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SUCCESSOR MANAGEMENT'S OBLIGATIONS UNDER EXISTING COLLECTIVE BARGAINING AGREEMENTS

I. INTRODUCTION

In the general law of contracts, one acquires rights and obligations as a result of undertakings between specific parties to the contract. The same is likewise true generally in the area of labor relations. An employee representative is chosen in proceedings to which both management and employees are parties. As a result of this proceeding (election), management and the designated representative may acquire an obligation to bargain in good faith with each other. Pursuant to this bargaining, a contract may evolve which will bind all parties according to its terms. Thus an employer may be obligated to bargain and may be obligated to observe substantive contract provisions agreed upon in the course of the required bargaining.

This simple statement of law, applicable to an employer who was a party to labor proceedings, was challenged early in the history of labor law[1] by employers who acquired the business of another employer which had been subject to bargaining and contract obligations. In response, the National Labor Relations Board (hereinafter the Board) and the lower courts developed the doctrine of successorship.[2] If a certain continuity remained in the "employing industry" after a new employer began operations, the new employer would be a "successor" and would be bound by certain labor obligations of his predecessor. The Supreme Court first entered this area in 1964 with its opinion in *John Wiley & Sons, Inc. v. Livingston.*[3] The case held a subsequent employer bound by an arbitration provision in its predecessor's contract. This holding was expanded by subsequent lower court decisions[4] until the Supreme Court in 1972 held, in *NLRB v. Burns International Security Services, Inc.*,[5] that an employer does not, as a matter of law, become obligated to observe the terms of a predecessor's contract. Because of the apparent inconsistency between these two decisions, the Supreme Court attempted

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1. Congress passed the National Labor Relations Act (Wagner Act), 29 U.S.C. § 151 (1970) in 1935. While there had been several earlier pieces of labor legislation, this was the first to offer basic rights to large numbers of employees.
2. NLRB v. Colton, 105 F.2d 179 (6th Cir. 1939); Charles Cushman Co., 15 N.L.R.B. 90 (1939).
3. 376 U.S. 543 (1964).
4. *See* pt. III, § A(2) of this comment.
5. 406 U.S. 272 (1972).

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to clarify the law of successorship in *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board.*[6]

The Supreme Court has repeatedly stated that its decisions in this area of labor law are largely dependent upon the precise facts in each situation.[7] In *Howard Johnson*, the Court also stated that, in developing the federal common law relating to the Labor Management Relations Act, the courts should necessarily proceed with caution.[8] Nevertheless, by analyzing these three Supreme Court decisions and the countless Board and lower court decisions before and after each, this comment will attempt to determine a subsequent employer's obligations to bargain with a union representing a predecessor's employees and to observe substantive terms of a contract negotiated between the union and the predecessor.

II. Development of the "Employing Industry" Concept

In 1939, the Sixth Circuit used the term "employing industry" in a frequently quoted passage which formed the basis for the entire doctrine of successorship.

> It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace . . . . It needs no demonstration that the strife which is sought to be averted is no less an object of legislative solicitude when contract, death, or operation of law brings about change of ownership in the employing agency.[9]

The term is a slight misnomer because it concerns the individual business that is transferred rather than with the industry of which the business is a part. Basically the doctrine means that if the business is conducted in a manner, after the transfer of ownership, substantially similar to the way in which it was operated before, then "successorship" will exist with the attendant obligations, the most important being the obligation to bargain with the previously designated representative of the transferor's employees.

As the doctrine developed and was applied, the courts and the Board looked to many factors in determining whether the "employing industry" remained unchanged. In an early decision, *Charles Cushman Co.*,[10] the Board easily found "successorship" and a duty

6. ___ U.S. ___, 94 S. Ct. 2236 (1974).
7. Howard Johnson Co. v. Detroit Local Joint Executive Bd., ___ U.S. ___, ___, 94 S. Ct. 2236, 2240 (1974); NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272, 274, 286 (1972).
8. Howard Johnson Co. v. Detroit Local Joint Executive Bd., 94 S.Ct. 2236, 2240 (1974).
9. NLRB v. Colton, 105 F.2d 179, 183 (6th Cir. 1939).
10. Charles Cushman Co., 15 N.L.R.B. 90 (1939).

to bargain with the predecessor's union where the shareholders remained identical, the management was essentially the same, and the same employees remained employed under the same wages, hours and other working conditions. In addition, the subsequent employer had assumed portions of its predecessor's parent's indebtedness, stock of the successor was issued to shareholders of the parent company in the same ratio as their existing holdings in the parent, and the labor contract between the predecessor and the union governing wages, hours, etc. was assumed by the new employer.

Of the many factors, it is difficult to know which, if any, were controlling on the issue of "successorship." Two circuit court cases suggest that continuity of ownership and senior management under merely a different corporate entity might be important.[11] The transfer of stock ownership to a son and a son-in-law was not considered a change in the "employing industry" sufficient to avoid "successorship."[12] It is also possible that weight was given to the possibility of bad faith pursuant to the transfer of a business.[13] In *Stonewall Cotton Mills*,[14] the Board made no specific finding of bad faith. Instead, the manufacture of the same products at the same plant with the same equipment and work force were cited as indicating that "no essential attribute of the employment relationship has been changed as a result of the transfer . . . ." However, it seems impossible to ignore that the predecessor sold the business after the union won an election and before certification. In *NLRB v. McFarland*,[15] the sale was consummated at the same time as the original union certification. The court found "successorship" relying ostensibly upon the continuation of an ore hauling business essentially unchanged in character. While the court rejected the purchaser's contention that the business had become integrated into its larger operation, it used language indicating one instance when "successorship" might not exist.

> If the transfer operated to effect a basic change in the employing industry, in the sense that the trucking operation of the predecessor became merged or integrated into the larger business of Res-

11. NLRB v. Auto Ventshade, Inc., 276 F.2d 303 (5th Cir. 1960); NLRB v. Lunder Shoe Corp., 211 F.2d 284 (1st Cir. 1954).
12. NLRB v. Auto Ventshade, Inc., 276 F.2d 303 (5th Cir. 1960).
13. NLRB v. McFarland, 306 F.2d 219 (10th Cir. 1962); Stonewall Cotton Mills, 80 N.L.R.B. 325 (1948).
14. 80 N.L.R.B. 325 (1948).
15. NLRB v. McFarland, 306 F.2d 219 (10th Cir. 1962).

> pondent so as to lose its identity, then the bargaining unit is no longer appropriate and enforcement of the order [to bargain] should be denied.[16]

This rationale has been relied upon to find an absence of business continuity and therefore "successorship" where control of policy moved from a national to a local level resulting in a change in worker-management relationships. Relations, formerly of a disembodied type normally found in a large corporation, became the close, personal type characteristic of a small, local business.[17] The same alteration of the "employing industry" has been found where a smaller company is absorbed and integrated into a larger one.[18] This was especially so where the larger, purchasing company already had a relationship with another labor organization.[19]

In the absence of such basic and sweeping changes to the bargaining unit, "successorship" has generally been found even where there has been a bona fide transfer with no hint of an active attempt to avoid formal labor relations.[20] The easiest case is one in which there is a purchase or other transfer of an entire going concern.

> [W]here a purchaser continues its predecessor's business from the same location, handling the same products, and employing the predecessor's employees, the purchaser is a successor employer with a duty to recognize and bargain in good faith with the incumbent union.[21]

Even where assets, rather than an ongoing business, are purchased, the Board and the lower courts have had no trouble finding "successorship." In *Johnson Ready Mix Co.*,[22] the buyer did not purchase the predecessor's accounts receivable, did not assume the accounts payable or any liabilities, and had no obligation to hire its predecessor's employees. The Board still found "successorship," noting that the same products were manufactured from the same location, using the same equipment, and the same customers were served. Furthermore, the Board stated:

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16. *Id.* at 220.
17. NLRB v. Alamo White Truck Serv., Inc., 273 F.2d 238 (5th Cir. 1959). *But cf.* NLRB v. Zayre, 424 F.2d 1159 (5th Cir. 1970).
18. NLRB v. Aluminum Tubular Corp., 299 F.2d 595 (2d Cir. 1962).
19. *Id.*
20. Skaggs Drug Centers, Inc., 150 N.L.R.B. 518 (1964); Johnson Ready Mix Co., 142 N.L.R.B. 437 (1963); Simmons Eng'r Co., 65 N.L.R.B. 1373 (1946); Syncro Mach. Co., 62 N.L.R.B. 985 (1945); Nash, *Successorship in Light of Burns*, 7 GA. L. REV. 664 (1973).
21. Skaggs Drug Centers, Inc., 150 N.L.R.B. 518 (1964).
22. 142 N.L.R.B. 437 (1963).

> [M]ost significantly, a majority of the employees in the unit we have found appropriate were formerly Missouri [the predecessor] employees, are now performing the same functions they had performed for Missouri, and are directly supervised by former Missouri Supervisors.[23]

Where the predecessor had manufactured products to fill outside orders while the purchaser of its assets used different machinery to manufacture different products for its own use, the Board nevertheless found "successorship" because for a short period of time the purchaser agreed to process unfilled orders of its predecessor, thereby having the same employees do the same work.[24]

The hiring of a predecessor's employees by a transferee became the single most important factor in determining "successorship."[25] If most of the employees hired by the transferee had worked for its predecessor, the Board and the lower courts were likely to find "successorship" so as to protect the employees' right to bargain through their elected representative and to avoid labor strife. As will be discussed subsequently (pt. III, § A), the Supreme Court, in its first decision in the area of "successorship,"[26] was primarily concerned with the bargaining rights of employees who were absorbed into a large operation through the merger of two companies. Subsequent to this decision, the Board continued to place great importance upon the numbers of a predecessor's employees hired by a transferee in finding "successorship."[27] Eventually the Board developed a numbers test which it felt must be met in order for "successorship" to exist.[28]

By applying a "number of retained employees" test and referring to numerous other factors, the Board and the courts determined whether a transferee was a "successor" employer with a duty to bargain with the union representing the predecessor's employees. However, before *Wiley* the Board was careful to distinguish between a "successor's" duty to bargain and any obligation under a labor

23. *Id.* at 441.
24. Syncro Mach. Co., 62 N.L.R.B. 985 (1945).
25. *See* authorities cited note 20 *supra*; Consolidated American Servs., Inc., 148 N.L.R.B. 1521 (1964); Colony Materials, Inc., 130 N.L.R.B. 105 (1961); National Bag Co., 65 N.L.R.B. 1078, *enforced*, 156 F.2d 679 (8th Cir. 1946).
26. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).
27. Ideal Laundry Corp., 172 N.L.R.B. 1259 (1968); Thomas Cadillac, Inc., 170 N.L.R.B. 884 (1968); Hackney Iron & Steel Co., 167 N.L.R.B. 613 (1967); Quaker Tool & Die, Inc., 162 N.L.R.B. 1307 (1967); Valleydale Packers, Inc., 162 N.L.R.B. 1486 (1967); Maintenance, Inc., 148 N.L.R.B. 1299 (1964).
28. Tallakson Ford, Inc., 171 N.L.R.B. 503 (1968).

contract between the predecessor and its employees' union. The "successor" generally was not bound by such a collective bargaining agreement.[29] Furthermore, a contract was, after the transfer, no longer a bar to a representation petition.[30] Therefore, unless the certification period was still in effect, the transfer would subject the union to a possible loss of representative status in favor of another union.

Although the doctrine of "successorship" was well developed by the Board and the lower federal courts when the Supreme Court entered the field in 1964, the Court has avoided the use of the term "successor" in determining the obligations of a subsequent employer. Instead, it has defined the obligations of such an employer in light of the specific circumstances of each case. In examining the Supreme Court cases on the subject, this comment will explore both whether there is a real practical difference between the Board's approach of determining whether an employer is a "successor" based upon the circumstances of each case and then imposing certain obligations due to that status and the Court's approach of determining obligations directly from the facts and what the Supreme Court believes are the obligations of subsequent employers.

III. WILEY — BURNS — HOWARD JOHNSON

A. *Wiley*

1. The Case

John Wiley & Sons, a large publishing firm employing nearly 300 employees, merged with Interscience Publishers, Inc. on October 2, 1961. At the time of the merger, 40 of Interscience's 80 employees were represented by a union. A collective bargaining agreement expiring on January 31, 1962 did not contain a provision making it binding on successors of Interscience. The agreement did, however, contain a provision requiring arbitration of issues which could not be resolved among the parties. The union contended that it continued to represent the covered employees taken over by Wiley and that Wiley had to recognize certain vested rights of these employees. Wiley contended that the merger terminated the bargaining agreement and refused to recognize the union as the bargaining agent or accede to the union claims. Before the contract expired, the union brought a proceeding under section 301 of the Labor Manage-

29. Rohlik, Inc., 145 N.L.R.B. 1236 (1964); Cruse Motors, Inc., 105 N.L.R.B. 242 (1953).
30. General Extrusion Co., Inc., 121 N.L.R.B. 1165 (1958); Jolly Giant Lumber Co., 114 N.L.R.B. 413 (1955).

ment Relations Act[31] to compel Wiley to arbitrate the unresolved issues pursuant to the collective bargaining agreement.

Relying upon the statement in *Textile Workers Union v. Lincoln Mills*[32] that section 301 authorizes the development of a federal common law of collective bargaining,[33] the Supreme Court noted that federal law controlled and held specifically that:

> the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered . . . and . . . in appropriate circumstances, present here, the successor employer may be required to arbitrate . . . under the agreement.[34]

This holding was of major significance because an employer had never before been held subject to the substantive terms of a collective bargaining agreement which it had neither signed nor agreed to assume. The Court did not decide what parts of the predecessor's agreement were binding upon the successor and did not hold that the duty to arbitrate always survives; rather the duty to arbitrate exists when the ownership or corporate structure of an enterprise is changed only if there is "continuity of identity in the business enterprise before and after a change."[35]

The Court, while acknowledging that the law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, noted that a collective bargaining agreement is not an ordinary contract. In holding Wiley subject to the arbitration provision, the Court relied upon "the central role of arbitration in effectuating national labor policy"[36] and the fact that New York state law provided that no claim or demand against a constituent corporation shall be extinguished by a consolidation. The philosophy behind the holding is best illustrated by this passage from the decision:

> Employees . . . ordinarily do not take part in negotiations leading

31. 29 U.S.C. § 185 (1971). This section permits suits for violations of contracts between an employer and a labor organization. Most NLRB suits are based upon unfair labor practices or failures to bargain, and do not arise out of contract.

32. 353 U.S. 448 (1957).

33. *Id.* at 451.

34. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 548 (1964).

35. *Id.* at 551.

36. The Court stated, 376 U.S. at 549-50:

> The preference of national labor policy for arbitration as a substitute for tests of strength between contending forces could be overcome only if other considerations compellingly so demanded. We find none.

> to a change in corporate ownership. . . . The objectives of national labor policy . . . require that the rightful prerogative of owners independently to rearrange their businesses . . . *be balanced by some protection to employees from a sudden change in the employment relationship.* The transition . . . will be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration . . . .[37]

2. The Aftermath

The Board and the courts immediately emphasized the language in *Wiley* concerning continuity of identity in the employing enterprise, applying it along with a "number of retained employees" test to determine the issue of "successorship." The combination of new ownership and a substantial change in the personnel of the unit often led to a finding of no "successorship."[38] However, one case found that termination of the employees before transfer of the business was actually a constructive termination by the transferee; therefore, continuity of the enterprise and "successorship" existed.[39] Beyond the "successorship" determination which remained basically unchanged by *Wiley*, the cautious and limited holding in *Wiley* was soon cited as supporting holdings which went far beyond its narrow scope.

Shortly after the decision came down, the Ninth Circuit applied the same reasoning to a situation where the business and assets of a company were purchased by another.[40] This court found that the fact that *Wiley* had involved a merger and the fact that state law required the successor in a merger to be bound by obligations of the disappearing entity not to have been the basis of the *Wiley* decision. Other cases relied on *Wiley* to require a "successor" to correct the unfair labor practices of its predecessor.[41] One court held that the expiration of the collective bargaining agreement did not permit the "successor" to act unilaterally without affording the union a reasonable opportunity to bargain.[42] Several cases stated that the employees of a predecessor became employees of the "successor" and therefore the "successor" employer was obligated to

37. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).
38. NLRB v. John Stepp's Friendly Ford, Inc., 338 F.2d 833 (9th Cir. 1964); Apex Record Corp., 162 N.L.R.B. 333 (1966).
39. Young's Super Mkt. v. NLRB, 377 F.2d 463 (9th Cir. 1967).
40. Wackenhut Corp. v. Int'l Union, United Plant Guard Workers of America, 332 F.2d 954 (9th Cir. 1964).
41. *See* Perma Vinyl Corp., 164 N.L.R.B. 968 (1967).
42. Overnite Transp. Co. v. NLRB, 372 F.2d 765 (4th Cir.), *cert. denied*, 389 U.S. 838 (1967).

bargain concerning seniority and hiring of employees.[43] These decisions, in effect, obligated the "successor" to abide by the predecessor's collective bargaining agreement upon hiring its own employees. Thus, the *Wiley* holding was greatly expanded.

The final step was a holding by the Board in *Burns*[44] and several other cases[45] that a "successor" not only had to bargain with the predecessor's union, but also was bound to adhere to the substantive provisions of the predecessor's collective bargaining contract. These holdings were subsequently reversed.[46]

B. *Burns*

1. The Case

Prior to July 1, 1967, Wackenhut Corp. provided plant protection services for Lockheed at an airport in California. On February 28, 1967, a majority of Wackenhut guards chose the United Plant Guard Workers union (UPG) in a Board election. Later, on April 29, Wackenhut and the union entered into a three-year collective bargaining contract. Wackenhut's one year contract with Lockheed was to expire on June 30, 1967, and when bids were submitted for subsequent service, Burns was awarded the contract. Burns offered employment to some of Wackenhut's guards but under different terms of employment. Eventually, Burns employed 27 of the Wackenhut guards while bringing in 15 of its own. Burns gave the Wackenhut guards union membership cards in the American Federation of Guards, the union with which it had collective bargaining contracts elsewhere. Burns then recognized the union on the basis of a card majority, but UPG demanded that Burns recognize it and honor the terms of the collective bargaining agreement between UPG and Wackenhut. Burns' refusal precipitated unfair labor practice charges. The Supreme Court affirmed the Second Circuit Court of Appeals, holding that because a majority of Burns' employees had been employed by Wackenhut, Burns had a duty to bargain with Wackenhut's union. Also affirming the court of appeals, the Su-

43. Spruce Up Corp., 194 N.L.R.B. 841 (1972); Martin Marietta Corp., 159 N.L.R.B. 905 (1966); Chemrock Corp., 151 N.L.R.B. 1074 (1965).

44. Burns Int'l Detective Agency, Inc., 182 N.L.R.B. 348 (1970).

45. *See* Bachrodt Chevrolet Co., 186 N.L.R.B. 1035 (1970); Denham Co., 187 N.L.R.B. 434 (1970); Ranchway, Inc., 183 N.L.R.B. No. 116 (June 26, 1970).

46. NLRB v. Denham Co., 469 F.2d 239 (9th Cir. 1972), *vacated and remanded*, 411 U.S. 945 (1973); NLRB v. Bachrodt Chevrolet Co., 468 F.2d 963 (7th Cir. 1972), *vacated and remanded*, 411 U.S. 914 (1973); NLRB v. Ranchway, Inc., 445 F.2d 625 (10th Cir. 1971), *vacated and remanded*, 406 U.S. 940 (1972); NLRB v. Burns Int'l Security Serv., Inc., 441 F.2d 911 (2nd Cir.), *aff'd*, 406 U.S. 272 (1972).

preme Court held that a duty to bargain does not carry with it an obligation to observe the substantive terms of a collective bargaining agreement to which Burns had in no way agreed. Finally, the Court held that Burns was free to set initial terms of employment without first bargaining with the union. Such action was held to constitute an unfair labor practice.

2. Analysis of the Decision

a. Duty to Bargain

Any employer's obligation to bargain with a union arises after a union is certified by the Board as the bargaining representative of certain employees. Absent "unusual circumstances," there is an irrebuttable presumption of union majority status for one year after certification.[47] The same presumption also applies where the union is voluntarily recognized.[48] The certification (and presumably a voluntary recognition) creates a rebuttable presumption of continued majority status even after the one year period.[49] If after the one year certification period, an employer can show good faith doubt of majority status, then it might rebut the presumption and could refuse to bargain.[50] These general propositions of law are equally applicable to a subsequent employer.[51]

In *Burns*, the certification was less than one year old. Thus, past decisions would indicate that Burns could have avoided bargaining only if "unusual circumstances" existed. The Court stated:

> [A] mere change of employers or of ownership in the employing industry *is not such an 'unusual circumstance'* as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of membership or management were employed by the preceding employer.[52]

Even if the predecessor's unit or the one existing after the change of ownership experiences a turnover in personnel, this will not be an "unusual circumstance" so as to overcome the irrebuttable pre-

47. Brooks v. NLRB, 348 U.S. 96, 98-99 (1954).

48. Keller Plastics E., Inc., 157 N.L.R.B. 583 (1966).

49. Celanese Corp., 95 N.L.R.B. 664, 672 (1951).

50. United States Gypsum Co., 157 N.L.R.B. 652 (1966); Celanese Corp., 95 N.L.R.B. 664, 672 (1951).

51. Terrell Mach. Co. v. NLRB, 427 F.2d 1088 (4th Cir. 1970), *enforcing* 173 N.L.R.B. 1480 (1969), *cert. denied*, 398 U.S. 929 (1970); NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272 (1972). *See also* NLRB v. Ranchway, Inc., 445 F.2d 625 (10th Cir. 1971), *vacated and remanded*, 406 U.S. 940 (1972); NLRB v. Bachrodt Chevrolet Co., 468 F.2d 963 (7th Cir. 1972), *vacated and remanded*, 411 U.S. 914 (1973).

52. NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272, 279 (1972) (emphasis added).

Gates: Gates: Successor Management's Obligations

sumption of majority status.[53] New employees will be presumed to support a union in the same ratio as those whom they have replaced.[54]

Language in *Burns* indicates that in a transfer of ownership/management situation, a good faith doubt might provide an excuse for a failure to bargain even within the certification year.[55] But in a non-transfer situation, the good faith doubt defense is available only after the one year certification period.[56] A subjective state of mind is insufficient to support such a doubt.[57] There must be objective facts which furnish a reasonable basis for the asserted doubt.[58] A showing that less than a majority were members of the union is not equivalent to showing a lack of union support.[59] Nor would reliance on isolated reports from vague unidentified sources of the union membership, the size of the unit, or that several employees wanted another union constitute the required objective evidence.[60]

Despite *Burns'* reference to good faith doubt, the language of the opinion suggests that the facts giving rise to such a doubt might be the same as those constituting an "unusual circumstance." Both would appear to be presumptively absent where a majority of the employees after the change of ownership had been employed by the predecessor and there has been a recent certification.[61] A different result, however, might ensue where the certification year has expired. It seems likely that after such time, the objective evidence/good faith doubt approach might be available to the new owner.[62]

In a non-transfer case, if a contract exists, there will be "contract bar" even after the end of the certification period. Thus, the employer could not challenge the representative status of the union

53. U.S. Eagle, Inc., 202 N.L.R.B. No. 74 (Mar. 20, 1973).

54. Laystrom Mfg. Co., 151 N.L.R.B. 1482 (1965).

55. NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272 (1972). "Burns' could not reasonably have entertained a good faith doubt about that [majority status]." *Id.* at 278.

56. *See* cases cited note 50 *supra*.

57. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

58. Laystrom Mfg. Co., 151 N.L.R.B. 1482 (1965).

59. Terrell Mach. Co. v. NLRB, 427 F.2d 1088 (4th Cir. 1970), *enforcing* 173 N.L.R.B. 1480 (1969), *cert. denied*, 398 U.S. 929 (1970).

60. *Id.*

61. NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272 (1972). "Burns' obligation to bargain with the union over terms and conditions of employment stemmed from its hiring of Wackenhut's employees and from the recent election and Board certification." *Id.* at 278-79.

62. Paramount Paper and Prods., 154 N.L.R.B. 1064, 1067-68 (1965); Mitchell Standard Corp., 140 N.L.R.B. 496, 500 (1963).

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or refuse to bargain during the term of the contract.[63] However, in a transfer situation, the contract, unless assumed, is no longer in existence after the transfer of ownership.[64] Therefore, it would seem that the subsequent employer could question the majority status of a union based upon objective evidence, where the certification period has expired.

Ignoring for the moment these previously discussed defenses of a subsequent employer, his duty to bargain with the union representing its predecessor's employees arises when a majority of his work force has been employees of its predecessor.

> *[W]here* the bargaining unit remains unchanged and *a majority of the employees hired by the new employer are represented by a recently certified bargaining agent* there is little basis for faulting the Board's . . . ordering the employer to bargain . . . .[65]

Since the Board has never held that an employer is required to hire all the employees of its predecessor[66] unless such an obligation is assumed, a new employer seems to be free to avoid bargaining by hiring a majority of its employees from sources other than its predecessor. If, however, it refused to hire its predecessor's employees because of their union affiliation, it will have committed a section 8(a)(3)[67] violation and a "successorship" bargaining obligation will arise despite the fact that the majority of the predecessor's employees test is not met.[68]

This reliance on a percentage of employees retained is strangely reminiscent of countless Board decisions.[69] The Board and courts of appeal have relied heavily upon this factor in finding "successorship." After determining that "successor" status exists, a duty to bargain with a predecessor's union was an automatic consequence. The *Burns* decision carefully avoids any mention of the word "successor."[70] The Court chose to find a duty to bargain due to the fact

63. Ecklund's Sweden House Inn, 203 N.L.R.B. No. 56 (May 2, 1973); Hexton Furniture Co., 111 N.L.R.B. 342 (1955).

64. NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272, 291 (1972).

65. *Id.* at 281 (emphasis added).

66. *Id.* at 280 n.5. *But see* Spruce Up Corp., 194 N.L.R.B. 841 (1972); Martin Marietta Corp., 159 N.L.R.B. 905 (1966); Chemrock, Corp., 151 N.L.R.B. 1074 (1965).

67. National Labor Relations Act, § 8(a)(3), 29 U.S.C. § 158 (a)(3) (1970).

68. TriState Maintenance Corp. v. NLRB, 408 F.2d 171 (D.C. Cir. 1968); Barrington Plaza & Tragniew, Inc., 185 N.L.R.B. 962 (1970).

69. *See* authorities cited notes 20 & 21 *supra*.

70. The dissent, 406 U.S. at 296, makes note of this. However, the dissent feels that the majority's position is sustainable only if Burns is considered a successor. The dissent then goes on to say that it believes there is no successorship because Burns did not assume the

that most of the employees hired by the new owner had been employees of its predecessor. The opinion did not utilize the step by step reasoning of the Board and the circuit courts. However, there appears to be little difference between the two approaches. The Court affirmed the Board's decision as to the bargaining order and in doing so cited several cases employing the "successorship" doctrine,[71] indicating acceptance of the Board's approach.[72]

Furthermore, while the Court refused to review the Board's determination of unit appropriateness, it made it clear that continuity of the bargaining unit is critically important in finding an obligation on the part of the new owner to bargain.

> It would be a wholly different case if the Board had determined that because *Burns' operational structure and practices* differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one.[73]

The Court's reference to "bargaining unit" seems to be broader than mere appropriateness under Board standards; it seems to encompass the "employing industry" concept.[74] Interpreting *Burns* in this fashion, the Board subsequently set out seven factors to be considered in determining "successorship."[75] In essence, the factors deal with retention of a predecessor's employees and continuity of the business enterprise.[76] The Tenth Circuit refused to find sufficient change in the bargaining unit where the new owner assumed only one of two maintenance contracts formerly performed by its prede-

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assets or business of another, but rather competed directly with another and won a contract previously performed by the other.

71. NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272, 281 (1972).

72. *But see* pt. III, § C of this comment.

73. NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272, 280 (1972) (emphasis added).

74. Nash, *supra* note 20, at 673.

75. Georgetown Stainless Mfg. Corp., 198 N.L.R.B. No. 41 (July 17, 1972). The factors were: (1) whether there has been a substantial continuity of the same business operations; (2) whether the new employer uses the same plant; (3) whether the new employer has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery, equipment, and methods of production; (7) whether he manufactures the same products or offers the same services.

76. It is important to note that this discussion does not include alter ego situations where there is a mere change in form with no real change in the unit or industry. Such situations include those where the purported new management cannot in reality be distinguished from the former management. In such cases, the "new" employer has been held bound by the acts and contracts of the former. *See* Southport Petroleum Co. v. NLRB, 315 U.S. 100 (1942); NLRB v. Herman Bros. Pet Supply, Inc., 325 F.2d 68 (6th Cir. 1963); NLRB v. Ozark Hardwood Co., 282 F.2d 1 (8th Cir. 1960).

cessor.[77] However, the Board, affirmed by the District of Columbia Court of Appeals, found that a unit was no longer appropriate where the predecessor's employees had been members of an 1100 man unit and the new management took over only a small part of the operation of the predecessor employing only 41, 14 of whom were new.[78] The Board, citing *Burns*[79] and the seven factors set out above,[80] found that the old bargaining unit was no longer appropriate where the predecessor's employees' duties were expanded and their jobs were functionally integrated with the other employees of the new employer.[81] Other important factors in determining the appropriateness of the former bargaining unit to the subsequent employer's situation are the period during which the predecessor was closed down before the new employer resumed operations,[82] use of new equipment, and the manufacture of new products.[83]

These post-*Burns* decisions illustrate that the doctrines of "employing industry" and "accretion"[84] and the importance of an appropriate bargaining unit among a successor's employees remain. All of this reinforces the proposition that *Burns* did little to change the law regarding a successor's obligation to bargain with the union which had represented its predecessor's employees.

b. Unilaterally Setting Initial Terms of Employment

Once a general obligation to bargain is found, it remains to be determined what may be done without first discussing it with the union. The Board's decision in *Burns* stated that a "successor" employer had the same obligation to refrain from unilaterally changing terms of employment established by prior collective bargaining as did a non-"successor." This holding was at least impliedly accepted by the Supreme Court.[85] However, the Board, before and after *Burns*, held that even where an employer is not bound

77. NLRB v. Geronimo Serv. Co., 467 F.2d 903 (10th Cir. 1972).

78. Atlantic Technical Servs. Corp., 202 N.L.R.B. No. 13 (Mar. 5, 1973), *enforced sub nom* International Assoc. of Machinists v. NLRB, ___ F.2d ___, 86 L.R.R.M. 2182 (D.C. Cir. 1974).

79. *See* text accompanying note 73 *supra*.

80. *See* note 75 *supra*.

81. Border Steel Rolling Mills, Inc., 204 N.L.R.B. No. 89 (July 9, 1973).

82. Norton Foundries Co., 199 N.L.R.B. No. 140 (Oct. 24, 1972).

83. Georgetown Stainless Mfg. Corp., 198 N.L.R.B. No. 41 (July 17, 1972).

84. *See* Columbus Janitor Serv., 191 N.L.R.B. 902 (1971); Humble Oil & Refining Co., 153 N.L.R.B. 1361 (1965). *But see* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964), where the subject of integration was never discussed as an issue.

85. NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272, 294 (1972).

by the terms of the contract, it must not institute terms of employment different from those provided in its predecessor's contract.[86] The Supreme Court refused to accept this statement of the law and affirmed the circuit court which had reversed the Board:

> It is difficult to understand how Burns could be said to have changed unilaterally any pre-existing term or condition of employment . . . when it had no previous relationship whatsoever with the bargaining unit and . . . outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees . . . may have differed from the terms extended by Wackenhut . . . , but it does not follow that Burns changed *its* terms and conditions of employment . . . .[87]

Therefore, a subsequent employer may set the initial terms on which it will offer employment without bargaining to an impasse. However, the Court also stated:

> There will be instances in which it is *perfectly clear* that the new employer plans to retain all the employees in the unit and in which it will be *appropriate* to have him *initially consult* with the employees' bargaining representative before he fixes terms.[88]

This language has raised several questions.[89] The Board and the Seventh Circuit felt that there must be a dual finding that (1) it is "perfectly clear" that a new employer plans to hire all the employees of its predecessor and (2) it will be appropriate to have the new employer initially consult with the union.[90] The Seventh Circuit, over a dissent,[91] made both findings and held that there was a duty to bargain.[92] At least one author would agree with this interpretation, believing that the Supreme Court in *Burns* envisioned two

86. *See* Emerald Maintenance, Inc., 188 N.L.R.B. 876 (1971), *enforced in part*, 464 F.2d 698 (5th Cir. 1972); Overnite Trans. Co., 157 N.L.R.B. 1185 (1966), *enforced*, 372 F.2d 765 (4th Cir.), *cert. denied*, 389 U.S. 838 (1967).

87. NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272, 294 (1972).

88. *Id.* at 294-95 (emphasis added).

89. Did it mean that no duty to bargain exists until the full complement is hired or does it immediately exist if it is clear that a predecessor's employees will be hired? S-H Food Serv., Inc., 199 N.L.R.B. No. 4 (Sept. 15, 1972), held that existing terms of employment included those of a predecessor and could not be changed without bargaining where substantially all the employees of the predecessor are retained. Hecker Mach., Inc., 198 N.L.R.B. No. 161 (Aug. 29, 1972), held that bargaining is necessary only after hiring is completed and it is clear that majority status exists. Therefore the employer was permitted to set the initial terms upon which it would hire its predecessor's employees.

90. Bachrodt Chevrolet Co., 186 N.L.R.B. 1035 (1970); Howard Johnson Co., 198 N.L.R.B. No. 98 (Aug. 8, 1972).

91. NLRB v. Bachrodt Chevrolet Co., 468 F.2d 963, 970 (7th Cir. 1972).

92. *Id.* at 969.

extremes — one where the duty would be clear and one where the duty could not be determined until all hiring is completed — with a middle ground where it might, nevertheless, be appropriate to "consult" the union.[93]

In any event, after the Supreme Court in reliance on *Burns* vacated several circuit court decisions,[94] the Board reconsidered the cases and relied heavily upon factual determinations as to the "perfectly clear" issue in deciding whether a duty to bargain existed.[95]

By conditioning employment upon an employee's acceptance of different wages and working conditions, a new employer would seem to be able to always avoid the "perfectly clear" language until at least a portion of a predecessor's employees have been hired. This easy way to avoid any obligation to bargain imposed by *Burns* was the approach taken by the Board in reconsidering *Ranchway, Inc.*[96] The Board held it was not "perfectly clear" that a majority of the successor's work force would come from the predecessor's because the new terms were offered before employees accepted employment.[97] The current Board and circuit court approach, therefore, seems to be to make a factual determination of "perfectly clear" and equate this with an appropriateness to "consult" with the union.[98]

The meaning of the term "consult" is likewise uncertain. The Supreme Court might have been referring to some limited bargaining as to things such as employee preferences.[99] Although it would logically seem that the Supreme Court meant something less than "bargain" when it said "consult," the terms have generally been equated by the Board.[100]

Since no duty to bargain exists unless a majority of a new employer's employees come from its predecessor or until it is "perfectly clear" that all of a predecessor's employees will be hired, the question remains as to when the determination is to be made. An employer could always argue that it will hire more from outside sources so as to destroy or delay the duty to bargain. It has been suggested that the duty to bargain exists when a successor's work force has grown to the point where it is representative in size and

93. Nash, *supra* note 20, at 678.
94. *See* cases cited note 46 *supra.*
95. *See* cases cited notes 96-98 *infra.*
96. 203 N.L.R.B. No. 118 (May 25, 1973).
97. *See also* Collinge Enterprises, Inc., 210 N.L.R.B. No. 8 (April 12, 1974).
98. *See* NLRB v. Wayne Convalescent Center, Inc., 465 F.2d 1039 (6th Cir. 1972); Eklund's Sweden House Inn, 203 N.L.R.B. No. 56 (April 2, 1973).
99. This was suggested by the concurring opinion in International Ass'n of Mach., Dist. Lodge 94 v. NLRB, 414 F.2d 1135, 1139 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 889 (1969).
100. *See* cases cited notes 46, 98 *supra.*

composition of the work force which will ultimately be employed.[101] However, the duty may not arise until the full work force has been hired.[102]

c. Imposition of the Contract

Perhaps the most important part of the *Burns* decision is its holding that a subsequent employer cannot be required to observe the substantive terms of a labor agreement negotiated by its predecessor. As previously mentioned, after the *Wiley* decision, the Board began requiring a "successor" to observe terms of a predecessor's contract. At about the same time, the Supreme Court decided *H.K. Porter v. NLRB*,[103] a case which was not immediately recognized as having application to the "successorship" area, but which the Supreme Court in *Burns* relied upon heavily. This 1970, non-successorship case held that while the Board may require parties to negotiate, it could not compel a union or an employer to agree to any substantive contractual provisions.[104] Section 8(d) of the National Labor Relations Act,[105] and particularly certain language from various congressional committee reports, had mandated the decision in *Porter*. It has been questioned whether section 8(d) or *Porter* should govern a "successorship" case.[106] Both concern situations where no contract provisions had ever been agreed upon; whereas in *Burns*, the predecessor's contract with the union had already been negotiated and implemented. Nevertheless, *Porter* and section 8(d) taken together led the Supreme Court to say of a "successorship" situation:

> Such a duty [to observe a pre-existing contract] does not, however, ensue as a matter of law from the mere fact that an employer is doing the same work in the same place with the same employees as his predecessor.[107]

101. *See* Hecker Mach., Inc., 198 N.L.R.B. No. 161 (Aug. 29, 1972). Generally a representative complement is not present unless 30% of the ultimate complement has been employed and 50% of the ultimate job classifications are in existence. *See* General Extrusion Co., 121 N.L.R.B. 1165 (1958).

102. Central American Airways, 204 N.L.R.B. No. 25 (June 14, 1973).

103. 397 U.S. 99 (1970).

104. The object of [the Labor Management Relations Act] was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and employees could work together to establish mutually satisfactory conditions.

Id. at 103.

105. 29 U.S.C. § 158(d) (1971).

106. Vernon, *Successorship & Collective Bargaining Agreements in Business Combinations & Acquisitions*, 24 VAND. L. REV. 903, 911 (1971).

107. NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272, 291 (1972).

Missouri Law Review, Vol. 40, Iss. 2 [1975], Art. 4

While noting that *Wiley's* goals of industrial peace and employee protection would be served by observance of the predecessor's contract, the Court clearly established that the bargaining freedom of both employers and unions is of greater importance. "Preventing industrial strife is an important aim of federal labor legislation, but Congress has not chosen to make the bargaining freedom of employers and unions totally subordinate to this goal."[108]

In addition to freedom of bargaining, the Court found that its decision would facilitate transfers of failing businesses. A company might be more willing to attempt a revival of such a business if it were not burdened with the terms and conditions of employment contained in the old collective bargaining contract. Furthermore, a union which made concessions to a financially troubled employer would be able to extract more favorable terms from a successful successor.[109]

While the subsequent employer is not to be bound by substantive provisions of its predecessor's collective bargaining contract or to the grievance procedures pertaining to discharge of (or failure to hire) employees of its predecessor,[110] the Court foresaw instances in which a successor would voluntarily observe a pre-existing contract.[111] Furthermore, the Court stated:

> [I]n a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract.[112]

The Court indicated one type of situation where a new employer would be held to have assumed the obligation of its predecessor's collective bargaining contract.[113] Since *Burns*, the Board has found assumption of a predecessor's contract where, although expressly not assuming it, the new employer granted wage increases only after

108. *Id.* at 287.

109. *Id.* at 287-88.

110. *Id.* at 288. Apparently *Burns* overruled several cases which indicated that employees of a predecessor were also the successor's employees, and thus grievance procedures of a predecessor's contract must be utilized before a successor could deny employment to such employees.

111. *Id.* at 291. The opinion states: "In many cases . . . successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the pre-existing contract rather than to face uncertainty and turmoil."

112. *Id.*

113. The Court cited Oilfield Maintenance Co., 142 N.L.R.B. 1384 (1963), thus implicitly stating that in an alter ego situation, the new ownership would be bound by the former contract.

Gates: Gates: Successor Management's Obligations

complying with the contract, honored a dues check-off provision after the transfer, and used the old contract as a base for negotiations of a new one.[114] However, another "successor" was found not to have assumed a predecessor's contract by merely complying with the provisions of its unexpired contract.[115]

If a subsequent employer is found to have assumed its predecessor's collective bargaining contract, then would a union also be bound or could it require new bargaining? The question would be important to a union which has made concessions to a failing predecessor. The only decision is pre-*Burns* and suggests that even without a clause specifically binding the union in a successorship situation, it must observe the old contract.[116]

3. Scope of the Decision—Conflict with *Wiley*

The dissent in *Burns* would not even have held Burns obligated to bargain with the predecessor's union. They believed such a duty could be imposed only in a "successorship" situation which they found absent because Burns was a direct competitor of Wackenhut rather than a transferee of Wackenhut's business.[117] However, any thoughts that *Burns* was limited to its facts and that *Wiley* controlled in true transferee cases were quickly eliminated by mass application of the *Burns* holding and reasoning to a myriad of fact situations.[118]

Burns' rejection of the imposition of substantive terms of a predecessor's contract upon its transferee gave rise to an apparent inconsistency between *Burns* and *Wiley*. Wiley was required to arbitrate in accordance with the terms of its predecessor's collective bargaining agreement and thereby be bound by other substantive terms as decided by the arbitrator. The *Wiley* case was unconvincingly distinguished in *Burns* on grounds that *Wiley* involved a section 301 action to compel arbitration, there being an historical preference for arbitration of labor disputes, while *Burns* was an unfair

114. Ecklund's Sweden House Inn, 203 N.L.R.B. No. 56 (May 2, 1973).
115. Noriega Indus., Inc., 201 N.L.R.B. No. 130 (Feb. 15, 1973).
116. Kota Div. of Dura Corp., 182 N.L.R.B. 360 (1970).
117. NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272, 296-310 (1972).
118. *Purchase of Assets*: Anita Shops, Inc., 211 N.L.R.B. No. 74 (June 12, 1974); Norton Foundries Co., 199 N.L.R.B. No. 140 (Oct. 24, 1972); Georgetown Stainless Mfg. Corp., 198 N.L.R.B. No. 41 (July 17, 1972). *New Franchises:* Crotona Serv. Corp., 200 N.L.R.B. No. 97 (Dec. 5, 1972); Milwaukee Engine & Equip. Corp., 198 N.L.R.B. No. 56 (July 21, 1972); Howard Johnson Co., 198 N.L.R.B. No. 98 (Aug. 8, 1972); Southline System Serv., Inc., 198 N.L.R.B. No. 71 (July 27, 1972). *Mortgage Foreclosed*: NLRB v. Wayne Convalescent Center, Inc., 465 F.2d 1039 (6th Cir. 1972).

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labor practice action. This distinction remained until the Supreme Court decided *Howard Johnson.*[119]

C. *Howard Johnson*

Howard Johnson, like *Wiley,* was a case brought pursuant to section 301 of the Labor Management Relations Act. The union representing a majority of the employees of the predecessor employer, Belleville Restaurant Co., sued to compel the purchaser, Howard Johnson Co., Inc., to arbitrate its duty to hire its predecessor's employees. The Grissom family which owned the Belleville Restaurant Co. had operated a Howard Johnson's motor lodge and restaurant under franchise agreements. All of the franchise's employees were represented by the same union which had entered into collective bargaining agreements with the Grissoms. The agreements provided, unlike the one in *Wiley*, that the provisions would be binding on successors. However, when Howard Johnson purchased the personal property and leased the real property from the Grissoms, it expressly did not assume the labor contracts of its predecessor. Howard Johnson commenced operations with 43 employees versus 54 employed by the Grissoms. Of these 43, only 9, none of which were supervisory personnel, had previously worked for the Grissoms.

The district court[120] and Sixth Circuit Court of Appeals[121] both held, relying heavily upon *Wiley*, that Howard Johnson was required to arbitrate the extent of its obligations to the former Grissom employees. While the labor bar had doubtlessly hoped for an end to the *Burns-Wiley* inconsistency, the Supreme Court refused to decide if any "irreconcilable conflict" exists. The Court stated that the reasoning of *Burns* must be taken into account in a suit to compel arbitration:

> It would be plainly inconsistent with this view [that federal common law must not ignore national labor laws] to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under § 301, and thus permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claim. Clearly the reasoning of *Burns* must be taken into account here.[122]

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119. Howard Johnson Co. v. Detroit Local Joint Executive Bd., ___ U.S. ___, 94 S. Ct. 2236 (1974).

120. ___ F. Supp. ___, 81 L.R.R.M. 2329 (E.D. Mich. 1972).

121. 482 F.2d 489 (6th Cir. 1973).

122. Howard Johnson Co. v. Detroit Local Joint Executive Bd., 94 S. Ct. 2236, 2240 (1974).

The Court held that Howard Johnson had no obligation to arbitrate its duty to the former Grissom employees.[123]

The major portion of the opinion was devoted to distinguishing the fact situation in *Howard Johnson* from that in *Wiley*. The Court found the distinction between a merger and a sale of assets important.[124] Because of the state law rule that the surviving corporation in a merger is liable for the obligations of the one which disappears, the successor in *Wiley* would have had a reasonable expectation that it would be bound by its predecessor's contract. No such expectation would exist where there was a mere sale of assets. Also, disappearance meant the union's only possible recourse was against the surviving corporation, while in *Howard Johnson*, the Grissom corporation continued in existence with substantial assets. Considered of even more importance as a distinguishing feature was the fact that Wiley hired all of its predecessor's employees while Howard Johnson hired its own work force. The consequence of this was that while in *Wiley* the union sought arbitration of the rights of Wiley employees, the union in *Howard Johnson* sought not to arbitrate rights of Howard Johnson employees but to arbitrate on behalf of persons not employed by Howard Johnson. Since the Court found that *Burns* gave Howard Johnson the right not to hire Grissom employees[125] and that *Wiley* required arbitration only where there is substantial continuity of identity in the business enterprise, Howard Johnson was not required by *Wiley* to grant arbitration and was prohibited by *Burns* from so doing because the union's goal was a requirement that Howard Johnson hire all the Grissom employees. *Wiley* sought only protection from sudden changes in the terms and conditions of employment for retained employees.[126] Thus the holding in favor of Howard Johnson was compelled so that "the protection afforded employee interests in a change of ownership by Wiley is . . . reconciled with the new employer's right to operate the enterprise with his own independent labor force."[127]

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123. *Id.* at 2244.

124. Thereby apparently overruling the expansion of the *Wiley* rationale even in § 301 cases where not involving a merger. *See* Wackenhut Corp. v. Int'l Union, United Plant Guard Workers of America, 332 F.2d 954 (9th Cir. 1964).

125. Howard Johnson Co. v. Detroit Local Joint Executive Bd., 94 S.Ct. 2236, 2243 (1974). However, the citation is to a footnote in *Burns* which merely states this as Board policy up to the time of *Burns*. *But see* Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 n.6 (1973).

126. Howard Johnson Co. v. Detroit Local Joint Executive Bd., 94 S.Ct. 2236, 2244 (1974).

127. *Id.*

IV. Conclusion — What Are the Obligations of New Management?

The Supreme Court in *Howard Johnson* rejected the court of appeals' approach of first determining that new management was a "successor" and then asking whether a "successor" must arbitrate.

> The question whether Howard Johnson is a 'successor' is simply not meaningful in the abstract. Howard Johnson is of course a successor employer in the sense that it succeeded the operation of a restaurant and motor lodge formerly operated by the Grissoms. But the real question . . . is . . . what are the legal obligations of the new employer to the employees of the former . . . owner . . . . The answer . . . requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case . . . .[128]

This, of course, is not helpful to future employers who would like to know what their obligations are before they assume a former employer's business. But while the Court rejected a mechanical approach, it did make clear what *Burns* and the Board had long held: that the most important factor in determining whether the new management has any obligations to the employees of its predecessor is whether a substantial portion of the employees are re-hired. "Since there was plainly no substantial continuity of identity in the work force hired by Howard Johnson with that of the Grissoms . . . the courts below erred in compelling the Company to arbitrate . . . ."[129]

Burns means that an absence of continuity in the work force will mean no obligation exists, even to bargain with the union representing the employees of one's predecessor. *Howard Johnson* stands for the proposition that such an absence will also mean no obligation exists to observe an arbitration clause in a predecessor's collective bargaining contract with respect to the predecessor's employees' rights. Since new management has the right to hire or not hire whomever it chooses, it appears that all obligations to the predecessor's union can be avoided.[130] However, if one hypothesizes a situation where continuity exists in the work force, the apparent inconsistency between *Wiley* and *Burns* remains to haunt the new employer. *Burns* allows the new employer to ignore substantive terms of a

128. *Id.* at 2243, n.9.

129. *Id.* at 2244.

130. However, hiring cannot be done with prejudice toward employees who are union members. *See* note 68 and accompanying text *supra*.

predecessor's collective bargaining agreement even where continuity of the work force exists. By deciding *Howard Johnson* solely on its facts, the Court leaves a situation where continuity of the work force will leave new employers subject to a previous arbitration clause, while the lack thereof will leave him free. This means either that *Howard Johnson* was a very narrow decision and *Wiley* lives on, or that *Wiley* is effectively dead. In light of the feeling in *Howard Johnson* that the forum should not govern the outcome[131] and that the new management should be free to operate its business unencumbered by prior collective bargaining agreements,[132] this author believes that the latter is true.[133]

LATHROP MEAD GATES

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131. *See* text accompanying note 123 *supra*.

132. *See* text accompanying note 127 *supra*; Howard Johnson Co. v. Detroit Joint Executive Bd., 94 S.Ct. 2236, 2243 (1974); NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272, 287-88 (1972).

133. Except as *Wiley* is limited to its holding that a successor employer is required to arbitrate the vested rights of employees which it retains.