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Labor Law--Successorship--the NLRB Has a Change of Heart

Craig R. McKay
West Virginia University College of Law

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LABOR LAW—
SUCCESSIONSHIP—THE NLRB HAS A CHANGE OF HEART

THE WILEY DOCTRINE

In John Wiley & Sons v. Livingston, the United States Supreme Court handed down a landmark decision. Wiley held a successor employer had a duty to arbitrate under the arbitration provisions of a predecessor employer’s labor contract, although the successor had neither been a party to nor assumed the collective bargaining agreement. The Court apparently based its opinion on broad national labor policy considerations. More particularly, the Court stressed the influential role of arbitration on national labor policy, acknowledging that arbitration has functioned as a “substitute for industrial strife,” and was “part and parcel of the collective bargaining process itself.” Moreover, the Court emphasized that:

It would derogate from “the federal policy of settling labor disputes by arbitration” . . . if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established; this is so much as in cases like the present, where the contracting employer disappears into another by merger, as in those in which one owner replaces another but the business entity remains the same.

Finally, it stressed that:

The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees’ claims continue to be resolved by arbitration rather than by “the relative strength . . . of the contending forces” . . .

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1 376 U.S. 543 (1964).
2 Id. at 549 quoting from United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).
3 Id. at 549 (emphasis added) quoting from United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).
4 Id. at 549 (emphasis added) quoting from United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).
The introduction of the *Wiley* doctrine produced controversy among labor law scholars. Accordingly, the flow of scholarly opinion on the multi-faceted topic of "successorship" has been prolific. Recently the National Labor Relations Board (NLRB) has reconsidered the *Wiley* case and modified the law significantly. Before elaborating on these recent decisions, perhaps it may be informative to look in retrospect at certain post-*Wiley* cases and from these attempts to trace the lines of thought that may have played a role in prompting the Board to redirect the law of successorship.

The Court in *Wiley* seemed deliberate in confining its ruling to the narrow inquiry of whether a *duty to arbitrate* which had been established previously under a predecessor's collective bargaining agreement would survive a change in ownership. Thus, the decision assured that subsequent to such a change, employees would be afforded relief from abrupt shifts in the industrial environment. However, some commentators voiced a fear that arbitration in itself might not adequately safeguard employee rights.

**The Wackenhut Interpretation**

Shortly after the *Wiley* decision, the question of successorship was presented squarely to the Ninth Circuit Court of Appeals. In *Wackenhut Corp. v. United Plant Guard Workers*, the facts indi-

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6 332 F.2d 954 (9th Cir. 1964).
cated Wackenhut had entered into an agreement to purchase substantially all of the assets of General Plant Production Company (a limited partnership engaged in providing guard service for California Oil and chemical plants). Under the contract of purchase and sale, Wackenhut expressly assumed the bulk of General Plant's monetary liabilities. However, Wackenhut was careful to avoid express assumption of any existing labor agreements—one such agreement being with the United Plant Guard Workers of America. Upon consummation of the sale, General Plant served notice on the respective unions that all employees would be dismissed, but assured them that all accrued wages and benefits would be paid. Later, Wackenhut posted a notice inviting these employees to re-apply for their former positions. The union unsuccessfully demanded that Wackenhut recognize the existing collective bargaining agreement.

At the time General Plant discontinued guard service, Wackenhut began to render the identical service using the same office facilities and equipment, employing most of the personnel who had previously worked for General Plant. Under instructions from the union, these employees failed to follow the re-employment procedures outlined by Wackenhut. The union then brought suit against Wackenhut under Section 301 of the Labor Management Relations Act. At the trial, the union urged the following three theories: (1) Wackenhut had expressly agreed to be bound by General Plant's labor agreement; (2) Wackenhut was estopped from denying the effect of the labor agreement; and (3) "Wackenhut as the successor employer is, . . . apart from the subsequent agreement or principles of estoppel, bound by the labor agreement of its predecessor . . ." In ruling for the union, the trial court accepted the first theory but refrained from commenting on the remaining two. On appeal the circuit court said the lower court erred only in theory selection; the third theory was the most appropriate. The court decided "the policy of the national labor laws obligated Wackenhut, the successor employer, to honor the collective bargaining agreement contracted by its predecessor . . ." Then, perhaps anticipating confusion as to the grounds for the relief granted, the court further elaborated:

8 Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954, 955 (9th Cir. 1964) (emphasis added).
9 Id. at 958 (emphasis added).
The specific rule which we derive from Wiley is that where there is substantial similarity of operation and continuity of identity of the business enterprise before and after a change in ownership, a collective bargaining agreement containing an arbitration provision, entered into by the predecessor employer is binding upon the successor employer.

* * *

It follows that under the rule of Wiley, Wackenhut is bound by the collective bargaining agreement . . . and is bound thereunder to arbitrate the union grievances. . . .

The salient feature of Wackenhut was the court's reading Wiley to require the successor employer to honor in toto the collective bargaining agreement and not merely its arbitration provision. This plainly was an expansion of the successorship doctrine in that the Supreme Court apparently had not chosen to resolve that issue.

RELIANCE—A SHORT STEP BACK

It was not long before the Third Circuit Court of Appeals was presented with a similar successorship problem in the case of United Steelworkers v. Reliance Universal, Inc. The Martin Marietta Corporation was ordered by the Federal Trade Commission to divest itself of a concrete pipe plant. The Commission's order directed the divestiture allow the plant to function as a "going concern." Pursuant to this mandate, the plant was sold to Reliance Universal. However, the contract of sale contained a provision stating that the "Buyer shall not assume any obligation of the . . . [seller] under any collective bargaining agreement. . . ." The United Steelworkers of America had been denominated the exclusive bargaining representative of the workers prior to the sale and had negotiated a collective bargaining agreement, which was fully operative at the time of the change in ownership. Reliance continued to operate the plant as a "going concern" without significant change in the operating, supervisory, or managerial personnel. Under these circumstances, the union demanded that Reliance adhere to the existing labor contract. Reliance refused and the union brought suit to subject the employer
to this contract. In addition, an order directing arbitration was sought. The district court dismissed the complaint and the union appealed. In granting the dismissal in the company’s behalf, the district court emphasized that:

   to impose the old owner’s labor contract upon the new owner would be “such a complete innovation that it cannot be regarded as a feature of federal common law under 29 U.S.C. 185 [section 301 of the Labor-Management Relations Act], but must await adoption through the legislative sanction of Congress”.  

Notably, Wiley had not been decided at the time the district court rendered its opinion. On appeal, however, the circuit court’s examination of the case in light of Wiley altered its result. Judge Hastie, in reversing the lower court, was quick to point out that he was unwilling to follow the view espoused in Wackenhut. He determined that the Supreme Court had not held the entire collective bargaining agreement unqualifiedly binding upon a successor employer. Moreover, he noted “the Supreme Court seem[ed] to have been careful to avoid so broad a ruling.” Nevertheless, the Reliance court apparently sought middle ground between the two cases, concluding:

   [The] collective bargaining agreement, as an embodiment of the law of the shop, remained the basic charter of labor relations at the Bridgeville plant after the change in ownership. But, in the arbitration of any grievance asserted thereunder, the arbitrator may properly give weight to any change of circumstances created by the transfer of ownership which may make adherence to any term or terms of that agreement inequitable.

   Apparently, the Reliance court was not ready to affirm the liberal interpretation of the Wiley rationale adopted by the ninth circuit. Instead, Reliance adhered to a more literal or restrictive construction of the successorship principle.

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13 Id. (emphasis added).
14 Less than two weeks later the Supreme Court announced the Wiley decision.
16 Id. (emphasis added).
17 The court stressed that Wiley had implicitly recognized that:
   New circumstances created by the acquisition of a business by a
A similar question was presented in 
McGuire v. Humble Oil & Refining Co. The pertinent aspect of the case was the complaint drawn against Humble Oil, the alleged successor. It requested not only an order directing the defendant honor the arbitration provisions of various collective bargaining agreements but further demanded that Humble "be restrained from pursuing any activities contrary to the provisions of the respective agreements; in effect, a request for specific performance of the collective bargaining agreement provisions." The court experienced little difficulty in finding that Humble should be compelled to arbitrate. On the question of total contract survival the court aligned substantially with Reliance in denying the "other relief" sought by the unions. Again, the court demonstrated unwillingness to expand the Wiley principle beyond the Reliance interpretation. Indeed, it said that it was clearly within the arbitrator's power to determine which rights survived the change in ownership. The court intimated the arbitrator and not the court was best suited to fashion a remedy.

THE BOARD—AN EVASIVE POLICY

Shortly after Wiley, the NLRB General Counsel served notice that "in the interest of consistent interpretation and development of collective bargaining concepts under federal labor law:" he

new owner may make it unreasonable or inequitable to require labor or management to adhere to particular terms of a collective bargain-
ing agreement previously negotiated by a different party in different circumstances. Although the pre-existing labor contract indicates the structure of labor relations and the established practice of the shop at the beginning of the new proprietorship, an arbitrator of a subsequent complaint charging unwarranted departure from that scheme may properly consider any relevant new circumstances arising out of the change of ownership, as well as the provisions of and practices under the old contract, in achieving a just and equitable settlement of the grievance at hand. The requirements of the contract remain basic guides to the law of the shop, but the arbitrator may find the equities inherent in changed circumstances require an award in a particular controversy at variance with some term or terms of that contract. We do not imply that any departure from what was established under the old contract is justified by any special cir-
cumstance of this case. We do not know. And, in any event, this is a matter for the arbitrator's determination.

335 F.2d 891, 895 (3d Cir. 1964) (emphasis added).

18 247 F. Supp. 113 (S.D. N.Y. 1965), rev'd 355 F.2d 352 (2d Cir. 1966), cert. denied, 384 U.S. 988 (1966). The case was somewhat novel in that it involved two competing unions, a fact which subsequently led to its reversal; but on different grounds than those discussed in this note.


20 NLRB General Counsel's Quarterly Report on Case-Handling Develop-
would authorize the issuance of section 8(a)(5) complaints in certain successorship cases. He emphasized those complaints would not only allege a duty of the successor employer to assume the predecessor’s bargaining obligations, but also a duty “to honor those terms of any existing contract between the predecessor and the union which were not ‘unreasonable or inequitable’ under the circumstances.” Notwithstanding this positive assertion, for quite some time the Board seemed reluctant to face the issue of total contract survival squarely. During this time, it appeared that the Board uniformly approached the issue with an attitude which could be characterized as “obviously evasive”.

In pre-Wiley decisions the Board ordinarily adhered to the general rule that the obligations of the predecessor employer’s collective bargaining agreement would not descend to the successor so long as he had in no way contractually assumed the agreement. Subsequent to Wiley, the Board was confronted with a steady stream of successorship cases analogous to those which had perplexed the federal circuits. For example, in Valleydale Packers, Inc., a Virginia corporation acquired the office plant and place of business of a Miami company. At the time of the acquisition there was an operative collective bargaining agreement. Nevertheless, the new plant superintendent announced to the union that all employees would lose their seniority and be regarded as new employees without paid vacations or wage increases until the firm realized an increase in profits. The union wrote the employer directing his attention to the outstanding collective bargaining agreement. The employer responded by refusing to comply with the provisions of the labor contract and even declined to recognize the union as bargaining agent. The Trial Examiner concluded the employer had committed an 8(a)(5) unfair labor practice in unilaterally changing the terms and conditions of employment and by unlawfully refusing to bargain. Although the union’s complaint included an allegation

(a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.
23 Rohlik, Inc., 145 NLRB No. 120, 1964 CCH NLRB Dec. ¶ 12,873.
24 162 NLRB No. 139, 1967 CCH NLRB Dec. ¶ 21,091.
that the employer's refusal to give effect to the predecessor's labor contract was in itself an 8(a)(5) violation, the Trial Examiner refused to pass on this issue, deferring its resolution to the Board. In adopting the findings of the Trial Examiner, the Board skirted the question of contract survival by asserting "no useful purpose would be served in determining the (successor's) liabilities, if any, under its predecessor's collective-bargaining agreement. . . ."\textsuperscript{25}

The Board took a similar route in \textit{Glenn Goulding}:\textsuperscript{26} There, the predecessor employer signed an agreement with the Retail Clerks Union requiring the employer's adoption of the collective bargaining agreement negotiated between the union and the Food Employers' Council. Following the execution of this agreement Joseph Glenn Goulding succeeded the employer as the franchisee of Fed-Mart Corporation. He occupied the same premises, continued to maintain the store's various departments without substantial change, and generally employed all the people who had worked for the predecessor.

Despite repeated requests, Goulding refused to recognize and bargain with the incumbent union. Consequently, 8(a)(5) and 8(a)(1)\textsuperscript{27} charges were filed. The Trial Examiner sustained the position of the union, ruling that Goulding was obligated to bargain since the union represented a majority of the employees. The Examiner further concluded that since Goulding was a successor, "his statutory duty to recognize and bargain with [the union] encompass[d] a duty to honor his predecessor's collective-bargaining contract."\textsuperscript{28} However, the Board on review again adhered to the evasive

\begin{footnotesize}
\begin{itemize}
\item 25 Valleydale Packers, Inc., 162 NLRB No. 139, at 1486 n.l., 1967 CCH NLRB Dec. \textsuperscript{\textcopyright} 21,091, n.l. The Board supported its elusive position by alluding to the fact that the present collective bargaining agreement was due to expire in less than one month and pointing to its existing affirmative order for the successor to commence bargaining with the union.
\item 26 165 NLRB No. 22, 1967 CCH NLRB Dec. \textsuperscript{\textcopyright} 21,454.
\item 27 29 U.S.C. \textsection 158 (1964):
\begin{enumerate}
\item It shall be an unfair labor practice for an employer—
\end{enumerate}
\item 28 Glenn Goulding, 165 NLRB No. 22, at 215, 1967 CCH NLRB Dec. \textsuperscript{\textcopyright} 21,454, at 214, n.l. In so stating, the Trial examiner adopted the view taken by General Counsel that John Wiley and Sons \textit{v. Livingston} compelled the Board to revise its current standards regarding the scope of a successor firm's bargaining duty. The Trial Examiner concurred and submitted that:
\end{itemize}
\end{footnotesize}
policy established in *Valleydale Packers*. In short, the Board ruled it was "unwilling on the instant record to hold that the successor employer's statutory bargaining obligation extend[ed] beyond the fundamental duty to recognize and bargain in good faith with the labor organization that had been designated by the predecessor's employees."29

Still again, in *Thomas Cadillac, Inc.*,30 the Trial Examiner found the successor's refusal to give effect to its predecessor's union contract was in violation of section 8(a)(5). This ruling was "wholly in harmony with the Supreme Court's teaching in the *Wiley* case."31 Nevertheless, the Board was able to avoid discussion on that point because it discovered the examiner had been incorrect in his determination that the employer was a successor under the circumstances presented.32

It seems apparent from these NLRB rulings and the federal circuit court decisions that the issue of total contract survival had

stakes of their succession reflect "substantial continuity of identity and operation" with respect to the business enterprises concerned, before and after such a change.

165 NLRB No. 22, at 216 (emphasis added). Furthermore, General Counsel cogently suggested in his brief:

If the stability of labor relations requires a continuity of bargaining rights, then the same policy considerations dictate a continuity of contract rights. There is no logical reason why a successor employer should be bound by one and not the other. If employees lost the rights secured for them in labor contracts every time a business changes hands, the prior negotiations would prove to be of minimal value. New negotiations would mean a gap in the terms and conditions of employment. Employees would be subjected to an uncertain fate which, of course, does not mean stability of labor relations.

165 NLRB No. 22, at 217 (emphasis added).

The two cases, examined in conjunction with Counsel's thesis, pursuaded the Examiner that the successor was bound by the predecessor's collective bargaining agreement.

29 Glenn Goulding, 165 NLRB No. 22, at 202, 1967 CCH NLRB Dec. ¶ 21,4541, at 27,968. The Board rationalized its hesitation to follow the lead of the Trial Examiner by stressing that the record was replete with uncertainties. Also, the Board voiced suspicion as to whether the previous employer had executed the contracts in question through arm's length bargaining.

30 170 NLRB No. 92, 1968-1 CCH NLRB Dec. ¶ 22,306.

31 Comment, Labor Obligations of Successor Employer, 36 Geo. Wash. L. Rev. 215, 222 (1967), (Footnote omitted). See also K. B. & J. Young's Super Markets, Inc., 157 NLRB No. 17, 1966 CCH NLRB Dec. ¶ 20,220, enforced, 377 F.2d 463 (9th Cir. 1967). The Trial Examiner had found that a successor's refusal to honor the predecessor's labor contract was an unfair labor practice. However, his recommended order had not included a positive directive that the successor administer the provisions of the contract. General Counsel excepted to his failure to do so. Once again the Board adroitly noted it was unnecessary to pass on the issue since the union had already given notice of its desire to reopen contract negotiations and had not lodged objection to the Examiner's omission.
aroused disagreement in the federal courts and was handled gingerly by the NLRB. There was scarcely more agreement among the commentators. One writer optimistically stated that the Wackenhut rule of total contract survival was appropriate if the Board’s successorship criteria were met and the bargaining unit remained the same after the change in ownership.\textsuperscript{33} Another took a contrary position and alleged the Trial Examiner’s findings in the Glenn Goulding and Thomas Cadillac cases had been improper extensions of Wiley. Each case, he submitted, had expressly adopted the Wackenhut view, an unwarranted interpretation of Wiley.\textsuperscript{34} A third writer contended the desire for short-term industrial stability alone would support automatic contract survival.\textsuperscript{35} Yet, he conceded that in Wiley the Court’s concern was limited to the duty to arbitrate. He then stated that so long as the “Court regards arbitration as an informal, inexpensive, expeditious forum and the arbitrator as the adjudicator more likely to comprehend the parties’ relative interests, long-term industrial stability can best be achieved by initial judicial abstention on the merits of survival.”\textsuperscript{36}

**Hackney Iron and Steel—A Prelude to a Change in Policy**

Amid the steadily increasing speculation and discussion of contract survival, the NLRB again confronted this bothersome question in *Hackney Iron & Steel Co.*\textsuperscript{37} The Trial Examiner decided the facts warranted a conclusion that Hackney Iron and Steel, as a successor employer, was guilty of various unfair labor practices. However,

\textsuperscript{33} Note, *The Duties of Successor Employers under John Wiley & Sons v. Livingston and its Progeny*, 43 N.Y.U. L. Rev. 498 (1968). This theory of total contract survival, he reasoned, was in accord with the Wiley policy of employee protection.

\textsuperscript{34} Comment, *Labor Obligations of Successor Employers*, 36 Geo. Wash. L. Rev. 215 (1967). He retreated somewhat, however, by conceding that although the Trial Examiner had improperly analyzed the legal precedents, national labor law policy would have lent support to the conclusions reached.


\textsuperscript{36} Id. at 430.

\textsuperscript{37} 167 NLRB No. 84, 1968-1 CCH NLRB Dec. ¶ 21,791. The predecessor employer, Tru-Weld, had negotiated a collective bargaining agreement in 1965. In 1966, Trinity Industries, which owned Hackney Iron and Steel, purchased the assets and equipment of Tru-Weld at its Navasota plant in Texas and promptly leased the premises. Hackney Iron and Steel hired all the former production employees, who continued in substantially the same type of work and job classifications they had held under Tru-Weld. When former Tru-Weld employees applied for work, the new employer asserted that he would not recognize the union contract but would talk to the employees on an individual basis. It was also made known that the employees would be hired without continuance of their seniority rights and at new rates of pay.

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the Examiner seemingly borrowed some of the phraseology used in *Reliance* and boldly stated that as

to the labor contract signed by the predecessor and the union it: "remained as the basic charter of labor relations at the plant after the change of ownership, which as a matter of national labor policy must survive any general or specific exclusion of its terms and obligations from the transfer of assets, so that (the successor) is bound to recognize and carry on all its terms, so long as the Union remains the statutory bargaining agent of the employees."\(^{38}\)

The Board, however, once more subjected the Trial Examiner's theory to the same evasive technique previously employed. In short, the Board conveniently found it unnecessary to confront the issue since that determination was found not to be within the scope of the complaint. But on petition for review, the Court of Appeals for the District of Columbia\(^ {39}\) doubted the soundness of the Board's persistent practice of evading the contract survival question. The court expressed some disagreement with the Board, saying:

"[w]e. . . do not understand quite why the Board believed that it was relieved of the burden of considering the matter. . . . We do not say that there is no rationale by which the Board’s order of relief in this successor employer situation may not in appropriate circumstances differentiate between ordering recognition of a certified union and bargaining with it for a new contract, on the one hand, and recognition which includes observance of an existing contract, on the other. But, especially in the light of [Wiley], this matter needs more illumination than the Board has provided in order for us meaningfully to review the disposition it has made of the matter here.\(^ {40}\)

Therefore, the case was remanded for further consideration—there appeared to be no alternative for the Board but to confront the problem. Accordingly, the remand was combined with three other cases pending on Trial Examiner's reports; the four cases raised an issue of substantial importance in the administration of

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\(^{38}\) Hackney Iron & Steel Co., 167 NLRB No. 84, at 28,547, 1968-1 CCH NLRB Dec. ¶ 21,791.

\(^{39}\) Chemical Workers Union v. NLRB, 395 F.2d 639 (D.C. Cir. 1968).

\(^{40}\) *Id.* at 641 (emphasis added).
the National Labor Relations Act. An offer was extended to interested parties to file briefs amici curiae and to participate in the oral argument.\(^{41}\) Of the four cases, the Board focused on Burns Int'l Detective Agency.\(^{42}\) There the facts indicated that Wackenhut, the predecessor employer, had been engaged in performing plant protection services for Lockheed Aircraft Service Company. The United Plant Guard Workers of America had been certified as the bargaining representative for the full-time and regular part-time plant protection personnel. Apparently Wackenhut had an agreement with Lockheed which called for the termination of the former's services on a particular date. Pursuant to that agreement Lockheed let the service contracts out for bids. At a prebid conference attended by Burns, Lockheed served notice that the Wackenhut guards were represented by the union. When Burns was advised it had been awarded the contract it immediately began interviewing several of the Wackenhut guards for employment. Burns assisted the American Federation of Guards in soliciting certain employees. Thereafter, Burns extended recognition to the American Federation of Guards and disregarded the assertion of the incumbent union that it was the proper bargaining representative. Included in the union's claim was a demand that Burns honor the bargaining agreement with Wackenhut. Burns resisted and the union filed unfair labor practice charges. The Board, on review of the case, evidenced a profound change of heart. Not only was Burns in violation of sections 8(a)(2)\(^{43}\) and 8(a)(1) of the Act by assisting and recognizing the American Federation of Guards but also it had committed section 8(a)(5) and 8(a)(1) violations in refusing to abide by the contract between Wackenhut and the union.

This was indeed a bold step, and the Board meticulously outlined the policy considerations justifying its departure from past practice. At the outset, the Board made it clear that:

\(^{41}\) The following parties filed briefs amici curiae: The Chamber of Commerce of the United States; American Federation of Labor and Congress of Industrial Organizations; International Union, United Automobile, Aerospace and Agricultural Implement Workers; The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; and the National Federation of Independent Unions.

\(^{42}\) 182 NLRB No. 50, 1970 CCH NLRB Dec. ¶ 21,863.


(a) It shall be an unfair labor practice for an employer—

... ... ...

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it ....
The concept of *substantial continuity in the employing industry* enunciated as a necessary condition for the survival of the duty to arbitrate when the ownership of a business changes hands is at the *heart of [a] determination that a purchasing employer is a successor employer* within the meaning of the act. 44

Then its opinion indicated that a demonstration that the "employing" industry had remained essentially the same despite a change in ownership was a prerequisite to a finding of successorship.

The Board re-emphasized that it had always been understood in labor quarters that industrial peace could best be achieved if the "employing" industry was subject to the remedial provisions of the National Labor Relations Act. Furthermore, it felt that certain broad policy considerations weighed heavily in favor of "the maintenance and adherence to *existing* collective-bargaining agreements. . . ."45 The Board therefore concluded that absent "unusual circumstances" an employer found to be a successor would thereafter be compelled to honor his predecessor's collective bargaining agreement. Based on the foregoing findings, the Board easily disposed of *Travelodge Corp.* 46 and *Hackney Iron and Steel,* 47 companion cases to Burns. *Travelodge* was not a successor because the requisite degree of continuity of ownership was lacking, whereas *Hackney Iron and Steel* seemed to fall comfortably within the successorship criteria established in Burns.

The Burns decision made clear to all prospective purchasers the duty to continue the collective bargaining agreement intact would, in most cases, attach to a successor. Remaining unanswered was the converse—should the successor have the correlative right to maintain that the incumbent union should abide by the terms of the existing labor agreement? Would not the balancing contemplated in *Wiley* be more fully attained if this were true?

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45 Id. at 28,085 (emphasis added). The court also noted that the signed collective bargaining agreement had proven to be the overriding factor in the stabilization of the industrial community. In short, negotiated labor agreements had served to place effective restraints on those forces which otherwise would have generated industrial strife.
46 182 NLRB No. 52, 1970 CCH NLRB Dec. ¶ 21,864.
Bath Iron Works Corp. v. Bath Marine Draftmen's Ass'n.\(^{46}\) dealt with this issue. In 1961 Bath Iron Works Corporation purchased all of the outstanding stock in the Hyde Windlass Company. Both were principally engaged in shipbuilding. Subsequent to the purchase, Hyde existed as a wholly owned subsidiary of Bath. The Bath Marine Draftsmen’s Association had been chosen the exclusive bargaining agent for some Bath employees and also for a portion of the Hyde employees. The Association represented the respective employees in two separate units and each unit had different contracts—the Bath contract conferring more benefits.

In 1964, while both contracts were in effect, Bath merged with Hyde. Following the merger, Bath notified the Association that it intended to abide by the collective bargaining agreement between Hyde and the Association. The Association took the position that the merger had nullified the Hyde agreement, and since the former Hyde employees were now employed by Bath, they were automatically covered by the Bath Contract. Bath excepted to this and petitioned the National Labor Relations Board for clarification. The Board reviewed the facts and said:

It is clear from the above that the changes in corporate reorganization have not effected such changes in the status of the employees as would require us to find that the two units have been merged. Nor are we satisfied that, on this record, we can say that only separate units are appropriate. For these reasons and because of the outstanding contracts, we conclude that the issues raised here are not properly to be resolved at this time in this type of proceeding.\(^{49}\)

Thereafter, in the Maine Federal District Court the union sought a declaratory judgment making the collective bargaining agreement between Bath and the union applicable to the Hyde employees.

The court divided the issue into two parts: (1) whether, as a matter of contract interpretation, the Bath contract could be extended to the Hyde employees; and (2) whether, as a matter of federal labor policy, the Hyde contract could survive the merger and be exclusively controlling. Judge Gignoux ruled favorably for the union on both counts. Initially, a vague succession clause in the

\(^{46}\) 393 F.2d 407 (1st Cir. 1968).

Bath contract was held to apply "plainly" to the Hyde employees. The directives of *Wiley* were scrutinized and found not to require the survival of the Hyde contract under the unique facts presented. Accordingly, the Bath contract was held binding.\(^50\) However, on appeal the circuit court modified the lower court's holding. It ruled "the Bath contract shall govern any arbitration but shall not, in the absence of arbitration, constitute the controlling contract."\(^51\) Retreating slightly from the district court's holding, the circuit court's discussion emphasized several factors. Perhaps the relative differences in the size of the two companies were crucial.\(^52\)

The *Bath* holding has been subjected to substantial criticism from the legal community. Professor Stephen B. Goldberg argued that the successor who merely takes over the business of his predecessor should be entitled to request and secure the same contract rights against the predecessor's employees as did the predecessor.\(^53\) Why, Professor Goldberg asked, should employees who were unsuccessful in utilizing the machinery of arbitration to obtain higher wages and benefits under the predecessor's contract be free to accomplish indirectly, under the pretext of successorship, exactly what they had been unable to achieve directly? Other writers, though not citing *Bath* as the antithesis of their position, seemed to align themselves substantially behind the theory that the same continuity of identity rationale underlying the successor's duty to arbitrate should apply with equal force when asserted by a successor


\(^{51}\) Bath Iron Works Corp. v. Bath Marine Draftsmen's Ass'n., 393 F.2d 407, 411 (1st Cir. 1968).

\(^{52}\) Note that the court said:

[A]fter a corporation in the situation before us has defined and settled all questions of management authority and responsibility through merger, it is not unfair to require that employee wages and benefits also be subjected to a limited scrutiny to the end that discrepancies in treatment attributable solely to limited bargaining power stemming from more limited financial capacity on the part of the smaller and now merged corporation may be rectified.

Bath Iron Works Corp. v. Bath Marine Draftsmen's Ass'n., 393 F.2d 407, 411 (1st Cir. 1968) (emphasis added). The Court's statement that "[a] disparity which could be tolerated when *neighboring* employers operated separate entities in unlike circumstances might well be a source of *dissatisfaction, unrest, and even tests of strength, after merger*" suggests that the factor of the two companies occupying adjoining premises may have been determinative. *Id.* (emphasis added). It seems reasonable to surmise that an employment situation which fostered a disparity in benefits for comparable worker skills would be unfavorable at best.

seeking to hold the union to its past contractual obligations.\textsuperscript{54} Perhaps the most scathing attack was in a case comment in the New York University Law Review. In that student commentor's opinion the Bath approach was "incorrect". Generally, he believed the decision disregarded the balancing of policies rooted in Wiley and doing so introduced new uncertainty into the law.\textsuperscript{55}

In \textit{Walter Kidde & Co., Kota Division of Dura Corp.},\textsuperscript{56} another companion case to \textit{Burns}, the Board redefined an employer's rights in the typical successorship context. The case involved an unusual interlacing of facts. The successor had purchased all the assets of the predecessor employer. Following the sale, all the employees were assured that the plant would continue under the same management, that salaries, wage rates, and fringe benefits of workers would remain the same, and employees of the predecessor would automatically become employees of the successor. In fact, instead of disaffirming the contractual obligations of the previous labor agreement, the successor expressly assumed them. However, the union pointed out the present contract had no "successor or assigns" clause, and contended that the new employer was required to negotiate a new contract. The employer took the position that the contract bound both the union and the employer. The union filed unfair labor practice charges, but the Trial Examiner recommended dismissal of the complaint. The Board agreed and tersely explained:

The \textit{Burns} case involved the duty of a successor employer to honor the contractual obligations of its predecessor with the representative of its employees, whereas this case involves the converse side of the coin, i.e., \textit{the right of the successor employer to insist upon the union's adherence to the contract negotiated with the predecessor employer}. The legal policy considerations which impel our conclusion that the continuing vitality of a bargaining


\textsuperscript{55} Comment, \textit{Labor Law-Contract Survival-Surviving Corporation May not Hold Union To Predecessor Employer's Contract}, 44 N.Y.U. L. REV. 220 (1969). The balancing of policy alluded to of course entails the weighing of the rightful prerogative of an owner to rearrange his business independently against the right of the individual employee to be insulated from sudden changes in the employment relationship.

\textsuperscript{56} 182 NLRB No. 51, 1970 CCH NLRB Dec. ¶ 21,885.
relationship and its contract obligations should be maintained in a successorship situation are, of course, the same in either case.57

CONCLUSION

There are some general observations that can be made after examining developments during the relatively short period of time from Wiley to Burns. Essentially, the Wiley rationale was predicated on a balancing of interests test. Specifically, the Court attempted to weigh a successor employer's legitimate interest in the unfettered management of his commercial enterprise against an employee's interest in being protected from capricious changes in the conditions of his employment resulting from a transfer of corporate ownership. These respective interests were weighed and it was determined that the employee's interest needed reinforcement. Therefore, a successor employer was required to arbitrate with the predecessor union. However, the question of contract survival began to appear with increasing frequency, taxing the Board's ability to evade the issue. Finally, in Burns it was faced with no recourse but to resolve the issue.58 Hereafter employers in the corporate marketplace must be especially cautious in evaluating a prospective acquisition. It is probably wise to heed the sound advice that "in taking over a going concern . . . the labor title is to be searched as diligently as the title to real property."59 But the Wiley decision should not be viewed as a complete setback for enterprising business establishments—they now appear to be endowed with the right to insist that a union adhere to the existing collective bargaining agreement.

It would seem that Burns and its companion cases have forewarned the prospective buyer that particular rights and correlative duties will attach upon acquisition. The buyer should generally expect nothing less than a requirement to assume the existing labor contract. On the other hand, the union should ordinarily expect nothing more than a continuation of existing contract benefits.

Craig R. McKay

58 At the time of this writing, two successorship cases have been decided which expressly follow the Burns holding. Ranch-Way, Inc., 183 NLRB No. 116, 1970 CCH NLRB Dec. ¶ 22,089; S-H Food Service, Inc., 183 NLRB No. 124, 1970 CCH NLRB Dec. ¶ 22,093.