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Labor Law--Arbitration--Duties of Successor Employer

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LABOR LAW—ARBITRATION—DUTIES OF SUCCESSOR EMPLOYER

More than a dozen years have passed since the United States Supreme Court first grappled with the concept of the duties and obligations of a successor employer as framed by *John Wiley & Sons, Inc. v. Livingston*.[1] The *Wiley* Court was confronted with a binding arbitration clause that was a part of the collective bargaining agreement currently in force with the union of the predecessor company, a small corporation that was being absorbed by merger with the Wiley Company. A suit was brought by the union of the absorbed company under section 301 of the Labor Management Relations Act to compel the Wiley Company management to arbitrate grievances as mandated by the collective bargaining agreement.[2] There was no clause in the agreement that bound successors and assigns, and, in addition, since none of the Wiley Company employees belonged to a union, there was no conflict of representational interests. Furthermore, the decision to merge was purely for business and economic reasons. In spite of these factors, the United States Supreme Court recognized that lack of notice of the impending merger was inherently unfair to the union organization and held that the court may make the determination that the subject matter of a dispute is to be submitted to arbitration, and that thereafter all procedural decisions growing out of the dispute and its disposition could be left to the arbitrator.[3] The *Wiley* decision specifically recognized and effectuated the national labor policy of granting arbitration a central role in settling labor disputes and easing potential industrial strife.[4] Relying heavily on the lan-

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

[2] *Id.* at 544-45.

[3] *Id.* at 557.

[4] *Id.* at 549. This federal policy was initiated in 1957, in a case providing that when the collective bargaining agreement provided for arbitration of a grievance upon the exhaustion of the grievance procedure, either party may force arbitration by a Taft-Hartley § 301 suit. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

Furthermore, if the claim falls within the arbitration provision of the collective bargaining agreement, it will be resolved in favor of arbitration, regardless of the merits of the grievance or the subsequent award. Judicial review was limited to whether the award was reached within the authority granted to the arbitrator by the collective bargaining agreement. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrier & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (the "*Steelworkers* trilogy").

guage of the *Steelworkers* trilogy,[5] the *Wiley* Court expressed its fear that if a mere change in corporate structure or ownership were to have the automatic consequence of removing a previously established duty to arbitrate, the importance of arbitration might be diminished.[6]

The *Wiley* decision was not without limitations. A majority of the Court recognized that the successor's duty to arbitrate might not survive in light of such compelling considerations as a lack of continuity in the succeeding business or union abandonment of its rights by failure to assert its claims.[7] In addition, the *Wiley* Court declared that the preference for arbitration could be overcome only if such compelling considerations existed.[8] *Wiley* predominantly upheld the union's claim that federal law required arbitration go forward and that the courts had jurisdiction to determine whether any or all parts of the collective bargaining agreement were to survive the merger. Thus, since the duty to arbitrate was of contractual origin, the courts were to determine whether the substantive collective bargaining agreement was sufficient to create the duty to arbitrate before a compulsory submission to arbitration could occur.[9]

The *Wiley* decision was examined in *Burns International Security Services, Inc. v. NLRB.*[10] As in *Wiley*, the major issue in *Burns* was whether the successor employer had a duty to bargain with the employees' representative of the union that was adversely affected by the change of corporate structure. The resolution of this issue depended upon whether a true successorship existed in the subsequent employer. The problem, still unresolved, is that the guidelines for determining the existence of a "successor employer" have never been adequately and completely defined by the courts. Another decision, *Howard Johnson Co. v. Hotel Employees Union,*[11] provided a more definitive approach to the successorship problem but, unfortunately, still did not resolve all uncertainties. For reasons to be discussed, the term "successor employer" should be broad enough to encompass mergers, acquisitions,

[5] 376 U.S. at 549.
[6] *Id.*
[7] *Id.* at 551.
[8] *Id.* at 549-50.
[9] *Id.* at 546-47.
[10] 406 U.S. 272 (1972).
[11] 417 U.S. 249 (1974).

reorganizations, divisions, and virtually any other corporate structural change.

Starting with the assumption that changes in corporate structure are almost invariably a function of management prerogative, definitions of "successor employers" may seem of questionable value because, absent anti-union animus, management can generally make structural changes as it sees fit. However, the United States Supreme Court has fostered a strong federal labor policy that jealously guards the rights of the individual workers.[12] This policy has enabled union counsel to arm the collective bargaining agreement to survive corporate change. As *Wiley* demonstrated, the arbitration mechanism may survive by court order even if the substantive contents of the collective bargaining agreement do not. Thus, employers are prevented from escaping unfavorable bargaining concessions by merely reorganizing the corporate structure each time they become dissatisfied with the current agreement.

Wiley also recognized that the collective bargaining agreement is not an ordinary contract since it creates rights akin to property rights in the employees, thus making labor policy predominate over traditional contract rules, even though one of the parties to the litigation did not sign the agreement.[13] For the attorney faced with his first successor dispute, a recognition that the courts do vary from traditional contract interpretations should prompt him to ask: *What* exactly does the arbitration clause of the collective bargaining agreement specifically provide? Once this is ascertained, his second task is to locate any successor and assigns clause, carefully scrutinize its language, and ask: *Who* will be bound by this clause? One author has taken the position that, even in the absence of a successor and assigns clause, the parties are likely to be bound for the reason that the union and the company were free to specifically provide that successors and assigns are not to be bound.[14] In addition, that commentator indicated that unless the collective bargaining agreement specifically provides otherwise, procedural questions arising from the dispute are always for the arbitrator.[15] Consequently, when the agreement is silent as to

[12] *See* Smith v. Evening News Association, 371 U.S. 195 (1962).

[13] 376 U.S. at 550.

[14] Barbash, *Status of the Collective Bargaining Agreement under Wiley v. Livingston: A Management Counsel's View*, 18 N.Y.U. ANN. CONF. ON LAB. 259 (1965).

[15] *Id.* at 262.

a particular procedural question, the gap will likely be filled by an interpretation tending to liberally expand the national labor policy favoring arbitration.

There are, however, instances in which the collective bargaining agreement will not survive. Business changes may be so drastic as to require new employees with different skills or new contract terms. Such circumstances, however, would need to be truly exceptional and would probably involve a substantial lack of business continuity, causing inequitable or unreasonable results.[16]

Since the union contract will usually survive the corporate change-over, prudent corporate counsel should read the collective bargaining agreement closely before any corporate change takes place. The agreement may require, for example, that any acquisition of new business entities is contingent on union acquiescence. The consequences of ignoring such specific contract language could lead to enormous back pay liability if the rights of unionized employees are not protected. One possibility for shrewd management counsel to reduce potential monetary damages would be to gear the corporate change to a point in time that is very close to, or simultaneous with the expiration of the existing collective bargaining agreement, being aware that there would still be proscriptions against making unilateral changes in the terms of employment of the existing employee group.[17] Such an approach would minimize back pay liabilities and limit immediate bargaining subjects to such items as severance pay.

Depending upon the type of corporate change, a number of items may be held to be arbitrable. If management plans a total cessation of a portion of the business and the decision is motivated by valid business reasons, the union may be limited only to terms of cessation and the effects on the displaced employees.[18] However, if the corporate reorganization is due to a merger, sale, or division, any or all of the following may be required bargaining subjects: seniority, contributions to pension, job security, grievances, vacation pay, and severance pay.[19]

With this in mind, it may be advisable for all parties to keep the current contract in force even if some of its terms are, from the

[16] *Id.* at 273.
[17] *Id.* at 275.
[18] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).
[19] 376 U.S. at 552-54.

management viewpoint, less than ideal. For example, businesses that involve distribution functions could encounter challenges for recognition by a highly organized union, such as the Teamsters, if the unaffiliated local is no longer recognized.

Another interesting aspect of the "successor" concept is the valid argument that a successor might really be the most remote business entity to emerge from the reorganization,[20] as would be the case with the emergence of a partially or fully controlled subsidiary. In such an instance, there may be variations in the new successorship agreements and in seniority rearrangements. Since the courts frown upon tests of strength in labor-management conflict situations among substantially similar operations, the parties should be advised to bargain out the subsequent effects.[21]

Additional problems exist for each separate labor-management permutation, thus necessitating a case by case determination of respective rights. Such was the case in *Burns*, where the predecessor and successor were represented by different unions, and *Wiley*, where one employer had no union involvements at all. When the same union represents both predecessor and successor employees, the situation is more easily resolved. One of the major problems in the latter circumstance is with seniority status. If new jobs are created or old ones eliminated, there is a very real possibility that some form of "dovetailing" or "eliminating" will be encountered. Recognizing that any such realignment is likely to create some inequities for some of the employees, it may be possible to bargain with the union for a lump sum settlement to be used to assuage hurt feelings and to balance inequities.[22] Such a solution has the added dimension of putting the onus of soothing ruffled feelings squarely on the union. Also, in the situation where the same union represents all concerned employees, there is authority that would allow the union to decline to honor its predecessor contract and go to arbitration with the successor.[23] One way to alleviate much corporate suffering in this situation would be to specifically define "successor" in the collective bargaining agreement itself, so that both sides agree to the definition before the

[20] Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw. U.L. Rev. 735, 748-55 (1968).

[21] 376 U.S. at 549.

[22] Goldberg, *supra* note 20, at 759-60.

[23] Bath Iron Works Corp. v. Bath Marine Draftmen's Ass'n., 393 F.2d 407 (1st Cir. 1968).

agreement goes into effect to preclude later challenges. Then, only inequitable or unreasonable circumstantial changes would allow a new party to set the agreement aside.[24] The implication of *Wiley* is to bind the successor employer under the rationale that management should have the right to negotiate any contract alterations they seek with the union prior to their acquisition of the new business interest. However, this implication was subsequently denied in *Howard Johnson*, where the court held that the successor's refusal to recognize the collective bargaining agreement was sufficient to excuse the subsequent obligation to bargain.[25]

All of the above problem situations assume prior union knowledge of the impending corporate change. This may be too great an assumption to make, because the union seldom knows about the change until it is upon them. From the management's standpoint, this is to court disaster. If the contract has language consistent with the usual broad arbitration clause, the arbitrator will be deemed to have power to correct inequities,[26] and he can do this in view of drastically changed circumstances, regardless of whether they were foreseen. Again, a contractual definition of seniority, termination rights, and other provisions could either prevent or greatly alleviate subsequent conflict.

If *Wiley* diminished the power of the NLRB, then *Burns* diminishes it even more. In *Burns* the NLRB suffered a limitation on its powers, which had been expanding to the point that they had begun to infringe upon the freedom of contract.[27] *Burns'* concept of successorship turned on nothing more than a bargaining unit determination. Because *Burns* was decided by a 5-4 majority, and because Justice William O. Douglas, voting with the majority, has since retired, the dissenting opinion will take on increased significance.

In *Burns*, the original employer had a collective bargaining agreement with his employees through their chosen certified union,[28] the United Plant Guards. The main employer, Lockheed,

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[24] United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964).

[25] 417 U.S. at 264.

[26] 335 F.2d 891, 895 (1964).

[27] *See* 406 U.S. at 277.

[28] The United Plant Guards (UPG) represented the employees of Wackenhut Corporation, which had previously provided protection for Lockheed Aircraft Service Company. The UPG had been duly certified by the NLRB by the election procedure just four months before Lockheed decided to open the security contract to bid. 406 U.S. at 274.

who employed the security crews on a bid system, decided to reopen the security operation for bid. The Burns detective agency, with full knowledge that Wackenhut (the current security force) had union-represented employees, bid successfully for the security operation.[29]

An important distinction from *Wiley* is that the Burns agency was a completely independent competing corporation from Wackenhut. Once their bid was accepted, Burns proceeded to hire twenty-seven guards that had previously been employed by Wackenhut. In addition, fifteen others were hired from other areas of the Burns operation, and all were hired on the condition that they join the American Federation of Guards (AFG), a union that was a rival to the predecessor's UPG.[30] This practice was later found to be a violation of the NLRA, § 8(a)(2).[31] Noting that the bargaining unit had remained essentially unchanged due to the hiring of most of the former Wackenhut employees, and that a majority of the current employees were therefore already represented by a certified union, the NLRB found that all grievances filed by the UPG were justified.[32] The Board remedy was to require the Burns agency to recognize the UPG as the bargaining representative for all Burns' employees at Lockheed, and for the Burns management to recognize the collective bargaining agreement previously accepted between the UPG and Wackenhut.[33] The forced recognition of the substantive aspects of the agreement was overturned by the court of appeals.[34] The Supreme Court affirmed, noting that the NLRB had exceeded its power.[35] The *Burns* Court found that the Board's reasoning had been predicated upon the findings of the Trial Examiner, who determined that the new bargaining unit contained a majority of the predecessor's employees and that Burns, therefore, incurred a duty to bargain since the employees were working on the same jobs in the same place as they had in the past.[36] The new employer had urged decertification, but this contention was dismissed because the Court found that a mere change in ownership is not such an unusual circumstance that it would change the

[29] *Id.*
[30] *Id.* at 275.
[31] *Id.* at 276.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 277.
[35] *Id.*
[36] *Id.* at 278.

certification status.[37] Mr. Justice White made it clear that if the operational structure of the Burns agency was so different as to make the bargaining unit different, this case could have had a different result. The Court, however, held that the bargaining unit was the same and the majority of the old employees were carried over, thereby binding the successor under a "majority" test.[38]

Nonetheless, a duty to bargain does not mandate a duty to accept the substantive terms of prior collective bargaining agreements, nor to make any concessions not agreed to, as would be the case if the new employer had to take over the substantive terms of the old agreement.[39] This conclusion is clear both from the legislative history and by express statutory mandate.[40] Since freedom to contract is one of the fundamental policies of the NLRA, it is within the Board's duties and powers to safeguard it, not interfere with it. Thus the NLRB ran contra to its own policies and prior holdings by ordering the successor bound by the substantive terms.[41] The NLRB erroneously stretched their interpretation of *Wiley* too far, relying on the language of *Wiley* to the effect that collective bargaining agreements are not ordinary contracts, but merely an outline of the common law of a particular plant or industry. The NLRB failed to recall that *Wiley* was contested as a question only of the extent to which the successor would be bound by the arbitration clause, forcing arbitration only to that extent,[42] but preserving the right to challenge a disputed award in the courts.[43]

A further distinction between *Burns* and *Wiley* is that *Wiley* arose in the context of a section 301 dispute under the NLRA, whereas *Burns* was initiated as an unfair labor practice suit, procedurally limited by the language of section 8(d) of the NLRA.[44] The only thing the Burns agency did was hire a majority of the predecessor's employees, thus incurring a duty to bargain.[45] Possibly, the source of the duty to bargain did not even come from the collective bargaining agreement, but rather from the fact that Burns, as a

[37] *Id.* at 279.
[38] *Id.* at 280-81.
[39] *Id.* at 282.
[40] *Id.* at 282-83.
[41] *Id.* at 285.
[42] *Id.*
[43] *Id.* at 286.
[44] *Id.* at 285.
[45] *Id.* at 286.

successor, took over a largely intact bargaining unit that had been recently certified.[46]

Clearly, a successor should not be bound by the substantive terms of a prior agreement to which it wasn't a party because the successor and the union might need to make special concessions, such as an agreed cutback in demands to help revive a faltering employer.[47] Thus, both successor employer and employees could be held to a bad bargain in light of the reorganization and tied to pre-existing obligations outside the borders of the contract itself.[48] For reasons such as these, even the NLRB subsequently expressed doubt as to the applicability of using their ruling in *Burns* as a hard and fast rule. The *Burns* Court agreed with the Board's hindsight in their reversing opinion, noting that the holding of *Burns* was limited to its facts.[49]

A converse consideration is that the existing collective bargaining agreement could be beneficial for all parties concerned. In such an instance, the NLRB would be permitted to find the ongoing validity of the agreement as a matter of *fact*, but never as a matter of *law*,[50] especially in reorganizations of the corporate structure, where little or no change in the business activity occurs.

The majority opinion in *Wiley* noted some additional restrictions that fall to the successor employer: (1) he is proscribed from making any unilateral changes between the terms of the collective bargaining agreements,[51] and (2) the new employer may set his own hiring terms, unless he intends to hire all of the employees in the prior bargaining unit.[52]

The *Burns* dissent took serious exception to the majority's treatment of the successor concept. In a separate opinion by Mr. Justice Rehnquist, four justices argued that the majority's opinion of the successor's duties was too expansive. There are some compelling points in Mr. Justice Rehnquist's analysis, but none that could prove fatal to the majority's successorship model. The first

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[46] *Id.* at 287.

[47] *Id.* at 290.

[48] *Id.*

[49] *Id.* at 274.

[50] *Id.* at 291.

[51] In *Burns*, there was no previous relationship, and although this was of no importance to the facts, yet inclusion in the opinion illustrates the importance the Court attached to it. *Id.* at 294.

[52] *Id.* at 295.

argument was the lack of adequate proof to assure that a majority of the employees carried over to subsequent employment voted for the certified representative, or that the resultant employee group contained a majority that had so voted.[53] This criticism could easily have been avoided by careful trial presentation. The second argument attacks the bargaining unit determination in light of the past history of the successor employer.[54] In *Burns*, the Burns agency had a history of keeping many of its guards in a more or less transient status, thus creating a problem for bargaining units centered on a single geographic location.[55] In effect, the challenge to the successorship was really a challenge to the bargaining unit itself. Since Burns and its predecessor, Wackenhut, were in direct competition and were not joined by merger or consolidation, the successor principle should have been narrowed to accommodate the demands of the successor's business. Under such an analysis, a successor employer can be burdened with bargaining difficulties that a non-successor in the identical business situation would not. Initially this consideration seems persuasive. However, the fact is that a non-successor would not be interfering in any respect with a previous build-up of job rights and employee security, whereas a successor necessarily does.

With the preservation of the collective bargaining system as its focal point, the Rehnquist opinion then outlined the factors that could be persuasive in finding successorship. These included a preference for continuity in labor relations,[56] avoidance of industrial strife,[57] essential sameness of the subsequent employer industry,[58] and the need to balance protection of employee rights against management prerogatives.[59] Thus, the limits of the bargaining relationship can be those implied in *Wiley*, rejecting a finding of successorship in instances that lack substantial business continuity.[60] There are instances, however, in which any application will probably result in inequities, regardless of planning and execution. The dissent justified these inequities by noting that

[53] *Id.* at 297.
[54] *Id.* at 298.
[55] *Id.*
[56] *Id.* at 300.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 301.
[60] *Id.* at 301-02.

there were some areas of employer conduct in which the NLRA has provided no remedy.[61]

The realities of the market place provide other difficulties as well. As the market fluctuates, continued employment will mandate the hiring away of employees from faltering industries. Forced retention of the bargaining unit in cases of mass hiring could burden the successor employer with the very concessions which caused the prior employer to falter. Mr. Justice Rehnquist argued, therefore, that the successor should be free to challenge the bargaining unit.[62] Much of the conflict would be erased if, in all situations of manifest similarity of business continuation by the successor, the duty to bargain could be created at the insistence of either party by a showing of an existing arbitration clause written to provide relief. If both sides are willing, the previous contract can, of course, be adopted with little effort. If any bargaining is to take place, notice should be afforded to give all interested parties ample time to prepare.

Into this setting came the *Howard Johnson* decision,[63] which involved a dispute arising from an operational takeover of a motel-restaurant by the Howard Johnson Company. Prior to the takeover, the Grissom family had operated the premises through the family owned corporation under a franchise arrangement with the Howard Johnson Company. The Grissoms negotiated with the union and agreed to the collective bargaining agreement, which contained both a successor and assigns clause and a dispute settlement provision with procedures leading ultimately to arbitration. Prior to the takeover, the Howard Johnson management expressly notified the union that they would not assume any labor agreements of the predecessor. The employees were given termination notice just fourteen days prior to the change. The union was given twelve days notice that Howard Johnson would not recognize the union agreement for any purpose. Upon the transfer, Howard Johnson conducted an open hiring period and retained only nine of the fifty-three employees previously engaged by the Grissoms, none of whom had been supervisors.[64] The union brought suit in state court, claiming a "lockout" in violation of their collective

[61] *Id.* at 304, citing Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965), and NLRB v. Am. Nat'l. Ins. Co., 343 U.S. 395 (1952), as the leading cases.

[62] 406 U.S. at 308-10.

[63] 417 U.S. 249 (1974).

[64] *Id.* at 252.

bargaining rights. Though an ex parte temporary restraining order was granted, Howard Johnson ignored it, claiming lack of notice and service, and the order was thereafter dissolved. Howard Johnson then moved to remove the suit to federal court on the ground that the suit involved issues under section 301 of the LMRA. The district court ordered Howard Johnson to arbitrate the extent of its obligations to the employees union, but refused to issue an injunction banning Howard Johnson from hiring other than the Grissom employees.[65] The court of appeals affirmed.[66]

The United States Supreme Court reversed the court of appeals, holding that where there was no substantial continuity of identity in the work force hired by the successor, and where the successor had made no express or implied assumption of the agreement to arbitrate, there was no obligation to arbitrate under the predecessor's collective bargaining agreement.[67] The *Howard Johnson* decision resurrected the "majority" test of employee transfer to a determinative level. Whereas the lower courts had found the rationale of *Wiley* to be persuasive and had emphasized the merit of the substantial business continuity test,[68] the *Howard Johnson* Court specifically noted that *Wiley* was a narrow holding closely linked to determination on the merger aspects of the corporate change.[69] Unfortunately, this argument overlooked such persuasive criteria as the facts that the successor in *Howard Johnson* took over all assets of the predecessor, retained the location and identity of the business, preserved many identical products and services, and underwent only a one minute gap in the continuing flow of operations.[70] The Court also rejected the significance of the existence of a successor and assigns clause of which Howard Johnson had knowledge before they consummated the purchase.

Howard Johnson is the most drastic departure from the *Wiley* rationale, in that the successor's knowledge of a specific successor clause was rejected as not controlling.[71] Lest one conclude that the *Howard Johnson* decision has opened the door for management escapism, it must be noted that the opinion predicated its result

[65] 81 L.R.R.M. 2329 (E.D. Mich. 1972) (mem.).
[66] 482 F.2d 489 (6th Cir. 1973).
[67] 417 U.S. at 249.
[68] *Id.* at 253.
[69] *Id.*
[70] 482 F.2d 489, 490.
[71] 417 U.S. at 251.

on the fact that the predecessor corporation had not disappeared as it did in *Wiley*.[72] The union still had the Grissoms to proceed against in a suit to determine the extent of liability incurred by the breach of the successorship clause and the remedy available to satisfy the claim.[73] Furthermore, the *Howard Johnson* Court intimated that the union had overlooked an additional preventive remedy—an injunction against the proposed sale to Howard Johnson based on a breach of the successorship clause in the existing collective bargaining agreement.[74] The Court seemed to overlook the fact that the union received only twelve days notice of the impending sale, hardly enough time to mount a major judicial offensive.

By specific language, the *Howard Johnson* Court also failed to adopt *Burns* as controlling, or to decide if there were irreconcilable conflicts between *Wiley* and *Burns*.[75] Instead, the opinion held that each case of this nature must turn on its own facts,[76] noting the lack of congressional guidance[77] and the cautious development of federal labor common law under section 301 of the LMRA.[78] Although this holding should eventually result in good law, it contains the consequent disadvantage of lack of present predictability.

Noting the importance attached to the development of federal common law from the policies of our national labor laws, the *Howard Johnson* Court went on to dismiss as unpersuasive the distinction noted in *Burns* between unfair labor practice suits and section 301 suits.[79] Thus, the *Howard Johnson* decision enhances predictability in that the interpretation of the successor employer's rights can no longer turn on the forum in which the union chooses to press its claim. Unfortunately, the decision ignores the argument made in *Burns* that an unfair labor practice proceeding is limited by statute under section 8(d) of the NLRA, as to procedure for termination.[80] Under section 8(d), a union is to receive sixty days notice of termination of the collective bargaining agreement,[81]

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[72] *Id.* at 257.
[73] *Id.*
[74] *Id.* at 258 n.3.
[75] *Id.* at 256.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] 406 U.S. at 285.
[81] National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1970).

yet by virtue of the *Howard Johnson* decision, the employer (Grissom) effectively terminated the agreement with only twelve days notice to the union.[82] Thus by a sale of assets, Grissom was allowed to do indirectly what it could not do directly.

The *Howard Johnson* Court relegated to a footnote the argument that to allow Howard Johnson to escape arbitration would be to encourage employers who were dissatisfied with their current collective bargaining agreement to realign their business.[83] Such treatment is a significant departure from the emphasis on protection of job rights proposed by *Wiley*. The Court found that Howard Johnson was not merely an "alter ego" of the Grissom's corporation, and that this was not merely a paper transaction designed to escape the collective bargaining agreement.[84] The facts of *Howard Johnson* could reasonably support such a construction; however, a definitive set of standards designed to prevent a reorganization aimed solely at escaping collective bargaining liability could prevent future abuse of employee rights.

The lack of standards becomes glaringly apparent in the situation where a business wishes to predict the effect on labor-management relations of an internal reorganization, division, or sale to a subsidiary. The alter ego test will obviously be a determinative factor, yet in the absence of judicial precedent and cast against the background of a case by case approach, the determining factors could likely be resolved on the imagination and persuasion of counsel, rather than on the merits.

Clearly, the Supreme Court has avoided an opportunity to make the successor concept more definitive. The only apparent standard to emerge from *Howard Johnson* is the mandatory inclusion of "continuity of the work force" within the "continuity of identity in the business enterprise" test,[85] elevating the majority test to pre-eminent status, reconciling *Wiley* to the extent that *Wiley* relied on the "wholesale transfer"[86] of employees into the successor work force, and *Burns*, to the extent that it failed to do so.[87] The only other common thread is the recognition that the

[82] 417 U.S. at 252.
[83] *Id.* at 259 n.5.
[84] *Id.*
[85] *Id.* at 263.
[86] 376 U.S. at 551.
[87] 406 U.S. at 287.

Howard Johnson decision was based on its own facts.[88] Thus, *Howard Johnson* moved away from the federal labor policy of encouraging arbitration, as delineated by the *Steelworkers* trilogy, and the chance to create an equally definitive "Successors Trilogy" must now await future decisions.[89]

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[88] 406 U.S. at 274; 417 U.S. at 256, recognizing *Wiley* as meeting the case by case determination standard.

[89] Perhaps the Successor Doctrine should not be used at all. The pressing need to balance management prerogative against employee job security rights could be handled under the policy favoring arbitration in all instances of industrial disagreement. This would allow prospective employer groups to take over moribund businesses that will only become functional if the "successor" can institute change. As long as there are employee groups who can gain certification, there will continue to be a duty to bargain. By freeing the consequent employer from the substantive conditions of his predecessor's agreement, the substantive proscriptions that beleaguered the former employer would not forestall business development by the successor. This would not be the case if the arbitrator would merely use the preceding agreement to force the successor to the bargaining table, where he stands or falls on his own ability. The duty to arbitrate both scope and extent of obligation would then become a function of the precise wording of the arbitration clause, something any successor would have access to prior to acquiring the successor interests. This would solve a major flaw in *Burns*—the "all or nothing" approach geared solely to the finding of successorship. The successor aspect would then be of secondary importance, utilizing flexibility to effectuate the labor policy favoring arbitration.