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A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach

Frederick K. Slicker*

The principal role of law in the development of American labor-management relations has been to create an atmosphere within which the interested parties may voluntarily resolve their differences in order to insure an uninterrupted and unimpeded flow of commerce within society. The predominant legal difficulty has been to develop general principles that strike an equitable balance between the employer’s quest for profits and the employee’s search for security. The inherent tension between entrepreneurial prerogative and employee security is brought into sharp focus where the identity of the employer changes after the employees have won officially recognized collective power to press their demands against their prior employer. The National Labor Relations Board has developed what it calls the doctrine of employer successorship to balance the interests of the parties in particular disputes of this nature. An excellent illustration of the conflicting interests involved and of the confusion accompanying the application of the doctrine is presented by the Supreme Court’s recent decision in NLRB v. Burns International Security Services, Inc.† Burns held that an employer who won a competitive bid to assume a service contract was obligated to recognize and bargain with the existing union where the new employer retained a majority of the former employees and where the union was certified as exclusive collective bargaining agent of these employees only four months prior to the award of the contract. The Court refused, however, to hold the new employer bound by the terms of the newly negotiated collective bargaining agreement between the union and the former employer. This Article examines the utility and viability of the doctrine of successorship with particular emphasis on the impact of Burns.

I. THE EVIL TO BE REMEDIED

Before embarking on a discussion of the various criteria

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* Harvard candidate for LL.M. Degree; member of the Kansas bar.
† 406 U.S. 272 (1972).
utilized to determine the successorship issue, it is essential to understand definitively the evil to which the doctrine is directed and the nature of the problems which threaten to impede progress toward eliminating that evil. It is the ultimate goal of national labor policy to maximize both freedom of choice and economic stability for all interested parties while minimizing governmental intervention. Successorship represents one attempt to strike an equitable balance where various legitimate, though inherently conflicting, interests clash. The former employer asserts a property right to freely transfer his assets and rearrange his business. The new employer seeks to achieve economic efficiency in the ongoing enterprise with the least possible labor disruption in order to maximize profits. Both old and new employee groups seek to maximize their monetary benefits within the framework of continued employment under favorable working conditions. The union which represents the former employee group and any competing union for the new employer, if there is one, asserts a right to represent the new employee complement. The existing union often won majority membership, employer recognition and contractual concessions only after great effort and expense. Any competing union seeks to reap the benefits of that effort. It is apparent that each of these separate interests, though inherently contradictory, is mutually dependent.

The present employer is rarely surprised to learn of an impending change in employer identity, since any such change is usually the product of its extensive planning. Where any employer hardship or difficulty is anticipated, prior planning and economic power can be asserted to eliminate the problem or diminish it to a tolerable level. If this is not possible, the employer change probably will not occur. On the other hand, the impact of change in employer identity often occurs without prior warning to the employees and leaves them little, if any, opportunity to plan in its wake. Such a change may be peculiarly harsh for the individual employee, since it often is accompanied by a reduction in pay or the loss of accumulated rights and benefits or even a loss of employment. Further, the employees' union choice and the continued vitality of any contract negotiated in their behalf with the employer are jeopardized by the employer change. Even where the employee learns of an impending change, he is largely without effective power, even through his union representative, to bring his overwhelming interests to bear on the employer's plans. It is this inequitable imbalance of im-
EMPLOYER SUCCESSORSHIP

II. DETERMINATION OF SUCCESSORSHIP

A. Successorship Defined

At the outset, it should be noted that nowhere in the pronouncements or legislative history of the national labor laws is the problem of employer successorship specifically addressed. The doctrine is purely a creation of the NLRB acting pursuant to its congressional mandate to fashion principles and procedures to effectuate national labor policies and objectives. In

2. The problem of employer successorship first received congressional attention in the hearings which culminated in the recent amendments to the Service Contract Act, 41 U.S.C. § 351 (1970), which specifies minimum wage and fringe benefit standards in service contracts at government installations. Section 4 of the Act was amended to provide inter alia,

No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract.

Pub. L. No. 92-473 (Oct. 9, 1972). This amendment was in large part precipitated by the succession of Boeing to TWA's installation service contract at the Kennedy Space Center in 1971. There, TWA employed approximately 1100 employees to perform fire, guard, and janitorial services at the government installation. These employees were represented by the Machinists under an addendum to TWA's nationwide collective bargaining agreement with the Machinists. This addendum constituted a two-year agreement, eight months of which remained at the time when Boeing succeeded TWA as contractor. Boeing also employed 270 employees in a separate unit at the space center, these employees being engaged in mission launch operations. These employees were also represented by the Machinists. At the time of Boeing's succession, Boeing employed only 400 of the former TWA installation service employees. In a suit for declaratory judgment brought by Boeing, the court held that Boeing was not a successor to TWA as it did not retain in its employ a majority of the former employees. Boeing Co. v. Int'l Ass'n of Machinists & Aerospace Workers, 351 F. Supp. 813 (M.D. Fla. 1972) (appeal pending before the Fifth Circuit).

3. The first reported use of successorship came in a case which questioned the scope of the Board's authority to issue remedial orders against a partnership newly created by operation of law. There a partnership engaged in a systematic scheme of interrogation and intimidation against its employees following Board certification of the union. While unfair labor practice charges were pending before the Board, one of the partners died and, therefore, the partnership dissolved by operation of law. In enforcing the Board's order against the old and new partnership and the executrix of the dead partner's es-
general terms, a new employer is held to be a successor where there remains in existence a "substantial continuity in the identity of the employing enterprise,"\textsuperscript{4} based on an analysis of the totality of the circumstances from the viewpoint of the employees.\textsuperscript{5} The fluidity of this factual determination has been "shrouded in somewhat impressionistic approaches,"\textsuperscript{6} resulting in considerable conflict and constant confusion.

B. Relevant Criteria

1. Work Force Composition and Size

Numerous factors have been considered by the NLRB and the courts to determine successorship.\textsuperscript{7} Since successorship arose out of a desire to protect the union decision of the former employees, it would seem that the principal criterion for finding successorship should be the extent to which the composition of the prior work force survived the change in employer identity. Thus, when a majority\textsuperscript{8} of the new work force does not consist...
of employees of the former unit, successorship should be denied, and when such a majority of former employees does exist, successorship should be found. Indeed, the Board has found successorship in only one case where such a majority did not exist, except where the new employer’s hiring practices constituted unfair labor practices through illegal discrimination against former union employees. In this regard, it should be observed that the Board has never imposed a requirement upon the successor to hire the former employees merely because they were former employees, but the Act does prohibit the employer from discriminating against union members in its hiring techniques.

On the other hand, the Board has occasionally found the new employer not to be a successor even though the new work force consisted of a majority of the former employees. It is difficult for the new employer to be a successor bound to recognize and bargain with the union since a majority of the new work force consisted of former employees represented by the union. See also Johnson Ready Mix Co., 142 N.L.R.B. 437 (1963), and Oilfield Maint. Co., 142 N.L.R.B. 1384 (1963). But see the dissent in Burns for a suggestion to the contrary. 406 U.S. 272, 296-310 (1972).


10. NLRB v. Lunder Shoe Corp., 211 F.2d 234 (1st Cir. 1954); Randolph Rubber Co., 192 N.L.R.B. 496 (1965); Richard W. Kaase Co., 141 N.L.R.B. 249 (1963), enforced in part, 346 F.2d 24 (6th Cir. 1965).

11. Firchau Logging Co., 126 N.L.R.B. 1215 (1960). In Firchau the new employer was a subcontractor of the predecessor, hiring 30 of his 62 employees from the ranks of the former unit. However, at the time of demand for recognition by the union, the union possessed membership cards of 43 of the 62 employees. There was a six month seasonal break in work, but the new employer began operations within the certification year. The Board held the new employer to be a successor, relying upon a presumption of continued majority within the certification year.

12. K.B. & J. Young’s Super Markets, Inc. v. NLRB, 377 F.2d 463 (9th Cir. 1967), cert. denied, 389 U.S. 841 (1971) (where the new employer hired all new employees after he had procured the discharge of all the former employees). See also Columbus Janitor Serv., 191 N.L.R.B. No. 125, 77 L.R.R.M. 1737 (1971) (where the new employer hired all new maintenance employees through the state employment agency and thereafter unlawfully solicited memberships for the union which represented its employees at its other job sites).

13. Tri State Maint. Corp. v. NLRB, 408 F.2d 171 (D.C. Cir. 1968). (Successorship denied by the court of appeals since a majority of former employees were not in the new unit and the evidence of discrimination was conflicting and insufficient to enter such a finding.) See also footnote 5 of the Supreme Court’s Burns decision. 406 U.S. 272, 280-81 n.5 (1972).

14. 29 U.S.C. § 158(a) (3) (1970). [Future references will hereinafter be shortened to § 158(a) (3), NLRA, for example.]

to reconcile these latter cases with the notion of protective continuity of employee interests, except as an indication that in unusual cases other factors may outweigh work force composition in deciding the issue of successorship.\textsuperscript{16}

One factor which is closely related to the composition of the work force is its comparative size with the former employee unit. However, prior NLRB and court decisions reveal no consistency in their application of this factor to the determination of successorship. Thus the Board has found successorship,\textsuperscript{17} and denied it,\textsuperscript{18} where the new employee complement was drastically reduced in size. Similarly, the decisions have been both for\textsuperscript{19} and against\textsuperscript{20} successorship where the new work force was sig-
nificantly larger than the former employee complement.

2. Personnel Policy

In addition to the composition of the work force, changes which affect personnel policy formulation have been considered controlling criteria in denying successorship in certain cases. For example, successorship has been denied both where a small, locally-operated business was consolidated with a large multi-state operation\(^2\) and where a national enterprise was reduced to one of local scope.\(^2\) Successorship also has been denied where a single business operation was split into separate competing enterprises,\(^2\) and where a new employer consolidated into one plant a manufacturing operation formerly carried on in separate plants in different states.\(^2\)

Seemingly as important as the formulation of personnel policies is the execution of such policies by the employee's direct supervisors. The retention of the same supervisors has significantly aided in the conclusion of successorship,\(^2\) while

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\(^{1}\)See also Union Texas Petroleum Corp., 153 N.L.R.B. 849 (1965) (new employer operated newly acquired plant as one division along with its other 15 petrochemical plants in other states).\(^{2}\)Contra, NLRB v. Zayre Corp., 424 F.2d 1159 (5th Cir. 1970) (prior national discount store administered each store separately and treated its licensees as separate operations but the new management treated all stores on a national basis and its licensees as a part of the employee complement of the store). Accord, International Chemical Workers Union v. NLRB, 395 F.2d 639 (D.C. Cir. 1968).

\(^{2}\)See also G.T. & E. Data Servs. Corp., 194 N.L.R.B. No. 102, 79 L.R.R.M. 1727 (1972) (new business employed 21 computer employees out of 3,000 employees in the former general telephone utility business).


changes in supervision have contributed to a denial of successorship.26

3. Lapse in Production

Since continuity in the employing industry is the focus for successorship, it would seem that the existence or nonexistence of an operational break in production caused by or resulting from a change in employer identity would significantly affect the finding of successorship. Once again, however, no discernible pattern emerges from prior NLRB and court decisions. Generally, where no hiatus occurs the new employer is found to be a successor,27 though the opposite result has been reached on a number of occasions.28 Similarly, some significant lapse in operations has been important where the Board has denied successorship,29 though again, the opposite result has often obtained even though the hiatus was of considerable length.30

4. Change of Product

Significant attention also has been focused upon the degree of similarity between the old and the new product produced or the service rendered. Once again, no clear pattern emerges at either the Board or appellate court level. Where the product or service remains the same, the new employer is generally found to be a successor,31 though this is not assured.32 Where the


31. NLRB v. Armato, 199 F.2d 800 (7th Cir. 1952) (maintenance
product or service is changed, the new employer is unlikely to be held a successor, although again, there is authority to the contrary. Similarly, the discontinuance of a portion of the products formerly produced or the services formerly rendered has resulted in inconsistent decisions.

and sale of metal products); NLRB v. Blair Quarries, Inc., 152 F.2d 25 (4th Cir. 1945) (mining); Randolph Rubber Corp., 152 N.L.R.B. 496 (1965) (manufacture of canvas and rubber shoes).


34. NLRB v. DIT-MCO, Inc., 428 F.2d 775 (8th Cir. 1970) (manufacture of radio electronic test equipment changed to manufacture of more sophisticated electronic equipment); NLRB v. Alamo White Truck Serv., Inc., 273 F.2d 238 (5th Cir. 1959) (truck sales, parts and service changed to service only); Syncro Machine Co., 62 N.L.R.B. 985 (1945) (manufacture, assembly, and welding of heavy duty ship parts changed to manufacture of high speed precision equipment, coupling, and elevator parts).

35. Successorship was denied in Davenport Insulation, Inc., 184 N.L.R.B. No. 114, 74 L.R.R.M. 1726 (1970) (one of five divisions of the former acoustical tile business was severed); Diamond Nat'l Corp., 133 N.L.R.B. 268 (1961) (the matchbook portion of the former lumber processing business was discontinued); Sewell Mfg. Co., 72 N.L.R.B. 85 (1947) (new employer purchased 2 of 3 manufacturing plants and continued operations in same location). Successorship was found in Maintenance, Inc., 149 N.L.R.B. 1299 (1964) (garbage and maintenance service contract split into separate parts).

36. Successorship was denied in Triumph Sales, Inc., 154 N.L.R.B. 916 (1965) (four additional stores and a gourmet food line were added to the former retail liquor business which consisted of 7 stores). Successorship was found in C.G. Conn, Ltd., 197 N.L.R.B. No. 84, 80 L.R.R.M. 1387 (1972) (addition of several new musical instruments to the prior business); Polytech, Inc., 186 N.L.R.B. No. 148, 75 L.R.R.M. 1491 (1970) (78% of the new employer's products were added to the former business of manufacture of plastic products). See also NLRB v. Zayre Corp., 424 F.2d 1159 (5th Cir. 1970) (new products added to the sales line of prior discount business).
5. Change of Plant Location

Changes in the location of the plant or the place where the services were rendered is another factor in assessing continuity in the employment relations which could significantly affect the employees' decision regarding unionization. Where such changes have occurred, however, the NLRB and the courts have usually disregarded this factor and still found successorship, though there is authority to the contrary.  

6. Changes in Internal Operations

In addition to the criteria already mentioned, the Board and the courts have also focused on whether various internal operations of the prior employer have been altered following the change in employer identity. Some of the alterations considered important include those in machinery and equipment, inventory, work in progress, methods of operation, job classification, etc. (see 37, 38, 39, 40, 41).
EMPLOYER SUCCESSORSHIP

It appears that the courts which rely on such criteria do so by focusing undue attention upon the continuity of the former business entity rather than by emphasizing indicia of continuity which would affect employee union sentiment. Indeed, despite the importance of these considerations from the management's viewpoint, it is unlikely that significant alterations in any one of the above would profoundly influence the employees' union sentiment. If this is true, then to find such

43. Good will.
44. Trade name.
45. Accounts receivable.
46. Customers.
47. Suppliers.
48. Accounting methods.
49. Methods of financing.

40. It appears that the courts which rely on such criteria do so by focusing undue attention upon the continuity of the former business entity rather than by emphasizing indicia of continuity which would affect employee union sentiment. Indeed, despite the importance of these considerations from the management's viewpoint, it is unlikely that significant alterations in any one of the above would profoundly influence the employees' union sentiment. If this is true, then to find such

44. Eastland Lanes, 194 N.L.R.B. No. 149, 79 L.R.R.M. 1097 (1972) (successorship found where good will retained).
46. NLRB v. Tempest Shirt Mfg. Co., 285 F.2d 1 (5th Cir. 1960) (successorship found where accounts receivable assumed); Herman Loewenstein, Inc., 75 N.L.R.B. 377 (1947).
51. See generally Goldberg, The Labor Law Obligations of a Successor Employer, 63 Nw. U.L. Rev. 735, 804-05 (1969), for a similar conclusion. The possibility exists, however, that technological advancements in equipment, for example, could displace members of the work force. Job classifications frequently cause jurisdictional disputes among various unions, and changes in customers could affect wage or other contract rights as in the case of a driver-salesman of beer on a commission wage scale whose route is lengthened due to added customers, thereby reducing his sales time. Thus, a total disregard for
considerations compelling, or even persuasive, is to distort the basic purpose and policy behind the successorship inquiry.

7. Form of Succession

One further comment should be made regarding criteria for determining successorship. The form of the succession, that is, the means by which the new employer assumes operational control of the enterprise, has been consistently held to be immaterial to the analysis.\textsuperscript{52} Thus successorship has been found where a former partnership incorporated;\textsuperscript{53} where a former corporation dissolved into a partnership;\textsuperscript{54} and where a former corporation went through some form of corporate reorganization, such as a merger or stock transfer.\textsuperscript{55} Similarly, successorship has been found where the business was leased\textsuperscript{56} or a portion assumed,\textsuperscript{57} where the physical assets were purchased with\textsuperscript{58} or without\textsuperscript{59} intangibles, and even where the acquisition agreement expressly excluded the assumption of labor obligations.\textsuperscript{60} In addition, successorship has been considered where a purchase was from a creditor's committee,\textsuperscript{61} from the bankruptcy trustee,\textsuperscript{62} or upon

\begin{itemize}
\item these considerations would be as unmeritorious as an overemphasis upon them.
\item Valleydale Packers, Inc., 162 N.L.R.B. 1486 (1967).
\item Dickey v. NLRB, 217 F.2d 652 (6th Cir. 1954); Northwest Glove Co., 74 N.L.R.B. 1697 (1947); Simons Eng'r Co., 65 N.L.R.B. 1373 (1946).
\item NLRB v. Adel Clay Prod. Co., 134 F.2d 342 (8th Cir. 1943).
\item NLRB v. DIT-MCO, Inc., 428 F.2d 775 (8th Cir. 1970). The court there said, "Corporate transformations of these companies represented only an internal metamorphosis, not the creation of an independent separate business . . . ." Id. at 781. See John Wiley & Sons, Inc. v. Livingston, 378 U.S. 543 (1964) (involving successor arbitration); NLRB v. Tempest Shirt Mfg. Co., 285 F.2d 1 (6th Cir. 1960).
\item NLRB v. Armato, 199 F.2d 800 (7th Cir. 1972); NLRB v. Blair Quarries, Inc., 152 F.2d 25 (4th Cir. 1945); Alexander Milburn Co., 78 N.L.R.B. 747 (1947).
\item American Concrete Pipe, Inc., 128 N.L.R.B. 720 (1960); Firchau Logging Co., 126 N.L.R.B. 1215 (1960).
\item Georgetown Stainless Mfg. Corp., 198 N.L.R.B. No. 41, 80
\end{itemize}
assumption of a mortgage by the predecessor.63 Finally, successorship findings have been entered where the old and the new employer had absolutely no prior dealings, or where the former employer lost his sales franchise,64 or where he, as an independent contractor, was discharged by his employer65 or lost his contract in competitive bidding.66 These results follow from the underlying rationale of successorship since, from the employees' viewpoint, the method of change is immaterial to whether "the employing industry remained essentially the same."67

C. THE NEED FOR PREDICTABLE AND UNIFORM STANDARDS

The only conclusion which emerges from this analysis of criteria found relevant to determinations of successorship is that significant confusion, conflict, and contradiction exist. Perhaps the most that can be said is that each case is judged on its own unique combination of facts, the end result being instability in the law where predictability and uniformity seem eminently desirable. In the absence of some authoritatively elaborated, generally applicable standards, confusion will continue to reign.

III. THE APPLICATIONS OF SUCCESSORSHIP

Before discussing the application of the successorship doctrine to particular labor disputes, it is essential to distinguish pure successorship cases from what is referred to as "alter ego"

64. Tom-A-Hawk Transit, Inc. v. NLRB, 419 F.2d 1025 (7th Cir. 1969); Glenn Goulding, 165 N.L.R.B. 202 (1967).
cases. The latter category includes situations in which a technical change in employer identity is merely incident to the former employer's attempt to disguise its continuance because of that employer's union animus or an unlawful motive to avoid the commands of national labor laws. Where the "new" employer is held to be the alter ego of the former employer, the successor is responsible for the predecessor's labor obligations, since the law views them as the same employer in fact.  

The successorship issue has arisen in the following contexts: (1) the survival of the union's status as exclusive bargaining agent of the former employees and the new employer's duty to recognize and bargain with this union; (2) the Board's power to order the new employer to remedy unfair labor practices committed under the authority of the former employer; (3) the extent to which the new employer may be compelled to arbitrate employee grievances, arising out of the change of employer identity, under the former employer's collective bargaining agreement; and (4) the degree to which the new employer is bound by the substantive provisions of the collective bargaining agreement in effect at the time of the succession.

A. Survival of Certification and the Duty to Bargain

A labor union acquires the officially sanctioned status of exclusive bargaining agent of a particular group of employees either by voluntary recognition from the employer or by certification from the NLRB. An employer is legally permitted to voluntarily recognize the union without the compulsion of Board certification only upon a good faith belief that the union represents a majority of the employees in question. This recognition carries with it a presumption of union majority membership for a reasonable time. In the absence of voluntary recognition, section 9 of the NLRA empowers the NLRB to conduct an election upon a petition demonstrating the existence of a question of representation affecting commerce and to certify the results.

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thereof. A victory for the union imposes an obligation on the employer to recognize and bargain with the union, violation of which is an unfair labor practice. Disregard of this obligation raises an almost conclusive presumption of continued union majority membership for twelve months following certification, absent extremely unusual circumstances.\textsuperscript{69} Thereafter, the presumption is rebuttable upon the employer's demonstration of an honest good faith doubt as to the union's majority status.

Precedent clearly and consistently indicates that a determination of successorship carries with it the survival of the union's certification requiring the employer to recognize and bargain with the union.\textsuperscript{70} Ordinarily where the employer is found to be a successor, he is required to recognize and bargain with the union. Similarly, a denial of successorship denies the vitality of the certification and relieves the new employer of any obligation to the predecessor's union, absent a union showing of majority membership or a new Board certification.\textsuperscript{71} Except for the absence of the twelve month presumption,\textsuperscript{72} no difference exists between the successor's duty to the union where there

\textsuperscript{69} Ray Brooks v. NLRB, 348 U.S. 96 (1954).
\textsuperscript{70} Where, as here, no essential attribute of the employment relationship has been changed as a result of the transfer, the certification continues with undiminished vitality to represent the will of the employees with respect to their choice of bargaining representative, and the consequent obligation to bargain subsists notwithstanding the change in the legal ownership of the business enterprise.

Stonewall Cotton Mills, 80 N.L.R.B. 325, 327 (1948).


For a statutory exception to the successor's duty to bargain, see Davenport Insulation, Inc., 184 N.L.R.B. No. 114, 74 L.R.R.M. 1726 (1970). In Davenport, a successor employer engaged in the construction industry did not violate the Act when it refused to bargain with a union which had contracted with the predecessor because the union's contract was entered into pursuant to section 8(f) of the Act. This section relieves successors of the duty to honor a bargaining obligation when there is no independent proof of the union's majority status and of the successor's unlawful refusal to bargain.

MINNESOTA LAW REVIEW

was voluntary employer recognition by the predecessor or where the certification year has passed.\(^{73}\)

Underlying the union's certification is a determination by the Board that the employee group is an appropriate bargaining unit. Section 9(b) of the Act invests the Board with exclusive and wide discretion in this regard. Indeed, the Board's discretion is so broad that the courts on review merely require it to state rational reasons for the unit determination\(^{74}\) and reverse only where the Board does clear violence to its congressional mandate by an arbitrary or unlawful unit designation.\(^{75}\)

The guiding principle of the NLRB in questions of unit appropriateness has been a search for the existence of a community or mutuality of employee interests.\(^{76}\) Similarity in wages, duties, skills and working conditions,\(^{77}\) the expressed desires of the employees,\(^{78}\) the extent of employee organization,\(^{79}\) and the history of collective bargaining within the plant, company or industry\(^{80}\) are some of the important factors considered in the Board's exercise of its discretion in these cases.

In the past, questions of unit appropriateness have evoked heated controversy among the parties, because this decision as a practical matter often determines which union, if any, will win the election. To illustrate the complexity of the problem, one need only recall the now familiar life insurance cases where the

\(^{73}\) Richard W. Kaase, 141 N.L.R.B. 245 (1963), modified, 346 F.2d 24 (6th Cir. 1965).


\(^{78}\) Pittsburg Plate Glass Co. v. NLRB, 313 U.S. 146 (1941); Globe Machine & Stamping Co., 3 N.L.R.B. 294 (1937) (Separate elections were ordered to determine the employee sentiment among four competing unions in one plant.)

\(^{79}\) Section 9(c) (5), NLRA, precludes this being the exclusive criterion used in unit determinations. NLRB v. Moss Amber Mfg. Co., 264 F.2d 107 (9th Cir. 1959). Cf. NLRB v. Quaker City Life Ins. Co., 319 F.2d 690 (4th Cir. 1963) (The court sustained the board's use of this as one of many criteria in the unit decision.).

\(^{80}\) Radio Corp. of America, 66 N.L.R.B. 162 (1946).
question was whether a single-office unit, a state-wide unit, or a company-wide national unit was appropriate, or the long undulating history of unit determination in the face of demands for craft severance. These issues raise perplexing problems for the Board, since the decision is rarely a choice between one appropriate unit and an inappropriate alternative but more often is among several completely appropriate units.

Unit determinations cause peculiar difficulties in successorship cases. Indeed, the issue has been so important that one might conclude that once the unit determination is made, successorship itself is resolved. There is clear authority to the effect that the mere change in ownership of a plant is insufficient to disrupt an established bargaining unit. This result logically follows the policy behind the factors determinative of unit appropriateness, since the employee's mutuality of interests is unaffected by a mere change in ownership of the plant. Equally indicative of a lack of successorship is an alteration in employer identity which so disrupts the prior employment relationship that the prior unit is no longer appropriate. However, to conclude that a determination of unit appropriateness ipso facto determines successorship paints the issue with too broad a brush.

The cases in which the unit is destroyed include the troublesome situations in which the Board applies its doctrine of accretion. An accretion occurs where an employee unit is added to, and becomes integrated or commingled with an existing unit to such an extent that the former unit completely loses its separate identity. The criteria for finding an accretion seem to closely follow those mentioned in connection with determining an appropriate unit, including the survival of an independently identi-
fiable group of employees with a community of employee interests. These problems are most perplexing where two existing, organized employee units are integrated by the change in employer identity. Where the accretion issue is factually close, the Board tends to deny the accretion argument in the interest of employee free choice and in view of the serious consequences which follow the decision in favor of an accretion. The accreted employees are treated as new employees in the surviving unit, entitled to representation by the surviving union and subject to its collective bargaining agreement, if one exists. Thus the accreted employees lose their right to exercise free choice in the selection of the union which represents them. This is true even where the employee union sentiment in the surviving unit was closely split before the addition of the accreted employees, although the new employees might upset the earlier decision if afforded a chance to vote. Nevertheless, if an accretion exists, the presumption of continued union majority survives.

In these circumstances, the new employer faces a dilemma. If he treats the new employees as an accretion to his existing unit and the Board disagrees, the employer commits an unfair labor practice by not recognizing and bargaining with the added employee's union. On the other hand, if the employer recognizes and bargains with the new employee's union and the Board finds an accretion, the employer has committed an unfair labor practice by recognizing and bargaining with a union that is not the exclusive bargaining representative of the employees in the unit. Indeed, whichever course of action the employer adopts, the opposing unions will press their viewpoints to the limit, with the employer caught in the crossfire. One escape for the employer is provided by section 9 (b) of the Act, which permits the Board to issue a unit clarification order upon a proper application. Alternatively, the employer may seek an election by the employees, but normally the Board's contract bar rules provide


89. The Board has developed a rule declining to hold an election during the term of an existing collective bargaining contract of rea-
vent such an election. The only other alternative is to prepare to defend against unfair labor practice charges.

The Board's rationale for denying accretion except upon a strong showing of complete integration achieves the objective of maximizing employee free choice, but only at the cost of potential employee tension. Where the accretion argument is denied, the employer has two unions with which to bargain: the union representing the existing unit and the union representing the newly-added employees. Rarely is stability enhanced where employees of the same employer do substantially the same work but under less satisfactory terms than other employees. As long as the employees are not commingled or integrated, the potential for tension is diminished. This is common where the employer has plants in multiple locations. But requiring the complete destruction of an employee unit is far removed from a standard which precludes accretion where there exists only partial integration. Indeed, a greater integration of employees is the basis for a stronger accretion argument. It is the rejected but relatively meritorious accretion case which heightens the potential for ultimate employee dissatisfaction. The judgment is to a large extent one of degree and requires an examination of all the relevant circumstances.90 The Board's rule merely opts to place the burden of proof upon the party asserting the existence of an accretion, which in general seems best calculated to achieve the purpose of the Act.

B. AN UNCERTAIN HISTORY: THE DUTY TO REMEDY PRE-EXISTING UNFAIR LABOR PRACTICES AND THE Milburn DoctrINe

The doctrine of successorship not only requires the successor to recognize and bargain with the existing union but also to remedy unfair labor practices committed by his predecessor.91 For example, the predecessor's refusal to bargain with and to

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91. The distinction between bona fide successorship and alter ego cases mentioned at text accompanying note 68 supra, applies with special force in this area.
recognize a designated employee representative is in itself an unfair labor practice for which the proper remedy is a bargaining order. Since the successor has an independent duty to bargain, it is not surprising that it is required to remedy this type of unfair labor practice.\textsuperscript{92} Such an order operates prospectively only, however, and is to be distinguished from cases in which the Board's remedial power operates retrospectively to require correction of past misconduct, such as ordering reinstatement with back pay in a case of an unlawful discharge of an employee because of the predecessor's union animus or discrimination. Even in this latter case, however, the NLRB has imposed the remedial obligations of the predecessor upon the successor. The Board does not here distinguish between successorship for bargaining purposes (prospective only) and successorship for unfair labor practice purposes (retrospective), but analysis indicates that this latter class of successorship is far more restrictive than the former.\textsuperscript{93}

The history of successorship in unfair labor practice cases has not been consistent. The NLRB initially declined without explanation to impose such a duty upon the lessee of an enterprise, even though the lessee retained in its employ the predecessor's supervisors who were responsible for the unlawful interrogation and threats against certain employees. The Board there emphasized the continued existence of the predecessor and assumed the predecessor's return to the job site at the expiration of the lease.\textsuperscript{94} Three years later, in \textit{Alexander Milburn Co.},\textsuperscript{95} the Board reversed its position and held that the bona fide purchaser with knowledge of the pending unfair labor practice charges was liable to remedy his predecessor's misconduct. The

\begin{footnotes}
\footnotetext{93.} See Comment, Purchaser's Liability for Predecessor's Unfair Labor Practices—Duty to Reinstatement with Back Pay, 13 Vill. L. Rev. 232 (1967); Comment, Independent Purchaser Held Responsible for Remedy Predecessor's Unfair Labor Practices, 42 N.Y.U. L. Rev. 1202 (1967). It should be noted that there exists some prospective application even in correcting past misconduct as when the Board orders the successor to cease and desist from these unlawful practices. This remedy is predicated on finding a course of employer conduct indicating a proclivity to continue unless restrained by the threat of contempt proceedings. It is questionable whether this type of remedy is appropriate against a successor when such a course of conduct does not exist.
\footnotetext{94.} South Carolina Granite Co., 58 N.L.R.B. 1448 (1944), enforced sub nom. NLRB v. Blair Quarries, Inc., 152 F.2d 25 (4th Cir. 1945).
\footnotetext{95.} 78 N.L.R.B. 747 (1947).
\end{footnotes}
Board reasoned that (1) the new employer was the only instrument through which a remedy was possible since the former employer had ceased to exist as a viable business entity; (2) the successor actually benefited from the unfair labor practices to the extent they discouraged the employees in the exercise of their section 7 rights to free choice and to organize; and (3) from the employees' viewpoint the mere change in employer identity gave little assurance against continued union hostility. On balance, the Board found no compelling employer interest in not requiring the successor to remedy the unfair activities, particularly where the new employer purchased the former employer's business with knowledge of the pending unfair labor practice complaint.

However, the Milburn rationale was destined for quick rejection. In *NLRB v. Birdsell-Stockdale Motor Co.*, the Tenth Circuit Court of Appeals reasoned that the Board's remedial authority flowed exclusively from section 10(c) of the Act which, though broadly empowering the Board to "take such affirmative action ... as will effectuate the policies of the Act," was on its face limited to "parties named in the complaint." Analogously, the court looked to Rule 65(d) of the Federal Rules of Civil Procedure, which applies to Board proceedings through section 10(b) of the Act. That rule denies injunctive relief except against "parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice" of the hearing. The court distinguished Supreme Court authority which enforced the Board's power to bind "successors and assigns" in a case where the successor was found to be an alter ego of the predecessor. In the absence of similar circumstances, the court found a lack of sufficient nexus between the former employer and the bona fide purchaser with knowledge of the unfair labor practice to order enforcement of the Board's remedial order.

Soon thereafter, the Board reexamined its Milburn rationale and again reversed its position, concluding that it lacked statutory authority to impose its remedial authority upon a bona fide purchaser with knowledge of the pending unfair labor practices, at least where this successor was not made a party to the

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96. 208 F.2d 234 (10th Cir. 1953).
98. *Accord, NLRB v. Lunder Shoe Corp.*, 211 F.2d 284 (1st Cir. 1954).
More recently, in *Perma Vinyl Corp.*, the Board revived *Milburn* on the grounds that its prior position was unjustified, overly restrictive and purely self-imposed, rather than a mandate from Congress. Throughout this history of conflicting results, the Board remained steadfast to the extent that if the successor agreed upon purchase to assume its predecessor's labor obligations and if the successor had at least constructive knowledge of pending unfair labor practice allegations, the successor was jointly and severally bound to remedy this misconduct with its predecessor.

Since the rebirth of the *Milburn* doctrine, and for that matter throughout its history, the Board has never imposed the remedial duty upon any successor that was a bona fide purchaser unless it at least had constructive knowledge of the existence of unresolved employer unfair labor practices. For example, if the complaint had resulted in the Board's adjudication and a remedial order had been issued against the predecessor at the time of succession, this judgment would be sufficient to give the successor knowledge. If the complaint had not been heard but had been filed with the Board at the time of succession, its existence and the successor's opportunity to be heard as an intervenor would be constructive knowledge. Similarly, the successor's retention of his seller's supervisors or other top management actively involved in the commission of the alleged unfair labor practices would be deemed by the Board to be constructive knowledge, even in the face of the successor's denial of actual knowledge.

The rationale for this constructive knowledge requirement is that the knowing purchaser can modify the terms of purchase to require indemnification from the predecessor while the inno-

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100. 164 N.L.R.B. 968 (1967), enforced sub nom., NLRB v. United Pipe & Foundry Co., 398 F.2d 544 (5th Cir. 1968).
cent purchaser is without such a remedy. However, successor benefit and alleviation of employee fear against future misconduct are not affected by the successor's degree of actual or constructive knowledge of the prior illegalities. The disappearance of the prior employer as a business entity leaves only the successor available for remedial action and this should be a significant factor in determining whether the successor should remedy past misconduct. In any event, this criterion has been found insignificant in determining if the new employer is a successor required to remedy his predecessor's past misconduct.

In addition to its insistence upon a successor with knowledge, the Board has restricted imposition of the predecessor's remedial obligations to situations in which the successor is a purchaser. As indicated earlier, however, the method of succession in the bargaining context would seem irrelevant, and successorship has been found in a variety of situations, including competitive bidding and loss of franchise, even though the new employer had absolutely no contact with the predecessor. Again, if successor benefit and alleviation of employee fear of future employer misconduct are the rationales for imposing the remedial obligations of the prior employer on the successor, it is difficult to understand how those considerations do not exist regardless of method of succession.

In this context, except for the means of succession, the Board looks to the same criteria for finding successorship in the unfair labor practice setting as in the bargaining context, even though the underlying policies of the two are quite different. In the bargaining context, unit continuity and retention of a majority of the former employees in the new enterprise seemed the paramount, if not determinative, consideration. On the other

107. The only exception is Eastman Kodak Co., 194 N.L.R.B. No. 27, 78 L.R.R.M. 1569 (1971), where Kodak's prior plant maintenance and repair contractor was replaced by Kodak's newly formed, wholly-owned subsidiary. The Board found insufficient evidence to support the contractor's employee discharges to be discriminatory but imposed upon both Kodak and its subsidiary the obligation to remedy the contractor's employee threats and interrogation.
108. See text accompanying notes 52-67 supra.
110. See text accompanying notes 8-16 supra.
hand, a retention of a majority of the former employees in the new unit hardly seems relevant to remedying the illegal discharge of a particular employee. This criticism was rejected in the only case reaching the court of appeals since *Perma Vinyl*, which squarely raised the issue.\textsuperscript{111} Even the Board in that case distinguished the *Perma Vinyl* result by denying employee reinstatement where the new enterprise was substantially smaller than the predecessor.\textsuperscript{112} Thus, even though the Board has the power to fashion broad remedies, the exercise of that power is limited by equitable considerations.\textsuperscript{113}

C. Successor's Duty to Arbitrate Grievances under the Predecessor's Collective Bargaining Agreement

1. Wiley and the Imposition of Arbitration

In *John Wiley & Sons, Inc. v. Livingston*,\textsuperscript{114} a unanimous Supreme Court broke new ground for the notion of employer successorship by holding a successor obligated to arbitrate employee grievances within the framework of the predecessor's contractual labor obligations existing at the time of succession.\textsuperscript{115} Wiley, a New York City publishing firm employing 300 unorganized employees, merged with Interscience Publishers, Inc.

\begin{itemize}
\item \textsuperscript{111} We consider the remedy of requiring the successor to “share a joint and several responsibility in the matter of back pay” and rehiring with the predecessor to be an appropriate remedy to “effectuate the policies of the act” in situations like that here before the Court, but with the added circumstance that the company maintained substantially the same workforce.
\item \textsuperscript{112} Thomas Engine Corp., 179 N.L.R.B. 1029 (1970) (The unit was reduced from 130 to 97 with the new employer hiring 90 of the former employees.).
\item \textsuperscript{113} The Board will not require the successor to do the impossible. See Riley Aeronautics Corp., 178 N.L.R.B. 495 (1969) (where the successor and the predecessor ceased to manufacture airplane parts, had no employees, and were both bankrupt. The Board did not order reinstatement of 5 employees unlawfully discharged but did order back pay as a creditor's claim in bankruptcy.).
\item \textsuperscript{114} 376 U.S. 543 (1964).
\end{itemize}
which had 80 employees, 40 of whom were represented by the complaining union. At the time of the merger, four months remained on the existing collective bargaining agreement. Shortly after the merger, the Interscience employees were transferred to the Wiley plant and were to some extent integrated into the Wiley operation. Despite discussions among all the parties, no agreement was reached as to the impact of the merger upon the existing contract. Prior to expiration of the contract, the union filed suit under section 301 of the Labor Management Relations Act\(^{116}\) to compel Wiley to arbitrate disputes as to the survival of seniority rights, pension benefits, vacation and severance pay, job security and grievance procedures, after the merger and both during and after the expiration of the collective bargaining agreement. No recognition or bargaining claim was made by the union except to the extent required to fulfill the terms of the contract.

At the heart of the Court's reasoning in Wiley was the preferential position to which grievance arbitration had been elevated in the resolution of industrial disputes. The Court's famous Steelworkers Trilogy\(^{117}\) was fresh in mind and deeply implanted in the Court's notion of its duty in arbitration cases. There the Court unequivocally enunciated a strong policy to defer to the arbitrator, whose decisions are reversible by the courts only when the "arbitrator's words manifest an infidelity"\(^{118}\) to the essence of the collective bargaining agreement in question. This deference flows from the special role in labor relations of a collective bargaining agreement which the Court characterizes as the parties' voluntary and consensual effort to "erect a system of self government" in the plant. Thus the resulting contract is the "common law of the shop,"\(^{119}\) at the core of which is the enforcement apparatus: a grievance procedure culminating in binding arbitration. Within this framework, the arbitrator's role is to insure the continued vitality of the shop's common law by resolving the parties' disputes through a balancing of the parties' interests and by interpreting their collective bargaining agreement. Arbitration thus represents a continua-


tion of the collective bargaining process with the ultimate objective of reducing industrial strife, the alternatives to which are constant interruption of the production process through continual tests of industrial strength or constant resort to litigation in the courts. Neither of these alternatives enhances the chance for a viable and stable daily employment relationship.

The Court did not relate Wiley's duty to arbitrate to any specific provision in the existing contract or to the successor's express assumption of such obligations. Rather, the Court envisioned the successor's arbitral duty as arising generally from the collective bargaining agreement and from the demands of national labor policy. However, the asserted claims in this case arose directly from specific language in the contract, which Interscience would clearly have been obligated to arbitrate if it continued to exist. As a successor employer, Wiley thus stepped into the shoes of Interscience for the purpose of determining the scope and content of its duty to arbitrate. Presumably, if Interscience had had no collective bargaining agreement, or had an agreement without an arbitration clause, or had no duty to arbitrate the particular subjects in dispute under the contract, Wiley would have been under no obligation to arbitrate either.

2. The Uncertain Effects of Wiley
   
a. Contract Obligations of Nonsignator

Wiley left the law of successorship in a state of even greater instability and confusion than existed earlier.\textsuperscript{120} The Court ex-

\textsuperscript{120} The arbitrator factually found that the Interscience employees remained at their same jobs in the same plant producing the same product until January 12, 1962, some 2½ months following the merger, at which time they were transferred to the Wiley plant and became a "minority accretion" to the Wiley employee unit. At that time the union lost its status as exclusive bargaining representative and the contract ceased to be enforceable. Interscience Encyclopedia, Inc., 55 Lab. Arb. 210, 218 (1970). The award imposed no obligation upon Wiley to continue severance pay or pension fund contributions, though Wiley was held to honor seniority rights, job security provisions, and accrued vacation benefits following merger to the time the contract ceased to be viable. Id. at 225. The arbitrator distinguished the Board's decision in Burns.

Prior to Wiley, traditional concepts of privity determined the successor's duty. See text accompanying note 142 infra. Occasionally, however, an arbitrator refused to be bound by concepts of privity of contract and held that collective bargaining agreements which contained a "successor and assigns" clause bound as a matter of contract interpretation a bona fide purchaser with knowledge, even though the successor was not a party to such an agreement and did not expressly assume it. Walker Bros., 41 Lab. Arb. 844 (1963).
pressly refrained from judging the merits of the union's claims, leaving this entirely to the wisdom and flexibility of the arbitral process. Therefore, *Wiley* did not hold that labor duties other than submission to arbitration fell upon the successor. However, the Court gave the arbitrator little guidance as to what criteria should be used in the interpretation of the contract against a nonsignator. The only standard suggested by the Court is "whether or not the merger was a possibility considered by Interscience and the Union during the negotiation of the contract." The arbitrator could determine the intent of the union and the predecessor in the event of a merger by looking to the scope of the negotiations leading up to the contract or by examining the content of a "successors and assigns" clause in the contract.

This approach is subject to various criticisms. The content of the successors clause is always determined without full knowledge of the circumstances under which a later succession occurs; unknown are such factors as size of the respective employee groups, the degree of integration of the former employees into any new operation, the nature of such operations, and the union status of any employees within the new employer's existing operations. Just as these considerations seem relevant to resolving whether the new employer is a successor, they seem equally relevant to judge the content of any labor duties imposed upon the successor through the arbitral process. Further, just as the employees usually are not represented in the merger negotiations, neither is the new employer present when the former employer and the union negotiate the contract. While the successor's interests are to some degree represented in these negotiations, there exists considerable employer disagreement regarding where to draw the line with the union. To the extent that subsequent merger negotiations can take account of the possible imposition of these labor duties on the successor by adjustments in purchase price or successor insistence upon indemnification, no injury is done to the successor. But frequently that simply is not feasible, as where the successor and the predecessor have no contact whatsoever prior to the succession. Further, if the content of the contract controls, the interests of the employees hinge upon the union's ability to broaden the language of the successors clause. Unless succession is an immediate possibility, the predecessor employer is not likely to be too concerned about the scope of a successor clause.

in the face of immediate union demands for higher wages. This permits a possible distortion in the collective bargaining process, with the union demanding the broadest possible successor clause without vehement resistance by the predecessor.

Thus, whatever use the arbitrator makes of the intent of the parties to the contract, it should be recognized to be a legal fiction to impute that intent to a nonsignator. The Wiley requirement that the successor arbitrate with the union has merit in that it presumably leads the parties to the bargaining table and thereby minimizes industrial tension. But there seems little justification for magnifying the predecessor's intent by focusing exclusively upon it to interpret the extent to which any of its other labor obligations fall upon the successor. Yet Wiley suggests no other criteria by which the merits of the arbitration should be judged.

b. Impact on Successorship Determination in Other Contexts

Wiley seems also to be an aberration in terms of the criteria for finding successorship in other contexts. Admittedly, the Court focused upon the existence of a “substantial continuity of identity,” a criterion apparently derived from other successorship cases. But it concluded that such continuity is “adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty.” The ease with which employees are transferred to a different plant in a different location and assimilated into a different employer complement, though certainly relevant, would surely be only one of many factors considered for successorship in other contexts. Standing alone, even the greatest facility possible would be insufficient to warrant a finding of successorship for bargaining purposes. Indeed, successorship for bargaining purposes requires at least a continuation of the former unit with a majority of the surviving employee group being former employees, neither of which was present in Wiley.

By contrast, if Wiley involved only a question of arbitration of preexisting grievances or the amount of severance pay due under the contract, for example, then survival of a majority of the former employees may not be required to compel arbitration, particularly since the predecessor ceased to exist after the

merger. However, Wiley clearly involved more than arbitration of vested rights, since the union sought to arbitrate the continuation of substantive terms of the existing contract after the merger and even after the expiration of the contract itself. Conceptually, even by the Court's own authority, arbitration is merely an extension of the collective bargaining process. If the Court would not require bargaining by the successor under the Wiley facts, then surely the Court should not compel a mere extension thereof. This would countenance a difference in result merely because of the forum chosen by the union to effectuate its asserted right. Stated differently, perhaps Wiley's sweeping silence as to other criteria of successorship is a rejection of their relevance not only for arbitration but also for other purposes. If that was the desired result, why did the Court cite authority for successorship in which other criteria not only were present but specifically determinative of the successorship issue? The answer is to be found in the application of Wiley both by the courts in the arbitration context and by the NLRB in other settings.

c. Differential Terms and Conditions of Employment

One other disturbing aspect of Wiley exists in light of the facts there presented. The Court expressly avoided evaluating the impact of differences in employee terms and conditions of work which would undoubtedly flow from a continuation of any portion of the Interscience collective bargaining agreement, which purported to advantage the employees included thereunder as opposed to other employees in the surviving unit. Surely stability in the shop is impaired rather than enhanced by requiring integrated employees to work under different wages, vacation and severance pay, and seniority and grievance procedures.

124. Contra, Houston Beverage Co., Inc., 72-1 CCH Lab. Arb. Awards ¶ 8232. There the arbitration award ordered a continued difference in wage rates where the former employer's contract called for it, where both employers had contracts with the same union, and where the contracts were substantially the same except for the wage clause. The arbitrator cited as cases of labor stability and employee tolerance situations where differences in wage scales existed for employees working side-by-side doing the same work if the difference was attributable to a rational standard, such as seniority or product output. This award is also interesting in that the only clause which survived the change in employers was the wage clause. The arbitrator clearly stated that no case authority compelled the conclusion that any or all substantive terms of the contract survived just because the new employer is a successor or because the contract contains a "successors and assigns" clause.
(the precise issues raised by the union in Wiley) just because some of the employees had a contract with a former employer. The Court was willing to permit resolution of these issues by the arbitrator under an extremely limited scope of judicial review. Deference by the Court to an arbitrator’s decision is appropriate where the parties bargained for the arbitrator’s award, but it is less than persuasive where, as here, the successor was not a party to that bargain.

3. Wiley’s Progeny

The progeny of Wiley illustrate its inherent ambiguity. In Wackenhut Corp. v. United Plant Guard Workers, the court stated:

[t]he 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.125

In Wackenhut, the new employer purchased the former internal security partnership and retained all employees in the same job at the same plant under the same supervision and used the same company name, uniforms, weapons, and equipment. One of the former partners also became a corporate director of Wackenhut. In addition, there was substantial evidence to indicate that by its actions Wackenhut had in fact assumed the terms of the contract, except for the union shop, wage, and dues check-off clauses, even though there was no express assumption of the contract by Wackenhut. It would seem that to follow this mechanical all-or-nothing view of Wiley would disregard consideration of the impact of any change in the employment relationship resulting from the alteration in employer identity.126 However, a labor contract is a series of mutually dependent clauses where, for example, the quantity of wages is dependent on the


126. Two arbitral awards not only mechanically held the successor bound by the terms of the collective bargaining agreement but also held the successor bound to honor long-established past practices of the predecessor, even though such practices were not the subject of any term in the collective bargaining agreement. Elesco Smelting Corp., 71-1 ARB § 8404 (successor must pay Thanksgiving and Christmas bonuses, even when economic conditions of the business do not warrant it, where 20 year predecessor practice was established); Simonds Worden White Works, 67-2 CCH LAB. ARB. AWARDS ¶ 8652 (25 year’s vacation pay policy follows the merger).
other benefits guaranteed. Thus to permit the arbitrator to have carte blanche authority to pick and choose which terms survive is to allow the arbitrator to upset the delicate balance struck by the parties when the contract was made.

The Wackenhut view of Wiley was rejected in United Steelworkers v. Reliance Universal Inc., where the court ordered arbitration but declined to compel the successor, ipso facto, to assume the substantive terms of the contract, stating that 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 of any term or terms of that agreement inequitable.127

Reliance purchased the concrete plant in question as a going concern in a competitive posture in compliance with an FTC divestiture order to the former employer. However, it expressly excluded assumption of any labor obligations of its predecessor. This view of Wiley seems more in line with the purpose and language of Wiley itself implying a presumption of contract survival, though it may permit virtually unlimited arbitrator discretion to conclude which provisions of the contract survive without providing the arbitrator any guidance upon which to base his conclusion, other than a general notion of equity.128

An interesting by-product of Wiley is found in Monroe Sander Corp. v. Livingston,129 where the principal operated two separate, wholly-owned subsidiaries, both engaged in the manufacture of paint, one organized and the other not. For entirely non-discriminatory economic reasons, the principal elected to liquidate the organized plant and transfer its work to the other subsidiary, which hired no new employees despite the increase in work. Arbitration was ordered against the organized employer and the principal, though not against the surviving subsidiary, in a dispute concerning the retention of jobs covered by the contract in the surviving unorganized plant.

To date, the most formidable attack on Wiley is found in U.S. Gypsum Co. v. United Steelworkers.130 A lime plant and

127. 335 F.2d 891, 895 (3d Cir. 1964).
other business assets were purchased, the agreement expressly excepting intangibles and the survival of any labor obligations of the seller. U.S. Gypsum retained all but three of the former employees and continued operations without any hiatus or substantial change. U.S. Gypsum declined to recognize or bargain with the union or to assume any obligations under the existing contract. After twenty months of dispute and during the term of the contract, the union was decertified following a board-conducted election. U.S. Gypsum argued that it was not a successor and that none of the labor obligations survived by the terms of its contract of purchase. It further argued that Wiley was poorly argued, wrongly decided and, that if arbitration pursuant to Wiley was ordered, it could apply only to vested employee rights which had accrued at the time of purchase, not prospectively to any employer-employee relationship after the purchase, particularly in view of the union's decertification. Rejecting these arguments, the court ordered U.S. Gypsum to arbitrate the survival of the entire contract, especially the impact after the purchase upon the seniority and dues check-off provisions of the contract. The court specifically found that the survival of any contract provisions after the union's decertification was a question for the arbitrator rather than the court. Finally, the court deferred to the Board the question of alleged unfair labor practices arising out of U.S. Gypsum's refusal to recognize the union.

On the merits, the arbitrator found that U.S. Gypsum was a successor and that the entire contract survived the sale. The arbitrator ordered U.S. Gypsum to pay the union damages equal to the dues check-off obligations with interest but without contribution from the employees. Finally, pursuant to a wage reopening provision in the contract, the arbitrator ordered into effect a new wage scale. In a suit to compel enforcement of the award, the court refused to uphold those portions of the award which ordered a new pay scale and which ordered damages without employee contribution, as these portions of the award created new rights for the union not contained in the contract. The court, however, sustained the arbitrator's award regarding the survival of the contract, even though two courts of appeals\textsuperscript{132}.

\textsuperscript{131} This position finds support in International Typographical Union, Local 21 v. San Francisco Newspaper Printing Co., 247 F. Supp. 963 (N.D. Cal. 1965). To the extent Wiley can be limited to arbitration of vested employee rights already accrued at the time of succession, this is analogous to the successor's duty to remedy unfair labor practices committed by his predecessor prior to succession. But on its face, Wiley is not so limited.

\textsuperscript{132} William J. Burns Int'l Detective Agency, Inc. v. NLRB, 441
had refused to order the successor bound by the contract where the issue arose in the context of the successor's duty to bargain with the union:

It is difficult to perceive how a successor employer could be required to arbitrate claims arising on account of conduct after its take over in alleged violation of the agreement without, of necessity, holding that it was bound by the terms of such agreement.\(^\text{133}\)

In each of these cases, the respective employers claimed that Wiley was applicable only to a merger of employers where the former employer ceased to exist. In each case, however, the courts refused to confine Wiley to the merger situation, holding that its rationale applied with equal vigor to the sale of assets cases, whether or not the former employer remained in the same business in another location.

However, Wiley has been held inapplicable in cases where its application would result in instability rather than stability, due to competing and conflicting union claims. In McGuire v. Humble Oil & Refining Co.,\(^\text{134}\) a portion of a small local coal and fuel oil delivery company was sold to Humble, a large nationally operated, fully-integrated oil company. The former employer remained in business in another location. Each employee group was represented by a different union and each had an existing collective bargaining agreement. Humble's employee unit consisted of 518 employees, 260 of whom were drivers and 95 of whom were mechanics. Four of the 10 drivers and 9 of the 14 mechanics in the seller's unit were hired by Humble and fully integrated into the Humble operation. Following the sale, Humble argued that the new employees were an accretion to the existing unit in seeking a unit clarification from the Board. The Board agreed, expressly declining to comment on the survival of Humble's duty to arbitrate under the predecessor's contract. Thereafter, the court held that Humble owed no duty to arbitrate under the predecessor's contract since to find such a duty

F.2d 911 (2d Cir. 1971); NLRB v. Interstate 65 Corp., 453 F.2d 269 (6th Cir. 1971).

133. United Steelworkers v. U.S. Gypsum Co., 339 F. Supp. 302, 306 (N.D. Ala. 1972). This case seems likely to be appealed, though no record of a decision on appeal has been found. Indeed, if the view taken herein of Burns is sound (see text accompanying notes 178-181 infra), the case will be reversed to the extent that U.S. Gypsum must honor substantive terms of the predecessor's contract since there was a clear manifestation by U.S. Gypsum prior to succession not to be bound by the contract. U.S. Gypsum would be obligated to bargain, however. Similarly, Reliance is of doubtful vitality after Burns.

"could be a source of endless exacerbation and conflict for all concerned." It is interesting to note that here, as in Wiley, the employee unit significantly changed as a result of the employer shift and the former employees were by no means a significant part of the remaining employee complement. The only apparent difference is that Humble's employees were organized and Wiley's employees were not. Surely the law would not permit this difference to control the result, since section 7 of the Act protects the employees' right not to organize as well as their right to organize.

Wiley has also been distinguished and arbitration denied in other cases where competing union claims existed. In one case, for example, the employer consolidated two separate trucking terminals, each represented by a different union. The court found that processing grievances under either union's contract, pending NLRB resolution of the unit question, would deprive the employer of his required neutrality, thus forcing the employer to commit an unfair labor practice. A similar result was reached where an organized employer purchased, free of all claims from the trustee in bankruptcy, a corrugated box manufacturing business following a one and one-half month hiatus. In that case, 31 of 33 employees hired to staff the newly-acquired plant had been transferred from the new employer's unionized staff in another plant; and later, when the new operation consisted of 110 employees, only 7 were formerly employed by the predecessor. Furthermore, the new employer's union clearly possessed majority backing in the newly-acquired plant throughout this entire period. To be contrasted with these conflicting union situations is a case where a wholly-owned subsidiary is merged with its principal, with both retaining their separate identity following the merger and both having contracts with the same union, though the latter's contract called for higher wages. Even though the principal expressly assumed the subsidiary's contract, arbitration was ordered to adjust the pay differences.

Other examples where Wiley has been held inapplicable and arbitration denied include the case where an organized em-

135. Id. at 358.
ployer's contract was asserted to require arbitration as to the representation of a newly-acquired plant in which those employees had twice voted for no union; where an employer purchased stock of a competitor from the trustee in bankruptcy after all creditors, including the union, had received 10% in discharge of their debts; and where a unionized drug store chain terminated one store, only to have a competitor nonunion drug store chain acquire and operate a new drug store out of the same location but with only 3 of 14 former employees.

After almost 10 years of experimentation with Wiley, the outer limits of arbitral successorship remain shrouded in mystery. To date, arbitration has been ordered only in cases involving purchases, mergers, and other business consolidations. No case ordering arbitration where successorship arose out of competitive bidding, for example, has been decided. Nevertheless, the courts have consistently held that Wiley is not dependent upon the means of succession. Further, Wiley seems to permit a far more liberal view of successorship than is envisioned for other purposes, even though the courts have been slow to implement it. Perhaps this broader view is proper because ordering arbitration is not analytically equivalent to entering a finding on the merits, though experience casts some doubt upon this conclusion.

Finally, the strong preference for arbitration rests upon the Court's view of arbitration as a continuation of the collective bargaining process. Perhaps in this regard, Wiley is a rousing success. Experience indicates that once the new employer is ordered to arbitrate a particular grievance, no further resort to official decision-makers is necessary. Interestingly enough, of all the cases mentioned under this heading where the successor's duty to arbitrate was challenged, only Wiley and U.S. Gypsum have resulted in an arbitrator's award. Only two conclusions are possible: Either the employer completely capitulates after being ordered to arbitrate (which seems unlikely in view of the time, effort, and expense involved in procuring the court's decision) or the parties resolve the controversy through the bargaining process rather than through arbitration. In any event, the

silence of future reports memorializing the continuation of industrial strife through tests of strength in official forums seems to be the strongest evidence available to support Wiley's rationale. On the other hand, this silence may simply mirror a lack of trust in the arbitral process, the parties preferring their own resolution of the dispute through bargaining to the uncertain award of the outside arbitrator.

D. Survival of the Substantive Provisions in the Collective Bargaining Agreement Without Resort to Arbitration

1. Introduction

There are possible practical differences for the union where an arbitrator orders the successor to comply with the substantive provisions of its predecessor's collective bargaining agreement as opposed to the case where the NLRB enters a similar order. In the latter instance, this ruling would arise in the context of an unfair labor practice hearing where the Board's holding may carry with it a cease and desist order, violation of which could lead to contempt proceedings. This order could significantly impinge the employer's future discretionary conduct for fear of contravening the cease and desist order. In addition, a finding of an employer's unfair labor practice by the NLRB, rather than a decision by an independent arbitrator construing the collective bargaining agreement, may have a significant psychological impact in the minds of the employees. However, the legal effect in either case is that the new employer is bound by substantive contract provisions which govern existing and future labor-management relations in the shop, even though the employer was not a party to the negotiations which led to the contract.

Perhaps it is this practical, rather than legal, effect which caused the Board to move slowly into the breach. Prior to Wiley, the Board consistently held that the successor was not bound by the substantive contract provisions of the predecessor unless the successor affirmatively assumed such an obligation. The successor's obligation regarding future relations was limited to recognizing and bargaining with the predecessor's union. Following Wiley, the Board continued to follow this course, consistently avoiding the apparent conflict. Thus the Board declined to consider the effect of Wiley where it held the employer

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not to be a successor;\textsuperscript{144} where the trial examiner entered no finding in this regard in deference to the Board and the Board affirmed without discussion of this issue;\textsuperscript{145} where the remedies would be the same whatever the outcome of this issue;\textsuperscript{146} where the record was "replete with uncertainties";\textsuperscript{147} and where the Board concluded it was "unnecessary" to consider the issue, since it was outside the scope of both the complaint and the record.\textsuperscript{148} It was not until the court of appeals for the District of Columbia remanded the issue to the Board that the NLRB was forced to squarely confront the impact of \textit{Wiley} upon the question of contract survival in the unfair labor practice context.\textsuperscript{149} This remand led directly to the Board's decision in \textit{Burns}.

2. \textit{NLRB v. Burns Security Services, Inc.}

a. The Fact Pattern

A detailed discussion of \textit{Burns} first requires some background material. From 1962 to 1967, the Wackenhut Corporation provided internal security guards for the Ontario International Airport near Los Angeles, California, under successive one year, competitive bid contracts with the Lockheed Aircraft Service Corporation. Following a consent election,\textsuperscript{150} the NLRB certified the United Plant Guard Workers (herein UPGW) as the exclusive bargaining representative of the Lockheed security force, which at the time consisted of 42 guards. Two months later, Wackenhut and UPGW entered into a three year collective bargaining agreement, even though both parties knew that Wackenhut's annual contract with Lockheed was about to expire. Lockheed was not a party to this collective bargaining agreement. Thereafter, Lockheed invited competitive bids for this security service, and UPGW gave notice to all bidders of its recent NLRB certification and of its existing contract with Wackenhut. Lockheed awarded the contract to the William J. Burns Int'l Detective Agency, Inc., over Wackenhut's bid. Burns provided similar security services at 30 other job sites in the greater

\textsuperscript{144} Triumph Sales, Inc., 154 N.L.R.B. 916 (1965).
\textsuperscript{145} Valleydale Packers, Inc., 162 N.L.R.B. 1486 (1967).
\textsuperscript{146} Rinker Materials Corp., 182 N.L.R.B. 1670 (1967).
\textsuperscript{147} Glenn Goulding, 165 N.L.R.B. 202 (1967).
\textsuperscript{148} Hackney Iron & Steel Co., 167 N.L.R.B. 613 (1967).
\textsuperscript{149} International Chemical Workers Union v. NLRB, 395 F.2d 639 (D.C. Cir. 1968).
\textsuperscript{150} A consent election occurs after the employer and the union agree under supervision of the Regional Director of the NLRB as to the appropriateness of the unit in question, the employees eligible to vote in the election, and the date of election.
Los Angeles area and Burns' employees at these sites were represented under a single contract by the American Federation of Guards (AFG). Burns freely transferred its guards from one site to another as these guards were in a single unit in accordance with its union contract. When Burns began operations at Lockheed, Burns' work force consisted of 15 guards transferred from other Burns locations and 27 guards from Wackenhut's Lockheed work force. Burns required all of these new employees to sign AFG membership cards before issuing them uniforms at Lockheed. These employees were hired under terms and conditions of employment in accord with its AFG guards at other sites, but wages were lower and other terms varied from those required under the UPGW's contract with Wackenhut.

Twelve days after Burns began work under the Lockheed contract, the UPGW demanded that Burns recognize and bar gain with it and further demanded that Burns honor the UPGW-Wackenhut collective bargaining agreement in its entirety. Burns refused all requests, asserting that AFG was the union choice of a majority of the Lockheed guards on the basis of its membership card count. This generated an unfair labor practice complaint against Burns, alleging that Burns was Wackenhut's successor employer and further alleging violations of sections 8(a)(1), 8(a)(2), and 8(a)(5) of the Act. Burns defended on the ground that the Lockheed unit was not an appropriate bargaining unit and that it was not a successor to Wackenhut obligated to recognize, bargain with, or assume the UPGW contract. The Board first held that the unit composed of guards at the Lockheed plant was an appropriate unit though a larger unit might also have been appropriate. The Board next held that Burns was a successor employer and as such was obligated, as Wackenhut would have been obligated, to recognize and bargain with the UPGW. In addition, the Board held that the duty to bargain carried with it the negative injunction prohibiting unilateral alteration in the terms and conditions of employment required by the Wackenhut contract. Finally, and most significantly, the NLRB held that Burns, as a successor employer, was bound as a matter of law by the substantive provisions of the collective bargaining agreement in effect between UPGW and Wackenhut, even though Burns did not either expressly or im-

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151. William J. Burns Int'l Detective Agency, Inc., 182 N.L.R.B. 348, 354 (1970). The Board also held that Burns violated 8(a)(1) and 8(a)(2) by actively assisting AFG by soliciting membership cards from its new employees, but this is not relevant to the remaining discussion in this paper as this finding was not contested by the parties on appeal.
pliedly assume such an obligation. The Board's remedial order required Burns to make complete monetary restitution to all employees in accordance with the UPGW contract.\(^{152}\)

b. The Majority Opinion

The court of appeals affirmed the NLRB's unit determination and its successorship finding but refused to enforce the Board's order requiring Burns to assume the substantive terms of the Wackenhut contract.\(^{153}\) The Supreme Court, in a 5-4 decision,\(^{154}\) affirmed the court of appeals by holding that Burns was

\(^{152}\) There were three companion cases: Hackney Iron & Steel Co., 182 N.L.R.B. 357 (1970) (new employer is a successor whose failure to honor the terms of the existing contract was a violation of 8(a)(5)); Kota Division of Dura Corp., 182 N.L.R.B. 360 (1970) (union barred from negotiation of new contract with successor where successor expressly assumed the prior contract, even though the prior contract did not contain a "successors and assigns" clause); Travelodge Corp., 182 N.L.R.B. 370 (1970) (evidence was conflicting and contradictory; successorship denied). As with other major cases in this area, the Board's decision in Burns evoked considerable legal comment. See Doppelt, Successor Companies: The NLRB Limits the Options—and Raises Some Problems, 20 DePaul L. Rev. 176 (1971); Stern, Binding the Successor Employer to Its Predecessor's Collective Agreement Under the NLRA, 45 Temp. L.Q. 1 (1971); Vernon, Successorship and Collective Bargaining Agreements in Business Combinations and Acquisitions, 24 Vand. L. Rev. 903 (1971); Comment, Labor Law—Successorship—The NLRB Has a Change of Heart, 73 W. Va. L. Rev. 53 (1971).

\(^{153}\) William J. Burns Int'l Detective Agency, Inc. v. NLRB, 441 F.2d 911 (2d Cir. 1971). A similar result was reached in NLRB v. Interstate 65 Corp., 453 F.2d 269 (6th Cir. 1971).

\(^{154}\) NLRB v. Burns Security Services, 406 U.S. 272 (1972) (No explanation is given for the change in the name of the case as it appears in the Board and the court of appeals decisions, and as it appears in the United States Reports.) See Swerdlow, Freedom of Contract in Labor Law: Burns, H.K. Porter, and Section 8(d), 51 Texas L. Rev. 1 (1972). The author's central thesis is that Burns and H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99 (1969), herald the Court's reaffirmation that freedom of contract forms an essential cornerstone of national labor policy. This conclusion is not challenged. In Porter, the Court denied enforcement of a Board order requiring an employer to be bound by a union dues check-off demand, after protracted and adamant employer refusal to agree to such a provision, because such an order contravened section 8(d). Mr. Swerdlow, however, asserts that Burns confines Wiley to its facts, that Burns "augurs a decrease in the importance of the successorship doctrine," and that Burns spells a dramatic shift in successorship criteria away from an emphasis upon the number of former employees retained to a search for "whether the new employer is operating . . . the same total business as the original employer." 51 Texas L. Rev. at 10-20. This Article challenges those conclusions. Indeed, Wiley seems viable as an alternative method for the factual determination of assent by the successor; continuity of employee unit composition as a successorship criterion seems strengthened by Burns rather than diminished; and the notion of business entity survival is specifically rejected by Burns on its facts.
obligated to recognize and bargain with UPGW as soon as Burns hired a majority of the former Lockheed guards, not as a result of the UPGW collective bargaining agreement but because of the recent NLRB certification and the unchanged nature of the existing bargaining unit. The Court also held that Burns was under no obligation to honor Wackenhut's collective bargaining agreement, since the Board factually determined that Burns had not assumed this obligation. Finally, the Court commented that Burns had not unilaterally altered the terms and conditions of employment initially offered the new guards, even though the terms upon which they were hired differed from the terms of their employment contracts under the Wackenhut-UPGW collective bargaining agreement. The four dissenters would have required the Court to examine the Board's unit appropriateness determination and would have held that Burns was not a successor to Wackenhut and thus was not obligated either to recognize or to bargain with the UPGW.

(1) The Duty to Bargain

Construed in the light of previously enunciated criteria, Burns on its facts presented a relatively easy case for finding successorship for bargaining purposes. A majority of the surviving employee complement, which remained the same size as the former unit, consisted of former employees working in the same jobs, rendering the same service to the same customer as before the change in employers, and with no interruption in operations. To be sure, there was a complete change in supervision and no retention by Burns of any equipment or other assets, either tangible or intangible, as indicia of any connection between Burns and Wackenhut. Indeed, they had no connection—they were competitors. But these criteria, as was concluded earlier, do not proximately relate to the effectuation of the basic aim and purpose of successorship in the bargaining context: employee protection against sudden shifts in employer

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155. The Court expressly recognized that the precise facts involved in Burns significantly affected the resolution on the merits. 406 U.S. 272, 274 (1972).

156. The Supreme Court denied certiorari as to the appropriateness of the Board's unit determination but granted certiorari as to the remaining issues confronted in the enforcement of the Board's order. 404 U.S. 822 (1971).

157. See text accompanying notes 39-50 supra. Though the Court did not expressly find Burns to be a successor, the Court inherently embraced this concept by affirming the Board and court of appeals decisions which imposed upon Burns a duty to bargain and expressly entered a finding of successorship.
identity which render ineffective the employee's choice of bargain-
gaining representative and which frustrate the opportunity for
individual employee security in his personal affairs.

It could be argued that there can be no sudden unexpected
shift in employer identity where annual or periodic competitive
bidding is held and, therefore, that the policy which supports
successorship is inapplicable to such cases. Since the employees
should reasonably expect some instability in their employment
relationship because of the competitive bids, their hopes for se-
curity do not warrant official protection, even when the em-
ployees secure a collective bargaining agreement through their
elected bargaining representative. However, awareness that
some turbulence may exist does not comfort the employees when
change does occur. To protect itself, the union could insist that
the principal employer, in this case Lockheed, join in the labor
contract at least to the extent that it becomes a condition prece-
dent to its acceptance of future bids on the particular job in
question. But Lockheed is not anxious to be thrust into the labor
policies and controversies of its contractors, and neither the con-
tractor nor the union is in a position to insist upon such an
agreement from Lockheed. Indeed, one reason for competitive
bids is to permit a change from unsatisfactory service by the ex-
isting contract employees and management. Other attempts at
protection through successful union demands of the contractor
to include a broad successors and assigns clause in the contract
would likewise be of little comfort to the employees, at least in
the unfair labor practice context, since the Board will not look
to private agreements to define the scope of national labor ob-
ligations.\textsuperscript{158} The effect, therefore, of adopting the conclusion
that bargaining successorship is inapplicable in competitive bid-
cases would lead to the elimination of employee organization
in this entire segment of labor situations, thereby creating
a gaping hole in the protection of national labor laws. Under
the circumstances, the Court's conclusion that Burns was under
a duty to recognize and bargain with the union seems to be im-
minently correct.

\textbf{(2) The Appropriate Unit Issue}

\textit{Burns,} however, presented a potentially interesting twist

\textsuperscript{158} Cruse Motors, Inc., 105 N.L.R.B. 242 (1953). The Board said:

Though the contract may create private rights and duties en-
forceable under other laws, so far as this statute is concerned,
the obligation to bargain is one neither created nor alterable
by private agreement.

\textit{Id.} at 248.
that the Court conveniently avoided by its limited grant of cer-
tiorari; the Court did not review the issue of unit appropri-
ateness following the Burns' intervention. Since the Board's con-
clusion as to the appropriateness of the unit was not clearly er-
roneous and since section 9(b) of the Act invests the Board with
broad discretion to determine the reach of bargaining units un-
der the facts of each case, the Court apparently concluded that
it should stand without further review. It would be in error
to construe this omission as diminishing the importance of the
issue of unit appropriateness in measuring successorship, for in-
deed, the Court said that had the Board concluded "the Lockheed
bargaining unit was no longer an appropriate one,"160 the re-
sults would have been different.

Even assuming the Court reviewed unit appropriateness on
the merits, the result is not likely to have been different. It
was strenuously argued that Burns' acquisition of the Lockheed
contract amounted to an accretion to its existing unit of 30 job
sites in the greater Los Angeles area. The record is silent as to
the exact provisions of the Burns collective bargaining agree-
ment, but it is reasonable to assume that it contained a union
shop or other union security clause applicable to newly-ac-
quired security operations, thus placing Burns in the middle of a
direct conflict between competing union claims. Of course,
Burns could have applied to the Board for a unit clarification
order, as was done in Humble. However, in view of the recent
Board certification of the Lockheed guards, a favorable result
to Burns seemed unlikely. Humble should be distinguished from
Burns not only because it was an arbitration case but also be-
cause the employees there were fully integrated into the Humble
operation, whereas in Burns there was a notable lack of inte-
gration of the Lockheed guards and the job site into the overall
Burns operation. In the absence of a complete integration, it
seems clear that the Lockheed guard unit did not completely
lose its separate identity so as to constitute an accretion to the
existing Burns unit.160

In connection with the Court's refusal to review the appro-
priateness of the existing unit, it found controlling the retention
by Burns of employees from that unit. Thus, "Burns' obligation
to bargain . . . stemmed from its hiring of Wackenhut's em-
ployees and from the recent election and Board certification,"161

160. See text accompanying notes 86-90 supra.
EMPLOYER SUCCESSORSHIP

and the "source of [Burns'] duty to bargain with the union is not
the collective-bargaining contract but the fact that it voluntarily
took over a bargaining unit that was largely intact and that had
been certified within the past year."162 Indeed, Burns retained
27 of 42 former guards, a clear majority of the surviving em-
ployee complement of 42 guards. One wonders what the result
would have been had Burns hired 7 fewer former guards so that
only 20 of the 42 guards would have been from the former unit,
or if Burns would have hired 28 additional guards along with
the 27 former guards retained. In neither case would a major-
ity of the employees in the surviving unit previously have been
represented by the existing union.163 Would this slight change
in facts destroy the existing unit to such an extent that Burns
would not have been a successor and, thus, would have had no
duty to recognize or bargain with the union? Prior Board au-
thority suggests an affirmative response,164 and the Court im-
plied its concurrence.165 If this is correct, the new employer
would be encouraged not to hire members of the existing unit,
which would result in greater employee anxiety and turbulence
rather than greater employee protection against sudden changes
in their employment conditions. At this point, the balance must
swing toward the protection of the new majority's section 7
rights through an election, rather than protecting a preexisting,
but now defunct, employee choice for a particular union. That
is, without the requisite majority in the new employee group,
there is no factual justification for presuming a continued ma-
jority by the existing union.

163. The example is similar to Tri State Maint. Corp. v. NLRB,
408 F.2d 171 (D.C. Cir. 1968). There, following an employer's successful
bid on a one year service contract, the new employer hired 23 of the
40 former employees, though the new employer increased his employees
to 70. The new employer was held not to be a successor. The court's
language is worthy of note:
Tri State had no privity of contract with Frugal [the predeces-
sor] or Frugal's employees and it was not a "successor em-
ployer" that bought out the business of another.
Id. at 173 (emphasis added).
164. See text accompanying notes 8-16 supra.
165. The Court stated:
[T]he Board's determination that the bargaining unit remained
appropriate after the changeover meant that Burns would face
essentially the same labor relations environment as Wacken-
hut: it would confront the same union representing most of
the same employees in the same unit.
406 U.S. 272, 280 n.4 (emphasis added). See also quote in text at note
161 supra. In addition, surely under the relaxed standard of continuity
contained in Wiley where only 40 of the 380 employees were in the
former unit this would have been of little moment.
(3) The Timing Issue

A different though related issue in the context of unit composition is raised by the issue of timing. The Court stated that "Burns' obligation to bargain with the union did not mature until it had selected its force of guards." Suppose that at the time operations began, Burns hired an insufficient number of former employees to constitute a majority in the surviving employee complement, so that presumably it would owe no obligation to bargain with the union. A short time later, Burns hired a sufficient number of additional former employees, either as additional guards or as replacements for unsatisfactory guards initially hired, to constitute a clear majority. Does Burns now have a duty to bargain where no such duty existed at the time it began operations? An affirmative answer imperils the section 7 rights of those in the unit at the time when operations began. If they must await future contingencies in the employer's hiring policies to organize for bargaining, then their rights may be effectively denied altogether. On the other hand, a negative answer creates an easy opportunity for employer avoidance of the successorship obligations. On balance, it seems that duties arising out of successorship should be determined at the time of succession, regardless of future contingencies. There is little logic in permitting future uncertain contingencies to cloud immediate objectives. If abuse of this technique is detected, the NLRB's ingenuity and remedial powers are sufficient to meet the challenge. 167

A logical by-product of the Court's resolution of the timing issue in Burns is the conclusion that Burns did not commit an unfair labor practice by unilaterally changing the conditions of employment by hiring former employees at a lower wage scale than existed under the Wackenhut contract. The underlying premise is that an employer is free to set initial terms of employment with its employees on an individual basis, unless the employer owes a duty to bargain with a union or to honor an existing contract. No unfair labor practice is established unless these initial terms of employment are changed following the time when Burns had a duty to bargain. Here, there simply was no evidence to this effect. 168 Burns' obligation to bargain did not mature until it completed hiring its guard force, that is,

167. The only cases specifically testing this timing issue are inconclusive. See note 16 supra.
EMPLOYER SUCCESSORSHIP

after the initial terms of employment had been set individually and Burns had no duty to honor the existing contract. Thus it was free to set initial terms of employment without prior restrictions.

The difficulty with this line of reasoning is not its logic but rather its application to future fact patterns. The precise point at which the duty to bargain arises will undoubtedly vary according to the circumstances, but the Court provided no litmus test and suggested no relevant criteria for measuring when the breaking point is passed. This matter of timing, then, will surely be the source of considerable instability in the law until such a test is developed. This uncertainty is particularly troublesome since employer-union negotiations before actual succession would frequently alleviate possible industrial disputes at the time of succession. But the employer is encouraged under the present timing decision to delay completion of hiring as long as possible, enhancing rather than mitigating employee anxiety over the impending change in employer identity.

c. The Dissent

It is appropriate here to test the rationale of the dissent on these issues. Mr. Justice Rehnquist, speaking for the four dissenters, would not disregard as frivolous or insubstantial Burns’ argument that it possessed a good faith doubt as to the union’s continued majority. He stated that it was “by no means mathematically demonstrable that the union was the choice of a majority of the 42 employees with which Burns began the performance of its contract with Lockheed.”169 Indeed, the dissent would seem to require a factual inquiry into the union sentiments of the former employees retained in the surviving unit in each case. But such a factual inquiry of individual union sentiment would undermine the union’s presumption of a continued majority during the certification year, thereby enhancing continued tests of strength with each shift in employee sentiment. This argument also disregards the fact that the union, upon certification, became the exclusive bargaining agent of all employees in the unit, even those who voted against it in the election. A majority of those employees represented by the union as commanded by the statute did in fact survive the employer change. The Board rejected the employer’s good faith doubt argument and this finding was not clearly erroneous. As such, the Board’s

findings properly were sustained, even though the dissenters might have reached a different result had they heard the case de novo.

The dissent makes a more direct attack on the successorship finding in this case, arguing that the duty to bargain should be imposed on the new employer only if there passed to Burns some tangible or intangible assets by negotiation or transfer from Wackenhut. In support of this conclusion, three cases are cited, all of which are easily distinguishable on their facts. *Tri State Maint. Corp. v. NLRB* involved the denial of successorship where the new employer hired 23 employees from the former group of 40 but included these 23 employees in a new unit of 70, so that a majority of the surviving unit was not composed of former employees. *International Ass'n of Machinists, Dist. Lodge 94 v. NLRB* involved the division of one national automobile distributorship into two separate, competing local dealerships, neither of which retained in its employ a majority of the former employees. Finally, *Lincoln Private Police, Inc.* involved the formation of a new corporation by officers of the former employer which hired 61 of its total 66 employees from the former business but retained only 38% of the former employer's internal security jobs, the others being assumed by one single business competitor. It is true that in each of these cases assets were not interchanged between the new employer and its predecessor, and this factor was strongly considered in the denial of successorship. But in these cases, the factor mentioned above placed the case within the framework of existing successorship criteria or was an exception to those policies due to very unusual circumstances.

In addition the dissent argued that the interests of all the parties would have been served by a denial of successorship in this case. The dissent asserted that the employees were denied lateral movement between competitor employers by the Board's imposition of a duty to bargain on the new employer. How is this less true where the employer has no duty to bargain with the union? Indeed, the employees are always free to leave the employ of a particular employer, whether or not that employer has a duty to bargain with the existing union. Even if the

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171. 408 F.2d 171 (D.C. Cir. 1968).
173. 189 N.L.R.B. No. 103, 76 L.R.R.M. 1727 (1971). The record is silent as to the number of former employees hired by this other employer.
employee's right to free movement was slightly impinged by a duty to bargain, his rights within the contract (though not binding on the successor) are far more important to the individual employee where he has a job that he wants to retain. According to the dissent, the new employer is disadvantaged to the extent it has to bargain with a union without a showing of majority membership. But if that duty extends to the new employer only when the employer retains sufficient numbers of the former unit as to constitute a majority in the surviving employee group, it is difficult to envision prejudice to the successor where the bargaining duty flows from its own decision to retain these employees. Finally, the dissent asserts that the prime contractor's interests may be adversely affected by the imposition of a duty to bargain on the successor, but this is not any different from the case where a new union demands recognition upon a showing of a majority membership in an appropriate unit within the contractor's domain.

The dissent concluded by asserting that the imposition of the duty to bargain under the facts in Burns places undue rigidity upon the labor relations in the job. Quite the contrary seems to be true. The duty to bargain permits each of the interested parties to assert its claims to the maximum extent thought desirable by the parties, thereby insuring maximum flexibility for each party while enhancing the opportunities for peaceful settlement of any disputes which arise. In the end, the arguments made by the dissent are neither supported by the authority cited nor persuasive in logic.

3. **Burns and Wiley Compared**

The starting point for considering the issue of contract survival must be the provision of section 8(d) of the Act which excludes from the duty to bargain in good faith "[compelling] either party to agree to a [proposal] or [requiring] the making of a concession." A comparison of the facts and rationale of Wiley with those of Burns places section 8(d) in its proper role in the contract Survival context. It will be recalled that Wiley involved a merger in the context of a suit to compel successor arbitration under the former employer's contract in which the employees of the small, former employer were integrated into the large, unorganized, employee complement. The Court ordered arbitration based upon the strong preference for grievance arbitration as a continuation of the collective bargaining process, as an agreed upon method of resolving disputes by the parties,
and as an effectuation of the national labor objective of industrial peace.

The Burns Court distinguished Wiley by saying that Wiley "held only that the agreement to arbitrate . . . survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract." Further, the Court strongly implied that 8(d) is inapplicable to arbitration cases. Finally, the Court found Burns distinguishable from Wiley in that the present case does not involve a § 301 suit; nor does it involve the duty to arbitrate. Rather, the claim is that Burns must be held bound by the contract executed by Wackenhut, whether Burns has agreed to it or not and even though Burns made it perfectly clear that it had no intention of assuming that contract. Wiley suggests no such open-ended obligation. Its narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation. . . . Burns merely hired enough of Wackenhut's employees to require it to bargain. . . . But this consideration is a wholly insufficient basis for implying either in fact or in law that Burns had agreed or must be held to have agreed to honor Wackenhut's collective-bargaining agreement.

These distinctions seem wholly unpersuasive. To be sure, the Wiley order to arbitrate does not automatically carry with it other substantive terms of the former collective bargaining agreement. However, as was seen earlier, the practical effect of the order to arbitrate usually leads the parties to resolve their disputes without resort to formal arbitration. But where arbitration is held, the arbitrator somehow finds that the contract survived in its entirety, relying upon Wiley for support of this conclusion. The protection of judicial review is of little consequence where the scope of that review is as narrowly drawn as is review of arbitral awards. Indeed, if Burns had arisen as a suit to compel arbitration, under Wiley's very broad continuity standard, arbitration would clearly have been compelled. In fact, Burns is an a fortiori case for continuity since a competitive bid situation compels continuation of the existing "employing industry," assuming that the present invitation does not materially alter the terms of prior invitations. Further, in the light of the arbitral experience under Wiley, contract survival in

176. See text accompanying notes 125-141 supra.
Burns would be virtually assured. Thus for the Court to find this purely analytical distinction controlling in the face of that experience is to elevate form over substance with the ultimate result on the merits largely dependent upon the union's choice of forums. Such a result is indeed anomalous.

Equally unpersuasive is the Court's legalistic assertion that section 8(d) does not apply to arbitration. Again, that conclusion analytically may be entirely correct, for section 8(d) purports only to define the scope of good faith bargaining, and not to reach the content of particular provisions within the consummated agreement. If it means anything at all, however, the policy of section 8(d) favors the consensual meeting of the minds of the parties. It substitutes arms-length bargaining and voluntary agreement for industrial strife or officially imposed terms and conditions of employment dictated from an agency outside the employment relationship. Indeed, the policy is based on the proposition that in labor disputes each side is best able to judge its own priorities, to make its own quantitative judgments, and to evaluate the relative strengths and weaknesses of the other side to its own advantage. In its wisdom Congress opted for a regulatory scheme requiring collective bargaining but compelling no particular content to the agreement reached. At the heart of this scheme of collective bargaining is grievance arbitration, which the Court envisions as the ultimate embodiment of the continuing collective bargaining process. Therefore, to hold that the statutory limitation of section 8(d) is inapplicable to arbitration is to permit indirectly what the Congress prohibits directly.

It should be noted, however, that not every case presents this anomaly, since Burns did not hold that no successor employer can ever be compelled to honor the substantive terms of his predecessor's contract. Indeed, the Court implied that the con-

177. See notes 126, 133 supra. If the results are so assured, one wonders why the union did not pursue this course in Burns. Perhaps it viewed the unfair labor practice course of action as more expeditious. Indeed, if full resort to judicial review is made, the unfair labor practice is decided in the Board with review in the court of appeals and in the Supreme Court. On the other hand, a suit to compel arbitration begins in the district court with review in the court of appeals and the Supreme Court, then the case is returned to the arbitrator on the merits with suits to enforce the award in the district court with review in the court of appeals and the Supreme Court. On the other hand, perhaps the union viewed the results on the merits as not absolutely assured in arbitration, since no case compelling arbitration exists where the form of succession was by competitive bid rather than by some form of purchase.
tract survives where the employer affirmatively assumes it or where "in 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 . . . ." What the Court held, therefore, is that such a duty does not "ensue as a matter of law from the mere fact than [sic] an employer is doing the same work in the same place with the same employees as his predecessor."

Despite constant affirmations to the contrary, this language suggests that in the area of contract assumption, as was apparently true in the successor's duty to remedy his predecessor's unfair labor practices, the form of succession may significantly affect, indeed may control, the ultimate result. In that context, if Burns had arisen as a question of the successor's duty to remedy existing unfair labor practices of Wackenhut, the results of successorship would have been denied since Burns was not a purchaser (even though it may have had knowledge of the unresolved misconduct). The opposite result would require a nonconsenting successor to correct the misconduct of a business competitor. In addition, this would discourage and undermine the wholesome objectives of competitive bidding as effectively as the existence of possible litigation discourages the purchase of any physical asset. No employer wants to inherit labor difficulties with the NLRB, even if appropriate adjustments in the bid could be made to avoid a financial loss, anymore than any person desires to "buy a lawsuit."

Perhaps a similar rationale might be appropriate where the question involves inheriting preexisting contract provisions of a substantive nature which would control the future relations of the parties. The application of a rule which mechanically imposes upon the successor the predecessor's contract would discourage competitive bidding, tending thereby to entrench the predecessor. This would place in the hands of the existing contractor a tool for abuse, both against his competitor-employers and against the union. If, for example, the existing employer decided not to submit a bid in response to the present invitation, it could agree to outrageous terms with the union, without the knowledge of the other bidders or at a time when amendments to the bids would be impermissible. Of course, if the bids could be withdrawn or amended and if the bidders knew of the agree-

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179. Id. (emphasis added).
180. See text accompanying notes 91-113 supra.
ment, they could choose not to compete for the bid or withdraw the bid in recognition of its probable impact. But if the bidders had no knowledge, then the mechanical application of contract survival could do irreparable injury to the winner. Either way, competitive bidding would be thwarted. This, of course, completely distorts the proper role of the collective bargaining agreement to the detriment of all concerned, enhancing rather than mitigating the chances for industrial strife.

The Court's reliance upon the "background of state law" of mergers to distinguish *Wiley* is particularly disturbing and wholly misplaced. *Wiley* itself expressly rejected consideration of state law as having any bearing whatsoever upon the duties of successors under the national labor policies. Further, utilization of state law as a criterion to determine the scope of employer duties arising under national labor policy would be a dramatic departure from a long and studied preemption of state law where the national statutory scheme applies.

The apparent result of the *Burns* reasoning, then, is that if the new employer expressly or by its conduct manifests a clear intent not to be bound by the predecessor's contract, the new employer is not bound thereby.\(^1\) The Board's pre-*Burns* rule is therefore revived. It will be recalled that an examination of intent was also found in *Wiley*, where the Court suggested as a standard for the arbitrator an examination on the merits of the intent of the parties as reflected by the collective bargaining agreement. There is a significant and crucial difference, however, for the intent to be ascertained under *Wiley* was that of the former employer and the union, while the manifestation of intent searched for in *Burns* was that of the successor without regard to the expressed intent of the parties to the preexisting collective bargaining agreement. Indeed, if section 9(d) is to be given any effect, it is the successor's intent which must control, for it is the future employment relationship of the successor and the union which is sought to be controlled by the preexisting contract.

It should be noted that section 8(d) is in no way limited to the case of a merger, reorganization, or assets purchase. The

\(^{181}\) Compare *Monroe Sander Corp. v. Livingston*, 377 F.2d 6 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967), with *United Steelworkers v. Reliance Universal, Inc.*, 335 F.2d 891 (3d Cir. 1964), both of which involved a duty to arbitrate in a purchase of assets context, even though the successor expressly manifested an intent not to be bound by the predecessor's labor contract. See generally the cases cited note 60 *supra.*
same conclusion must apply regardless of the method by which the succession takes place, though it is assuredly much easier to find a manifestation of intent in fact in such situations.

By reading Wiley and Burns together and giving vitality to each, the conclusion seems inescapable that the substantive terms of the contract survive, whether by decision of the arbitrator or the NLRB, only if the successor in word or deed manifests an intent to be bound thereby. A different result in the face of section 8(d) is untenable. Yet this conclusion does not disregard the interests of the employees. True, their contract does not survive automatically, but it provides a basis against which the employer-employee dialogue can be measured. Further, even though their contract does not survive, there is more employer incentive to retain the individual employee already trained to do the job where the employer has a hand in shaping the content of the ongoing employment relationship than where the terms of the relationship are dictated by the predecessor (in this case by a competitor). Indeed, such a conclusion seems calculated to minimize industrial strife by placing the parties at the bargaining table to work out their differences in an atmosphere of good faith bargaining, while at the same time maximizing protection for free choice, not just for the former employees but for all parties to the new employment relationship.

IV. CONCLUSION

The notion of employer successorship in labor relations embodies an inherent tension underlying much of the law. On the surface there are the competing interests represented by the employer's quest for profit through economic efficiency and the employee's search for higher wages, better working conditions, and job security. Underlying each particular dispute are the conflicting national labor objectives of maximizing freedom of choice while minimizing industrial strife. More generally, successorship illustrates the law's search for a balanced regulatory scheme which permits the development of easily administered, mechanical tests within a framework of individual justice; an excess of the former achieves efficiency at the expense of rigidity, while an excess of the latter purchases case-by-case flexibility at the price of diminished uniformity. No concept of fundamental fairness can be developed which fails to strike an equitable balance between the various competing and conflicting interests at issue. Such is the task of the doctrine of employer successorship.
As this Article attempts to reveal, it is inherently confusing and factually inaccurate to label successorship with the title "doctrine," suggesting a logically consistent, explicitly defined set of facts or a universally applicable set of standards, policies, and purposes. The successorship inquiry is merely question-begging, that is, under the particular facts presented, would the underlying objectives of the Act be best achieved by holding the new employer obligated to fulfill some or all of the labor obligations of the former employer? Such a general inquiry, however, suggests a complete absence of basic criteria against which each case is to be measured. Thus the concept of successorship arose to fill this apparent void.

As has been illustrated, the issue of employer successorship arises out of a seemingly endless variety of factual settings with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Surely much of the confusion which attends successorship is the facility with which each case is distinguishable on its facts from all former cases.

However, to dismiss the confusion so lightly would be to compound it by oversimplification, for such a conclusion would wholly disregard the fundamental differences inherent in the various legal contexts in which the issue arises. For example, the basic policies which underlie successorship for bargaining purposes are certainly different than the objectives sought to be satisfied when the issue is the successor's duty to remedy preexisting unresolved unfair labor practices committed by the predecessor. In the bargaining context, a former employee majority in the surviving work force and a continuity of the former employee unit are absolutely essential to the imposition of a duty to bargain. On the other hand, a reinstatement with back pay order against the successor with regard to a particular individual discriminatorily discharged by the predecessor may not call for either continuity of employee composition or unit. Successorship for arbitration purposes may be designed either to adjust disputes as to vested rights having accrued at the time of succession, or to determine the survival of substantive duties affecting the plenary, prospective relationship of the successor with the union and the employees. Prospective protection for employee free choice is quite different than remediying past misconduct based on a concept of unjust enrichment. The frequent failure of the decision-making bodies to distinguish between the
underlying policy objectives inherent in the different legal contexts in which the issue of successorship arises has led to utilization of criteria relevant for one purpose but neutral or contrary to the objectives of the other. Clear thinking, rational consistency, and elimination of confusion demand the Court's recognition of the nature of the successorship issue raised and assessment of the objectives served by the resolution of it.

A large, though not altogether satisfactory, step in this direction was taken by the Court in *Burns*. The Court charted a more evenly balanced accommodation between free choice and industrial peace by denying the imposition of substantive, prospectively applicable contract provisions upon a non-consenting successor. The Court affirmatively required both the arbitral inquiry mandated by *Wiley* and Board inquiry in the unfair labor practice context to focus on factual affirmations of the successor's assent, either by word or by deed, prior to ordering the successor bound substantively by a preexisting collective bargaining agreement. Finally, the Court reaffirmed the existing policy of *ad hoc* evolution of general criteria applicable to successorship in these and other contexts. Therein lies *Burns'* greatest wisdom and, perhaps, its most telling weakness, for it permits the widest possible flexibility in the face of constantly changing factual patterns, but at the same time it diminishes predictability in an area of the law where predictable consequences are exceedingly desirable. Whether employer successorship will rise out of the morass of confusion with which it has long been plagued through the helping hand from *Burns* will be left to the constantly unfolding process of development which constitutes the common law.