGICAL INTERPRETATION OF ARTICLE I OF THE WAGE AGREEMENT

The foregoing discussing suggests serious disagreement among arbitrators and the courts over the proper interpretation of Article I of prior Wage Agreements. Similar battles over the meaning of Article II of the NBCWA of 1988 are inevitable. This uncertainty makes it very difficult for coal industry operators to be able to anticipate with any degree of predictability whether or not a particular transaction will be found to have violated Article I of the Wage Agreement. Similarly, the new job security provisions added to the 1988 Wage Agreement makes it possible for the Union to extend the contract to coal properties that otherwise would not be subject to Article

121. NBCWA of 1988, art. II(B).
122. Article II(B)(2) commands that “all offers of employment . . . shall first be made to the Employer’s classified laid-off Employees.” When the operation in question had previously been a signatory operation of the signatory employer, the Wage Agreement specifically states that the employer’s laid-off employees must be given first chance at the job opportunities, notwithstanding any collective bargaining obligations of the lessee/licensee. This provision may well be an illegal extension of union jurisdiction into an area where it has not been certified as the collective bargaining representative.
I, as well as exacerbate an employer’s concerns in the event it mis-calculates. This lack of predictability is contributing to the continued distressed state of the industry, because operators that might otherwise purchase coal assets and reopen abandoned properties are often reluctant to do so because of the 1988 Wage Agreement’s successorship provisions.

The Union clearly has legitimate interests in insuring that unscrupulous operators do not evade their contractual responsibilities. Decisions such as *Eastover* and *Pickands-Mather* are not an appropriate response to attempts at evading the Wage Agreement. Notwithstanding this interest, it is not sensible to accept the Union’s ultimate argument that every transaction involving any coal property that was ever owned by any employer that was signatory to the Wage Agreement is subject to Article I of the Wage Agreement. Such an argument is at odds with the statutory policy objectives articulated by the Supreme Court in *Burns* and *Fall River* to protect an employer’s interest in being able to transfer capital, and the Section 7 rights of the employees to choose or reject unionization. 123 Overly-expansive interpretations of the NBCWA ultimately are inconsistent with the Supreme Court’s admonishment in *Burns* that “serious inequities” would result if a new employer is burdened by the inefficient terms and conditions of employment that helped to insure the demise of its predecessor. The Union’s position, carried to its logical conclusion, is that the labor contract constitutes an equitable servitude equivalent to a covenant running with the land. 124 Indeed, the Union’s overzealous attempt to apply Article I of the Wage Agreement is ultimately self-defeating, because it inevitably draws the industry further towards development of coal reserves in non-union areas and to the utilization of international sources of coal.

Given this situation, the proper scope of the Wage Agreement should reflect the legitimate interests of both labor and management.

123. *Burns*, 406 U.S. at 287-89. The Court in *Burns* stressed that an employer may not be interested in acquiring a moribund business if he is to be saddled with the terms and conditions of employment contained in the old labor contract. *See also Fall River*, 107 S. Ct. at 2234 ("to a substantial extent the applicability of *Burns* rests in the hands of the successor").

In transactions involving abandoned coal properties, the analysis of the district court in *United States Steel Mining Co.* strikes a fair balance between the interests of the Union in enforcing its contractual entitlements and protecting the job security rights of its members, and the industry's legitimate interest in attempting to operate at a reasonable profit. Arbitration and judicial decisions that attempt to apply the successorship provisions of Article I to cases involving an economically motivated cessation of business are unwise, to the extent that they fail to accommodate the principles articulated in *Burns*. Said differently, a purchaser should not be obligated to assume the Wage Agreement unless it is first established that it is a *Burns* successor. Similar common-sensical interpretations should be given to the other unresolved issues posed by the NBCWA of 1988. The district court's decision in *Pickands-Mather* to reject the Union's equitable servitude argument, for example, illustrates the proper accommodation of the competing interests. Contractual restrictions on the transfer of capital should not be interpreted in a manner that is inconsistent with important policy considerations under the Act.