[Vanderbilt Law Review](https://scholarship.law.vanderbilt.edu/vlr)

Volume 31
Issue 2 *Issue 2 - March 1978*

Article 2

3-1978

Is There Arbitration After Burns?: The Resurrection of John Wiley & Sons

Sue J. Henry

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Labor and Employment Law Commons

Recommended Citation

Sue J. Henry, Is There Arbitration After Burns?: The Resurrection of John Wiley & Sons, 31 *Vanderbilt Law Review* 249 (1978)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol31/iss2/2

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Is There Arbitration After *Burns*?: The Resurrection of *John Wiley & Sons*

*Sue J. Henry**

TABLE OF CONTENTS

I. INTRODUCTION 249
II. LEGAL DEVELOPMENT OF THE UNANSWERED QUESTIONS . 251
  A. John Wiley & Sons, Inc. v. Livingston 251
  B. Wiley *Progeny* 255
  C. National Labor Relations Board v. Burns International Security Services 258
  D. Howard Johnson Co. v. Detroit Local Joint Executive Board 262
  E. *The Unanswered Questions* 264
III. DEVELOPING ANSWERS TO THE QUESTIONS 266
  A. *Equitable Accommodation of National Labor Policy* 266
    (1) Preventing Industrial Strife and Promoting Freedom of Choice 267
    (2) Impinging upon Free Collective Bargaining 276
    (3) Practical Results of *Wiley* 280
  B. *Effect of the* Burns *Decision on the* Wiley *Holding* 282
    (1) Distinguishing *Burns* and *Wiley* 282
    (2) Analysis of the *Burns* Opinion 290
IV. ARBITRAL STANDARDS 298
V. CONCLUSION 306

I. INTRODUCTION

The development of the federal labor law dealing with the obligations of a successor corporate employer[1] based upon the predeces-

* Member, Illinois Bar. B.A., 1973, Miami University, Oxford, Ohio; J.D., 1977, Northwestern University. The research and original text of this manuscript were prepared under the guidance of Professor Stephen B. Goldberg of the Northwestern University School of Law Senior Research Program.

1. This Article deals only with true successor situations in which the new employer is a bona fide successor to the previous employer. It does not deal with the case in which the successor corporation is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). Such cases involve a mere technical change in the structure or identity of the

sor employer's collective bargaining agreement—the so-called "successorship doctrine"—has been confusing, incomplete and, apparently, inconsistent. The most likely explanation for this problem is that the courts and the National Labor Relations Board, in dealing with the situation "where the identity of the employer changes after the employees have won officially recognized collective power to press their demands against their prior employer,"[2] have had to balance the interests of the various parties—the old employer, the new employer, old and new employee groups, and their unions—in an effort to achieve the "ultimate goal of national labor policy to maximize both freedom of choice and economic stability for all interested parties while minimizing governmental intervention."[3]

The decisions of the United States Supreme Court in *John Wiley & Sons, Inc. v. Livingston,*[4] *NLRB v. Burns International Security Services, Inc.,*[5] and *Howard Johnson Co. v. Detroit Local Joint Executive Board*[6] have raised, but left unanswered, two significant questions regarding the proper balancing of the parties' inter-

---

> employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor.

Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 259 n.5 (1974).

2. Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach,* 57 MINN. L. REV. 1051 (1973). Throughout this Article the successorship doctrine shall apply only to those labor laws and policies that deal with the successor employer's obligations under the predecessor employer's labor contract.

3. Slicker, *supra* note 2, at 1052.

4. 376 U.S. 543 (1964), *aff'g* 313 F.2d 52 (2d Cir. 1963). *Wiley* evoked comment from numerous authors. For thorough discussions of the decision and its implications, see Abodeely, *The Effect of Reorganization, Merger or Acquisition on the Appropriate Bargaining Unit,* 39 GEO. WASH. L. REV. 488 (1971); Doppelt, *Successor Companies: The NLRB Limits The Options—and Raises Some Problems,* 20 DE PAUL L. REV. 176 (1970); Goldberg, *The Labor Law Obligations of a Successor Employer,* 63 NW. U.L. REV. 735 (1969); Patrick, *Implications of the John Wiley Case for Business Transfers, Collective Agreements, and Arbitration,* 18 S.C.L. REV. 413 (1966); Note, *The Successor Employer's Duty to Arbitrate: A Reconsideration of John Wiley & Sons, Inc. v. Livingston,* 82 HARV. L. REV. 418 (1968); Note, *The Contractual Obligations of a Successor Employer Under the Collective Bargaining Agreement of a Predecessor,* 113 U. PA. L. REV. 914 (1965) [hereinafter cited as *Contractual Obligations of a Successor Employer*].

5. 406 U.S. 272 (1972). For a thorough discussion of the *Burns* decision, see Bakaly & Bryan, *Survival of the Bargaining Agreement: The Effect of Burns,* 27 VAND. L. REV. 117 (1974); Morris & Gaus, *Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns,* 59 VA. L. REV. 1359 (1973); Note, *Contract Rights and the Successor Employer: The Impact of Burns Security,* 71 MICH. L. REV. 571 (1973) [hereinafter cited as *The Impact of Burns Security*].

6. 417 U.S. 249 (1974). For a thorough discussion of the *Howard Johnson* decision, see Note, *The Impact of Howard Johnson on the Labor Obligations of the Successor Employer,* 74 MICH. L. REV. 555 (1976).

ests: (1) does the successor employer's duty to arbitrate with the union under the predecessor's contract survive a corporate change?; and (2) if so, does the arbitrator have the power to impose the substantive terms of the predecessor's labor agreement on the successor?[7]

To answer these questions, this Article initially will analyze in detail the three Supreme Court cases that have dealt with the duty of a successor to arbitrate under its predecessor's labor agreement. This inquiry will demonstrate that the Court has taken what ultimately can be described only as fundamentally inconsistent positions regarding a successor's duty to arbitrate and that the inconsistency is based, in part, upon a shift in emphasis from the policy of preventing industrial strife toward the policy of promoting free collective bargaining.

The second section of the Article will demonstrate theoretically and empirically that the successorship rule formulated in *John Wiley & Sons* best achieves *both* national labor policies of preventing industrial strife and promoting free collective bargaining. Furthermore, the examination of these cases will reveal that the inconsistency between *Wiley* and *Burns* results from erroneous legal analysis in *Burns*. Accordingly, the Court's opinion in *Burns* should be rejected to the extent that it undermines the previous holding in *Wiley*.

In the third and final section of the Article, some general guidelines will be proposed for arbitrators who must apply a predecessor's collective bargaining agreement to the successor's employment situation, and the manner in which they should be applied in the ordinary successorship situation will be demonstrated.

II. Legal Development of the Unanswered Questions

A. John Wiley & Sons, Inc. v. Livingston

In *John Wiley & Sons, Inc. v. Livingston,*[8] Interscience Publishers merged with John Wiley & Sons, another publishing firm, on October 2, 1961, and ceased to do business as a separate entity. At the time of the merger, Interscience was party to a collective bargaining agreement with District 65 of the Retail, Wholesale and

7. In light of the large number of corporate mergers and acquisitions that take place in the United States, these questions are being asked with increasing frequency and their answers are acquiring great significance. In 1973, 874 corporate mergers and acquisitions took place in manufacturing and mining. The number of corporate mergers and acquisitions per year more than doubled between 1961 and 1969, although the number declined from 1970 to 1973. *See* Statistical Abstract of the United States 506 (1975).

8. 376 U.S. 543 (1964).

Department Store Union, AFL-CIO. The agreement was not due to expire until January 31, 1962, and covered forty of Interscience's eighty employees. It did not contain a "successors and assigns" clause, which expressly would have made the contract binding on any successors of Interscience.[9] All of the Interscience employees were hired by Wiley and for approximately four months after the merger they performed their same jobs at the same location. The Interscience plant then was closed and the former Interscience employees transferred to the Wiley plant, where they were integrated with the 300 Wiley employees, none of whom were represented by a union.

In discussions before and after the merger, the Union and Interscience (and later Wiley) failed to reach an agreement concerning the effect of the merger on the collective bargaining agreement and on the rights of the employees covered by it. The Union asserted that, despite the merger, the labor agreement remained in effect and, therefore, that Wiley was obligated to abide by the Interscience contract provisions dealing with seniority rights, contributions to the Union fund, vacation and severance pay, job security, and grievances. The Union further claimed that these rights had "vested" during the term of the Interscience agreement and that Wiley was legally bound to recognize them even after the expiration of the agreement. Wiley insisted that the Interscience bargaining agreement had been terminated by the merger and refused to recognize the Union as the bargaining representative of the former Interscience employees or to agree to any of the Union's claims on their behalf.

Pursuant to the arbitration clause in the Interscience labor agreement, the Union instituted an action under section 301 of the Labor Management Relations Act[10] (LMRA) to compel Wiley to

---

9. A typical "successors and assigns" clause reads as follows:

> SUCCESSORS AND ASSIGNS. This Agreement shall be binding upon the parties hereto, their successors and assigns. It is the intent of the parties that the Agreement shall remain in effect for the full term of the Agreement, and shall bind the successors of the respective parties hereto.

Food Employees Local 590 v. National Tea Co., 346 F. Supp. 875, 877 n.2 (W.D. Pa. 1972).

Numerous arbitrators have held that labor agreements containing "successors and assigns" clauses can be enforced against the successor employer without regard to the doctrine of successorship. *See, e.g.,* Lake States Leasing Corp., 46 Lab. Arb. & Disp. Settl. 935 (1966) (Gundermann, Arb.); Sanborn's Motor Express, Inc., 44 Lab. Arb. & Disp. Settl. 346 (1965) (Wallen, Arb.); Walker Bros., 41 Lab. Arb. & Disp. Settl. 844 (1963) (Crawford, Arb.); Sigman Meat Co., 40 Lab. Arb. & Disp. Settl. 540 (1963) (Seligson, Arb.); C-F-M Co., 37 Lab. Arb. & Disp. Settl. 980 (1962) (Kates, Arb.); Hess Oil & Chem. Co., 62-3 Lab. Arb. Awards ¶ 8831 (1962) (Donnelly, Arb.). After *Wiley,* which did not involve a "successors and assigns" clause, the presence or absence of such a clause is not determinative of whether the successor will be bound by the predecessor's labor contract.

10. 29 U.S.C. § 185 (1962) [hereinafter cited as LMRA].

arbitrate the above-mentioned grievances. The district court denied relief,[11] but the Court of Appeals for the Second Circuit reversed, ordering arbitration.[12] The Supreme Court affirmed the court of appeals, holding that

> the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.[13]

In arriving at this conclusion, the Court initially reasoned that Wiley could not be ordered to arbitrate unless the courts, not the arbitrator,[14] found that Wiley was bound by the bargaining agreement's arbitration provision.[15] Relying on "federal law, 'fashioned from the policy of our national labor laws,' " the Court found Wiley bound by the arbitration clause.[16] In the Court's view, the national labor policy of avoiding industrial strife best could be accomplished by encouraging arbitration as the means for settling labor disputes and by protecting employees from the potentially harmful effects of a change in corporate ownership.[17]

The Court specifically rejected Wiley's assertion that it could

---

11. 203 F. Supp. 171 (S.D.N.Y. 1962).
12. 313 F.2d 52 (2d Cir. 1963).
13. 376 U.S. at 548.
14. The Court asserted:

> The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori,* it cannot be compelled to arbitrate if an arbitration clause does not bind it at all.

Id. at 547.

15. *Id.* at 545.

16. *Id.* at 548. The Union had relied on § 90 of the New York Stock Corporation Law, N.Y. Bus. Corp. Law § 906 (McKinney 1951), which provides that no "claim or demand for any cause" against a constituent corporation shall be extinguished by a consolidation. In reference to the Union's reliance on state law the Court asserted, "[s]tate law may be utilized so far as it is of aid in the development of correct principles or their application in a particular case . . . , but the law which ultimately results is federal." 376 U.S. at 548.

17. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers *be balanced* by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by "the relative strength . . . of the contending forces," *Warrior & Gulf,* 363 U.S. 574, 580.

> The preference of national labor policy for arbitration as a substitute for tests of strength between contending forces *could be overcome only if other considerations compellingly so demanded.*

376 U.S. at 549-50 (emphasis added).

not be required to arbitrate under Interscience's collective bargaining agreement because it was not a party to that contract and thus had not agreed to be bound by the arbitration clause. In so holding, the Court utilized a balancing test and found that "the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed."[18] Thus the Court expressly rejected the notion that the law governing ordinary contracts applies to a collective bargaining agreement because such an agreement is not an ordinary contract. Instead, it is a

> generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant. . . . Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship.[19]

By attributing this unique character to the collective bargaining agreement, the Court was able to conclude that Wiley's consent was not necessary for the arbitration clause to bind it, but that such a determination should be made according to the dictates of national labor policy.[20]

Although the Court ordered Wiley to arbitrate under the Interscience agreement, it explicitly refused to hold that the duty to arbitrate survives every change of corporate ownership. A "lack of any substantial continuity of identity in the business enterprise before and after a change" or a union's failure to make its claims known would prohibit the imposition of such a duty.[21] Wiley did not

---

18. *Id.* at 550.

19. *Id.*

20. Wiley further argued that the Union's claims were outside the scope of the arbitration clause because: (1) the agreement did not embrace post-merger claims; and (2) the claims related to a period beyond the limited term of the agreement. The first argument was dismissed summarily as previously having been decided. "It would be inconsistent with our holding that the obligation to arbitrate survived the merger were we to hold that the fact of the merger, without more, removed claims otherwise plainly arbitrable from the scope of the arbitration clause." *Id.* at 554. In answer to Wiley's charge that the claims were beyond the term of the contract, the Court noted that the original parties might have agreed to the accrual of certain rights during the term of the contract that would not be realized until after the contract's expiration. Whether this was the case and whether the Union's claims had any merit were questions to be determined by the arbitrator, not the court. *Id.* at 555; *see* United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

21. 376 U.S. at 551. The *Wiley* Court made clear that a finding of "substantial continuity in the business enterprise before and after a change" in ownership is a prerequisite to finding that the new employer is a successor for the purpose of imposing the duty to arbitrate. Although this determination has been "shrouded in somewhat impressionistic approaches," International Ass'n of Machinists Dist. Lodge 94 v. NLRB, 414 F.2d 1135, 1139 (D.C. Cir.)

fall within either of these exceptions; the Court found the requisite continuity of identity in the "wholesale transfer of Interscience employees to the Wiley plant" and recognized that the Union consistently had made its position clear.[22]

B. Wiley *Progeny*

The somewhat vague *Wiley* decision was soon applied by the lower federal courts to similar successor situations. Their various interpretations of *Wiley* highlighted the uncertainty generated by that decision. In *Wackenhut Corp. v. Plant Guard Workers Local 151*,[23] two unions brought suit under section 301 of the LMRA to compel Wackenhut to arbitrate grievances under a labor agreement between the unions and General Plant Protection Company. Wackenhut was not a party to the agreement, but had purchased the business and assets of General Plant and had hired almost all of General Plant's former employees. The unions asserted that Wackenhut, as a successor employer, was required to honor its predecessor's labor contract and therefore was obligated to arbitrate grievances concerning labor agreement provisions that Wackenhut had failed to put into effect. Wackenhut took the position that it was not

(Leventhal, J., concurring), *cert. denied,* 396 U.S. 889 (1969), several evidentiary considerations have become relevant to the determination: (1) continuity in the work force; (2) continuity of the supervisory personnel; (3) continuity of business operations; (4) changes in the internal operating method; (5) similarity of product or service; (6) continuity in the plant location; and (7) existence of a hiatus in business operations. In considering these criteria, the basic inquiry is whether the structure of the employing enterprise has been changed sufficiently to alter the employees' perception of the employment relationship. Teamsters Local 249 v. Bill's Trucking, Inc., 493 F.2d 956, 963 n.40 (3d Cir. 1974); Retail Clerks Local 1552 v. Lynn Drug Co., 299 F. Supp. 1036, 1039 (S.D. Ohio 1969); Goldberg, *supra* note 4, at 747-55; Slicker *supra* note 2, at 1054-63. Until *Howard Johnson* the continuity of the composition of the work force had been merely one of several criteria to be considered. *Howard Johnson* held that the hiring of a substantial number of the predecessor's employees is a necessary, but not always sufficient, element for a finding of successorship. *See* text accompanying notes 57-71 *infra.*

22. 376 U.S. at 551. The Court specifically stated that it was not expressing any views on a certified union's claim to continued representation after a change in corporate ownership since the Union did not assert that it had any bargaining rights independent of the Interscience contract. The Court stated, however, that even if the Union did not represent a majority of the employees in the appropriate bargaining unit, this fact would not prevent the Union from representing the employees covered by the agreement in dispute and out of which Wiley's duty to arbitrate arose. The Court foresaw no conflict with other unions because Wiley had no contract with any union covering the work force into which the former Interscience employees were integrated. Although the Court foresaw the possibility of problems arising from an arbitral award granting preferential treatment to former Interscience employees, it felt that such a possibility did not warrant denying the union the right to arbitrate the employees' claims. The Court had "little doubt that within the flexible procedures of arbitration a solution can be reached which would avoid disturbing labor relations in the Wiley plant." *Id.* at 552 n.5.

23. 332 F.2d 954 (9th Cir. 1964).

a successor and thus was not bound by the labor agreement.

The Court of Appeals for the Ninth Circuit held that Wackenhut was a successor employer, finding irrelevant that the change in corporate employers had resulted from a sale and purchase of assets, rather than from a merger.[24] The court ordered Wackenhut to arbitrate with the unions, stating that:

> The specific rule which we derive from Wiley is that where there is substantial similarity of operation and continuity of identity of the business enterprise before and after a change in ownership, a collective bargaining agreement containing an arbitration provision, entered into by the predecessor employer is binding upon the successor employer.[25]

Wackenhut accordingly interpreted *Wiley* in two meaningful ways. Initially, it established that *Wiley* was not to be limited to merger situations, but quite to the contrary, suggested the broader proposition that the technical form by which the change in employers occurs is irrelevant to the determination of whether the *Wiley* principles will be applied.[26] Furthermore, *Wackenhut* appears to interpret *Wiley* as holding that a predecessor's entire labor contract is binding on the successor, leaving only the interpretation and enforcement of that contract to the arbitrator.[27] Since *Wiley* had required only that the successor honor the arbitration clause contained in the predecessor's contract, the extent to which other terms of the contract could be enforced by either a court or an arbitrator was left an open question.

---

24. *Id.* at 958.

25. *Id.*

26. Several courts and commentators agree with *Wackenhut*'s reading of *Wiley* on this point. United States Gypsum Co. v. United Steelworkers, 384 F.2d 38 (5th Cir. 1967), *cert. denied*, 389 U.S. 1042 (1968); Monroe Sander Corp. v. Livingston, 377 F.2d 6 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967); McGuire v. Humble Oil & Ref. Co., 355 F.2d 352 (2d Cir.), *cert. denied*, 384 U.S. 988 (1966); Joint Bd. of Cloak, Skirt, and Dressmakers v. Senco, Inc., 310 F. Supp. 539 (D. Mass. 1970); Retail Clerks Local 1552 v. Lynn Drug Co., 299 F. Supp. 1036 (S.D. Ohio 1969); Goldberg, *supra* note 4, at 751; Slicker, *supra* note 2, at 1062-63; Vernon, *Successorship and Collective Bargaining Agreements in Business Combinations and Acquisitions*, 24 VAND. L. REV. 903, 914-15 (1971).

27. Other courts and commentators have read the *Wackenhut* opinion in this fashion. Teamsters Local 249 v. Bill's Trucking, Inc., 493 F.2d 956 (3d Cir. 1974); International Ass'n of Machinists v. Howmet Corp., 466 F.2d 1249 (9th Cir. 1972); United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964); Sangerman, *The Labor Obligations of the Successor to a Unionized Business*, 19 LAB. L.J. 160, 166 (1968); Slicker, *supra* note 2, at 1080; Comment, *The Impact of John Wiley Revisited—From the Vindication of Policy to the Verge of Inequity*, 21 SYRACUSE L. REV. 875, 882 (1970) [hereinafter cited as *The Impact of John Wiley Revisited*]; *Contractual Obligations of a Successor Employer*, *supra* note 4, at 927; Note, *The Duties of Successor Employers Under John Wiley & Sons v. Livingston and Its Progeny*, 43 N.Y.U. L. REV. 498, 503 (1968) [hereinafter cited as *The Duties of Successor Employers*]. *But see* Goldberg, *supra* note 4, at 775 (arguing that it is incorrect to read the *Wackenhut* decision as holding that the entire labor contract survives).

The Court of Appeals for the Third Circuit in *United Steelworkers v. Reliance Universal, Inc.*[28] expressly rejected *Wackenhut's* view that *Wiley* provided authority for imposing a predecessor's entire labor agreement upon a successor.[29] In *Reliance,* the Federal Trade Commission had ordered Martin Marietta Corporation to divest itself of its Bridgeville, Pennsylvania plant. Accordingly, Martin Marietta sold the plant as a going concern to Reliance Universal, Inc., which operated the plant without significant change and hired virtually all of Martin Marietta's former employees. At the time of the sale, Martin Marietta was a party to a collective bargaining agreement with the Steelworkers Union. After Reliance refused to abide by this agreement, the Union sued under section 301 of the LMRA, requesting both a declaratory judgment that the predecessor's labor contract was binding on Reliance and an order directing Reliance to arbitrate with the Union.

The circuit court ordered Reliance to arbitrate with the Union,[30] holding that, although it had become the new employer via a purchase and sale of assets rather than a merger, Reliance was still a successor.[31] Yet, the court staunchly refused to impose the entire labor agreement upon the successor, stating that *Wiley* did not support such a holding. Instead, the court read *Wiley* as expressing a concern that new circumstances, created by the change in employers, might render certain contract terms negotiated by a different party in different circumstances unreasonable or inequitable when imposed on a successor employer.[32] The court stated that the question whether a departure from certain provisions in the predecessor's contract is justified by unusual circumstances should be resolved by the arbitrator, not by the courts. In making this decision the arbitrator should be authorized to "consider any relevant new circumstances arising out of the change of ownership, as well as the provisions of and practices under the old contract, in achieving a just and equitable settlement of the grievance at hand."[33]

---

28. 335 F.2d 891 (3d Cir. 1964).

29. *Id.* at 895 n.3.

30. The Third Circuit argued:

So strong, in the [*Wiley*] Court's stated view, is the federal policy in favor of amicable settlement of labor disputes by arbitration that the emerging federal common law of labor relations requires a succeeding proprietor of a business to take the business subject to a duty to arbitrate grievances, the existence and scope of that duty being defined by whatever unexpired labor contract governed labor relations there at the time of the change in ownership.

Id. at 894.

31. *Id.*

32. *Id.* at 895.

33. *Id.* Although the court felt that the arbitrator should have this flexibility, it asserted

Reliance thus confirmed the conclusion that *Wiley* applied regardless of the technical form of the change in employers, reopened the question whether other substantive terms of the predecessor's contract might be automatically binding on a successor, and established flexible guidelines for arbitrators in successor situations.[34]

C. NLRB v. Burns International Security Services, Inc.

The next Supreme Court pronouncement on a successor employer's duties under a predecessor's labor contract came in *NLRB v. Burns International Security Services, Inc.*[35] In that case, the Wackenhut Corporation had provided protection services to a Lockheed plant under a one-year service agreement. Several months before this contract was to expire, the Wackenhut employees elected and the Board certified the United Plant Guard Workers of America (UPG) as their bargaining representative. The UPG then entered into a three-year collective bargaining agreement with Wackenhut. Upon the expiration of Wackenhut's service contract, Lockheed solicited competitive bids for the supplying of protection services to its plant and received bids from both Wackenhut and Burns International Security Services. After notifying Burns of the existence of a labor contract, Lockheed awarded it a one-year service contract.

Burns hired twenty-seven former Wackenhut guards and transferred fifteen of its own guards to Lockheed from other locations. When Burns hired the Wackenhut employees, it supplied them with membership cards of another union, the American Federation of Guards (AFG), and informed them that they would not be hired unless they joined the AFG. Burns recognized the AFG as the bargaining representative on the theory that a majority of their employees had signed AFG membership cards. The UPG demanded that Burns recognize it as the employees' bargaining representative and that Burns honor the collective bargaining agreement between the UPG and Wackenhut. When Burns refused, the UPG filed unfair labor practice charges with the NLRB.

The UPG charged and the NLRB found that Burns had committed unfair labor practices by unlawfully recognizing and assisting the AFG, a rival union of the UPG,[36] by failing to recognize and

---

that the terms of the collective bargaining agreement would still be the basic guide to the law of the shop at the Bridgeville plant. *Id.*

34. The *Reliance* court's establishment of arbitral guidelines emphasizes the absence of any such standards in *Wiley*. The only guideline suggested by the *Wiley* Court to aid the arbitrator in determining the effect of the merger on the collective bargaining agreement was an examination of "whether or not the merger was a possibility considered by Interscience and the Union during the negotiation of the contract." 376 U.S. at 557.

35. 406 U.S. 272 (1972).

36. This conduct violated §§ 8(a)(1) and 8(a)(2) of the National Labor Relations Act,

bargain with the UPG,[37] and by failing to honor the existing labor contract between the UPG and Wackenhut.[38] Accordingly, the NLRB ordered Burns to bargain with the UPG and to honor its predecessor's labor agreement.[39] The Court of Appeals for the Second Circuit upheld the Board's bargaining order, but reversed the order to honor the labor contract holding that such an order exceeded the Board's power.[40] The Supreme Court affirmed the decision of the court of appeals.[41]

In upholding the order to bargain, the Court found that the Lockheed plant was the appropriate bargaining unit[42] and that the UPG, recently certified as the bargaining representative of all the employees in that unit, still represented a majority of those employees.[43] The Court held, however, that the NLRB erred in finding that

---

29 U.S.C. §§ 158(a)(1), 158(a)(2) (1970) [hereinafter cited as NLRA].

37. This conduct violated NLRA §§ 8(a)(1), 8(a)(5), 29 U.S.C. §§ 158(a)(1), 158(a)(5) (1970).

38. This conduct also violated NLRA §§ 8(a)(1), 8(a)(5), 29 U.S.C. §§ 158(a)(1), 158(a)(5) (1970). Instead of implementing the terms of the predecessor's contract, Burns established its own terms of employment.

39. William J. Burns Int'l Detective Agency, Inc., 182 N.L.R.B. 348 (1970). There were three companion cases to *Burns:* Hackney Iron & Steel Co., 182 N.L.R.B. 357 (1970) (successor's failure to honor the predecessor's contract violated NLRA § 8(a)(5)); Kota Div. of Dura Corp., 182 N.L.R.B. 360 (1970) (successor who assumed the predecessor's labor contract could not be compelled to negotiate a new contract with the union); Travelodge Corp., 182 N.L.R.B. 370 (1970) (new employer held not to be a successor).

40. 441 F.2d 911 (2d Cir. 1971). Burns did not appeal the Board's finding of unlawful assistance to a union.

41. 406 U.S. 272 (1972).

42. *Id.* at 278. The Court based this conclusion upon the trial examiner's finding, adopted by the NLRB, that the Lockheed plant was the appropriate bargaining unit. Justice Rehnquist pointed out in dissent that the trial examiner's finding on this issue depended upon a previous stipulation concerning the appropriate bargaining unit between the UPG and Wackenhut. *Id.* at 297.

43. This conclusion was based on the representation by the UPG of a majority of Burns' employees and on the recent certification by the NLRB of the UPG as their bargaining representative. When the UPG was certified, it became the exclusive bargaining agent of all Wackenhut employees in the unit, even those who voted against it. Thus the UPG represented a majority of the employees in the Burns bargaining unit because a majority of those employees were former Wackenhut guards.

Furthermore, Board certification carries with it an almost conclusive presumption of continued majority status for a reasonable period, usually a year. Brooks v. NLRB, 348 U.S. 96 (1954). The Court noted that a mere change of employers does not affect the force of a Board certification order. 406 U.S. at 279. The UPG's majority status, therefore, could not be attacked until one year after the Board's certification. *See* Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131, 1138-39 (7th Cir. 1974); Maintenance, Inc., 148 N.L.R.B. 1299 (1964); Doppelt, *supra* note 4, at 181. Justice Rehnquist dissented from this conclusion claiming that "it is 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." 406 U.S. at 297. This comment seems to disregard all of the effects of certification mentioned above.

Burns' failure to honor its predecessor's contract constituted an unfair labor practice and in ordering Burns to honor that contract.[44] Relying on *H.K. Porter Co. v. NLRB*,[45] the Court reasoned that section 8(d) of the National Labor Relations Act (NLRA), which prohibits the Board from "compel[ling] either party to agree to a proposal or require the making of a concession,"[46] prevented the NLRB from imposing the substantive terms of a predecessor's contract on a successor employer.[47]

The NLRB urged that *Wiley*, with its emphasis on the peaceful settlement of industrial disputes and the protection of employees' contractual rights, required Burns to abide by the terms of its predecessor's labor agreement.[48] In response to this argument, the Court specifically found that *Wiley* did not control the particular facts at issue. The *Burns* Court distinguished *Wiley* on the basis of its different procedural context, stating that "*Wiley* arose in the context of a §301 suit to compel arbitration, not in the context of an unfair labor practice proceeding where the Board is expressly limited by the provisions of §8(d)."[49] Moreover, the Court pointed out that

---

44. 406 U.S. at 291. The Court did suggest, however, that in some circumstances the Board properly might find, as a matter of fact, that a successor employer had assumed obligations under the predecessor's contract. Such a duty, however, would not arise as a matter of law. *Id.*

45. 397 U.S. 99 (1970). In *Porter* the Board found that the employer had committed the unfair labor practice of failing to bargain with the union by adamantly rejecting a dues check-off provision. As a remedy, the Board ordered the employer to agree to the provision. The Supreme Court agreed that the employer had violated the Act, but held that the Board had no power to impose a substantive contract term upon one of the parties.

46. Section 8(d) of the NLRA reads in pertinent part as follows:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representatives of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . . .

29 U.S.C. § 158(d) (1970).

47. 406 U.S. at 282-83. Further support for this interpretation of § 8(d) is found in its legislative history and in Congress' constant refusal to interfere with free collective bargaining in numerous other contexts. Also, the Court noted that, prior to *Burns*, the NLRB consistently had held that successor employers are not bound by their predecessor's collective bargaining contracts. *Id.* at 284; *see* Rohlik, Inc., 145 N.L.R.B. 1236, 1242 n.15 (1964); Slater Sys. Md., Inc., 134 N.L.R.B. 865, 866 (1961); General Extrusion Co., 121 N.L.R.B. 1165, 1168 (1958).

48. *Burns* was the first proceeding in which the Board applied *Wiley* to a § 8(a)(5) refusal to bargain charge. 182 N.L.R.B. 348 (1970). The Board previously had refused to do so. *See* Glenn Goulding, 165 N.L.R.B. 202 (1967); Valleydale Packers, Inc., 162 N.L.R.B. 1486 (1967), *enforced*, 402 F.2d 768 (5th Cir. 1968), *cert. denied*, 396 U.S. 825 (1969); Rinker Materials Corp., 162 N.L.R.B. 1670 (1967).

49. 406 U.S. at 285.

Wiley rested upon the national labor policy favoring arbitration and therefore only ordered the successor employer to arbitrate with the union. The Court further noted that *Wiley* dealt with a merger taking place against a background of state law that imposed liability on a successor corporation for its predecessor's obligations,[50] whereas the two companies in *Burns* were competitors who had had no prior dealings with each other.

On a more fundamental level, the Court rejected *Wiley*'s applicability by asserting that, although preventing industrial strife was a major goal of national labor policy, Congress had not totally subordinated the bargaining freedom of employers and employees to that goal.[51] The Court felt that imposing the predecessor's contract on the successor not only would impinge on the parties' right to free collective bargaining, but also would create many serious inequities that might unduly injure or restrict the parties in conducting their business operations. Thus, in support of its result, the Court discussed various policy issues raised by the successorship situation.[52] For instance, the Court expressed a major concern that imposing a predecessor's labor contract on a new employer might discourage corporations from acquiring moribund businesses, thereby impeding the free transfer of assets. In turn, employees whose unions had made concessions to failing employers would not be able to reap the benefits of a new and more prosperous employer. The Court also felt that, if the successor were required to honor the predecessor's labor contract, the predecessor's employees would be deemed employees of the successor, dischargable only in accordance with the contract. The employer thus would not be free to select his own employees, but would be obligated to accord seniority rights, vacation privileges, and retirement fund benefits to the predecessor's employees. Finally, the successor employer would be unable to compel the union to bargain for a modification of the contract before its expiration date and would be prohibited from disputing, even in good faith, the union's majority status during the term of the contract.[53]

In accordance with its holding prohibiting the Board from imposing the predecessor's contract on Burns, the Court held that Burns was not guilty of unilaterally changing the terms or condi-

50. *Id.* at 286; *see* note 16 *supra*.

51. 406 U.S. at 287.

52. For a critique of these policies, see text accompanying notes 164-95 *infra*.

53. The "contract bar" rule is imposed by the Board for the term of a collective bargaining agreement of "reasonable duration," a period now defined as three years. General Cable Corp., 139 N.L.R.B. 1123 (1962).

tions of employment[54] because as a new employer "it had no previous relationship whatsoever to the bargaining unit and . . . no outstanding terms and conditions of employment from which a change could be inferred."[55] Only when the new employer's intention to hire all of the former employees is "perfectly clear" would the new employer be required to consult with the union before determining the initial terms of employment.[56]

D. Howard Johnson Co. v. Detroit Local Joint Executive Board

The most recent Supreme Court statement regarding a successor's duties under his predecessor's labor agreement came in *Howard Johnson Co. v. Detroit Local Joint Executive Board.*[57] In that case, the predecessor employer, the Grissoms, operated a motor lodge and restaurant under a franchise agreement with Howard Johnson. The Grissoms had entered into two collective bargaining agreements with two unions, one covering the lodge employees, the other covering the restaurant employees.[58] Both agreements contained arbitration provisions and "successors and assigns" clauses.[59] Prior to the expiration of either agreement, the Grissoms agreed to sell all the assets of the motor lodge and restaurant and to lease the real property to Howard Johnson. When Howard Johnson began operating the business, it hired forty-five employees, only nine of whom previously had been employed by the Grissoms, who prior to the sale had fifty-three employees.

---

54. This conduct would have violated NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970).

55. 406 U.S. at 294.

56. *Id.* at 295. In a vigorous dissent written on behalf of four members of the Court, Justice Rehnquist argued that the bargaining order and the order to honor the contract should be overturned. Disputing the majority's finding of successorship upon which the bargaining order rested, Justice Rehnquist insisted that successorship can be found only when contractual dealings have occurred between the two employers. *Id.* at 296, 306. The mere shifting of employees between Wackenhut and Burns, Justice Rehnquist felt, was too attenuated a relationship to warrant imposing the obligations of successorship upon Burns.

In the same vein, Justice Rehnquist attacked tbe order to honor the contract, stating that:

> If we deal with the legitimate expectations of employees that the employer who agreed to the collective-bargaining contract perform it, we can require another employing entity to perform the contract only when he has succeeded to some of the tangible or intangible assets by the use of which the employees might have expected the first employer to have performed his contract with them.

Id. at 305.

57. 417 U.S. 249 (1974).

58. As the Court pointed out, although these two unions bore different names, they were identical in interest and governance. They thus were treated as a single union. *Id.* at 251 n.1.

59. *See* note 9 *supra.*

After Howard Johnson refused to recognize the unions or to assume any obligations under the labor agreements, the unions filed suit under section 301 of the LMRA.[60] The unions characterized Howard Johnson's failure to hire all of Grissom's former employees as a "lockout" in violation of the labor contract and sought an order compelling arbitration. The district court's order directing Howard Johnson to arbitrate under its predecessor's contract[61] was affirmed by the Sixth Circuit,[62] but was reversed by the Supreme Court.[63] The Supreme Court recognized that the reasoning of *Wiley* appeared inconsistent with the approach taken in *Burns*.[64] Yet, the Court found it unnecessary to determine whether any "irreconcilable conflict" existed between those two decisions because it felt that not even *Wiley* would support an order to arbitrate under the circumstances.[65] Holding that the "substantial continuity of identity in the business enterprise"—a prerequisite to ordering a successor to arbitrate—"necessarily includes . . . a substantial continuity in the identity of the work force across the change in ownership,"[66] the Court found such continuity lacking because Howard Johnson had hired only nine of Grissom's fifty-three employees. The Court further supported its holding by asserting that the successor had no obligation to hire any of the predecessor's employees.[67]

Pointing out that *Wiley* involved a merger, whereas a purchase and sale of assets was here at issue, the Court enunciated two additional reasons why *Wiley* was not controlling. First, in *Wiley* the New York merger statute imposed the obligations of a predecessor on the successor corporation.[68] Thus, the successor and the employees in *Wiley* reasonably should have expected that they would be bound to arbitrate under the predecessor's contract. No similar

60. 29 U.S.C. § 185 (1970).

61. 81 L.R.R.M. 2329 (1972).

62. 482 F.2d 489 (6th Cir. 1973).

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

64. For a discussion of the inconsistency, see text accompanying notes 72-76 *infra*.

65. 417 U.S. at 256.

66. *Id.* at 263. The Court felt that the *Wiley* Court recognized this requirement by resting its finding of continuity upon the "wholesale transfer" of Interscience employees to *Wiley*.

67. Because the Union argued that the predecessor's labor contract required Howard Johnson to hire all of the former Grissom employees, the Court felt that the Union was not seeking arbitration to protect the rights of the Howard Johnson employees, but rather, was acting on hehalf of the Grissom employees who were not hired by Howard Johnson. The Union's assertion is at odds with the basic principles of labor law that establish that Howard Johnson had the right not to hire any former Grissom employees as long as it did not base its hiring decisions on union membership. *Id.* at 261-62.

68. *See* note 16 *supra*.

finding could be made in *Howard Johnson*. Second, the merging corporation in *Wiley* disappeared, leaving the employees without means of enforcing their contract unless they were given a remedy against Wiley. In *Howard Johnson*, however, the Court felt the employees had an effective means by which to enforce their labor agreement since the seller remained a viable entity with substantial assets.[69]

Although the Court refused to attempt a reconciliation of *Wiley* and *Burns*, it did rebuke the lower courts for holding *Burns* inapplicable because it dealt with an NLRB order, whereas *Wiley* and the present case involved section 301 suits to compel arbitration. The Court stated that

> [i]t would be plainly inconsistent . . . to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under §301, and thus to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claims.[70]

Accordingly, the Court held that the principles of both *Wiley* and *Burns* applied to successorship issues.[71]

E. *The Unanswered Questions*

This line of cases leaves a number of questions unanswered. The most fundamental of these emanates from the apparently contradictory holdings of *Wiley* and *Burns*. In ordering the successor to arbitrate, the *Wiley* Court specifically declared that national labor policy was not to be thwarted by basic principles of ordinary contract law. The Court determined that arbitration was a means of avoiding industrial strife and protecting the contractual rights of the employees that outweighed the fact that Wiley was not a signatory to the contract. The inescapable implication of *Wiley's* arbitration order is that other substantive terms of a predecessor's contract potentially are binding on the successor. It is inconceivable that the Court would have ordered Wiley to arbitrate the Union's claims under the predecessor's labor agreement unless the arbitrator had

69. Indeed, the Grissoms had conceded their obligation to arbitrate with the union in accordance with the collective bargaining agreements they had signed. 417 U.S. at 253.

70. *Id.* at 256. Although it rejected the lower court's differing treatment of NLRB orders and § 301 suits, the Court acknowledged that the distinction had been suggested by the *Burns* Court.

71. The Court felt that its decision requiring a suhstantial continuity of the work force in order to find successorship for arbitration purposes accommodated both *Wiley's* concern for protecting employee interests in a change of ownership and *Burns'* emphasis on the new employer's right to operate the business with his own independent work force. *Id.* at 264.

the power both to find the predecessor's contract terms binding on the successor and to find the successor in violation of those terms.[72]

In stark contrast to this position, the natural inference from *Burns* is that none of the predecessor's contract terms, *including* the arbitration clause, could be imposed upon an unconsenting successor. *Burns* reflects a shift in the Court's emphasis from a concern with avoiding industrial strife and protecting employee rights toward a preference for free collective bargaining and the unimpeded transfer of assets.[73] Although refusing to address this inconsistency, the Court in *Howard Johnson* cast some doubt upon the future vitality of *Wiley* by limiting that case to its specific facts and by emphasizing the right of a purchaser to make appropriate changes in a business, including the hiring of his own independent work force.

Although it is clear that *Wiley* has not been overruled expressly,[74] the ultimate effect of the *Burns* decision on the continued viability of *Wiley* has yet to be determined.[75] The question remains

72. There is a virtual consensus that this is the necessary implication of *Wiley*. *See* Teamsters Local 249 v. Bill's Trucking, Inc., 493 F.2d at 960 n.20; United Steelworkers v. United States Gypsum Co., 339 F. Supp. 302, 306 (N.D. Ala. 1972), *rev'd on other grounds*, 492 F.2d 713 (5th Cir. 1974); United States Gypsum Co., 56 Lab. Arb. & Disp. Settl. 363, 388 (1971) (Valtin, Arb.); Shaw & Carter, *Sales, Mergers and Union Contract Relations*, 19 N.Y.U. ANN. CONF. ON LAB. 357, 370 (1967); 14 B.C. INDUS. & COM. L. REV. 193, 199 (1972); 21 U. KAN. L. REV. 97, 104 (1972). In a recent decision, Bartenders Local 340 v. Howard Johnson Co., 535 F.2d 1160 (9th Cir. 1976), the Ninth Circuit refused to impose a predecessor's lahor agreement on a successor, apparently rejecting this interpretation. For a full discussion of this decision, see note 155 *infra*.

73. The Board recognized this shift in emphasis in its recent decision, Lone Star Steel Co., 231 N.L.R.B. No. 88 (1977), which held that a "successors and assigns" clause is a mandatory subject of collective bargaining. The Board stated "it is clear that the general rules governing successorship [enunciated in *Burns*] guarantee neither employees' wages nor their jobs."

74. The Supreme Court in Nolde Bros. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 243 (1977), relied on *Wiley* in holding that an employer is required to arbitrate a contractual dispute even though the dispute arose after the collective bargaining agreement had expired.

75. As is highlighted by the decisions in *Bartenders Local 340 v. Howard Johnson Co.* and *Lone Star Steel Co.*, the question of *Burns'* effect on *Wiley*'s viability is a question of some immediacy with no clear answer. In *Bartenders Local 340 v. Howard Johnson Co.* the Union put this question into issue. Although the court declined to decide the question, it noted that the issue whether *Wiley* survived *Burns* was undecided. For a discussion of this case, see note 155 *infra*. The uncertain state of the law regarding a successor's obligations under its predecessor's labor agreement was emphasized by the Board's disagreement in *Lone Star Steel Co.* regarding the holding that a "successors and assigns" clause is a mandatory hargaining issue. The dissent asserted that this holding would "achieve precisely what the *Burns* court sought to avoid." One court, however, appears at first blush to have decided that *Wiley* remains controlling precedent. In an ambiguous and conclusory opinion, the court in Lathers Local 104 v. McGlynn Plastering, Inc., 91 L.R.R.M. 3000 (W.D. Wash. 1976), utilized language which could be interpreted as imposing the arbitration clause of a predecessor's

whether courts in the future may order a successor employer to arbitrate under his predecessor's labor agreement and, if the courts may do so, whether and to what extent an arbitrator may impose other substantive terms of the contract upon the successor. Furthermore, as highlighted by *Reliance,* guidelines are needed to aid the arbitrator in determining which provisions of the predecessor's contract survive and how those provisions should be interpreted with regard to the new employer.[76]

III. Developing Answers to the Questions

A. *Equitable Accommodation of Goals of National Labor Policy Through Arbitration*

An attempt to resolve the questions whether courts may now require a successor to arbitrate under his predecessor's contract and whether an arbitrator may impose other substantive terms of the contract necessarily involves consideration of the issue, initially dealt with in *Wiley,* of whether such obligations should be imposed. The federal courts' mandate is to develop a federal common law regarding enforcement of collective bargaining agreements "fashioned from the policy of our national labor laws."[77] Because the

---

collective bargaining agreement upon a successor. In that case, a grievance arose between the Union and the original employer, McGlynn Plastering, a proprietorship. The Union took the dispute to arbitration at which the employer defaulted. The arbitration award granted in favor of the Union provided that it would be binding on the employer or its successor. Subsequently, the proprietorship was incorporated and hecame McGlynn Plastering, Inc. The Union brought suit to enforce the arbitration award against the corporation. The court denied a motion for summary judgment because there had been no showing that the corporation was a successor employer bound by the contract of a predecessor under § 301 of the NLRA. Later, relying on uncontroverted affidavits and *Wiley,* the court concluded the corporation was a "successor" to the proprietorship because there was a "continuity of operation across the change of ownership" in that the proprietorship had transferred its name, assets, good will, and licenses to the corporation. Accordingly, the court enforced the arbitrator's award against the corporate employer.

Despite this court's language, it would be serious error to rely upon *McGlynn Plastering* as support for *Wiley*'s continued vitality. First, as a successorship case, it is an inaccurate, incomplete statement of the law; without any mention of *Burns* or *Howard Johnson,* the court states that a successor will be bound by a predecessor's contract. Second, even the very brief, vague facts contained in the opinion reveal that this is not a true "successor" situation, but instead is an alter ego problem. *See* note 1 *supra.* The first employer, a proprietorship, merely was incorporated. There had been no meaningful change in the identity of tbe employer, only a technical change in the structure of the employing entity. Thus, the arbitration award properly should have been enforced against the corporation as an alter ego. Also, if the corporate employer were to be considered a successor, it should be meaningful in this case only because language of the arbitration award was by its own terms binding only on a successor.

76. For a discussion of *Reliance,* see text accompanying notes 28-34 *supra.*

77. Textile Workers v. Lincoln Mills, 353 U.S. 448, 456 (1957). *See also* Teamsters Local

national labor policies relating to the successorship issue are inherently conflicting, the answer depends upon whether the national labor policies that are furthered by imposing obligations on the successor outweigh the labor policies that are impinged upon by enforcing such obligations. This determination requires an analysis of the specific facts of each case, as well as the interests of the parties, and their effects on the objectives of national labor policy.[78] Imposing the duty to arbitrate on a successor greatly enhances both the labor policy of preventing industrial strife and that of promoting freedom of choice, whereas it results in only minimal governmental interference with the free collective bargaining process. Accordingly, an equitable balance between these competing policies favors requiring the successor to arbitrate his future obligations under his predecessor's contract with the union.[79]

(1) Preventing Industrial Strife and Promoting Freedom of Choice

Although the goal of preventing industrial strife is basic to our national labor policy, it generally has not been urged as a basis for interfering with free collective bargaining.[80] In light of the separate-but-equal co-existence of these two goals, the difficult question becomes how an even minimal interference with free collective bargaining can be justified in a successor situation. The answer, simply stated, is that the risk of industrial strife is substantially greater in the case of a successor employer than it is in the normal bargaining context, and imposition of the predecessor's labor agreement may

---

174 v. Lucas Flour Co., 369 U.S. 95, 105 (1962); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

78. This method of analysis was suggested by the Court in *Howard Johnson*:

> [T]he real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative? The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc.

417 U.S. at 262-63 n.9.

79. At least one other commentator has arrived at a similar conclusion. *See* Stern, *Binding the Successor Employer to Its Predecessor's Collective Agreement Under the NLRA*, 45 TEMP. L.Q. 1, 34-35 (1971).

80. NLRB v. Insurance Agents' Int'l, 361 U.S. 477, 488-90 (1960); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 401-03 (1952). *See also* H.K. Porter Co. v. NLRB, 397 U.S. at 103; Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241 (1962); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. at 582; Swerdlow, *Freedom of Contract in Labor Laws:* Burns, H.K. Porter, *and Section 8(d)*, 51 TEX. L. REV. 1, 1-6 (1972). For a discussion of Congress' persistent refusal to interfere with the process of free collective bargaining by imposing compulsory arbitration, see Goldberg, *supra* note 4, at 742-73.

be necessary to avert its occurrence.

Industrial instability from either strikes and other means of economic disruption or continuous litigation is very likely to result from a wholly unanticipated termination of employees' contract rights following a change in employer. Employees normally expect the rights and benefits afforded them under their collective bargaining agreement to continue until its expiration date. A unilateral, premature termination of their contract naturally would foster a sense of insecurity among the employees about any future contracts and reasonably could be expected to breed resentment and ill will against the new employer.[81] New contract negotiations, during a period in which no contract exists, would present the employees with a gap in the terms and conditions of their employment and would subject them to an uncertain future, thus jeopardizing the stability of labor relations.[82] Furthermore, permitting a successor employer to flout the employees' previously negotiated contract and to require the union to expend additional time and money negotiating a new contract, with all the uncertainties that attend the process, is likely to anger the union and the employees. Bargaining negotiations therefore would be more difficult, the possibility of agreement would be reduced, and the likelihood of a strike would be greatly increased.[83]

An order requiring arbitration, with the implication that other contract terms might bind the successor, would avoid industrial strife by protecting the employees' expectations from the effects of a sudden change in their employer's business over which the employees have absolutely no control.[84] This restriction on the new employer's right to arrange his business freely cannot be justified as a means of protecting employees' substantive rights. Rather, the restriction is warranted because it is the best means of achieving industrial peace, but is a valid approach only as long as it is a necessary and effective means of achieving that goal. The protection of employee rights is merely incidental to accomplishing this ultimate goal.[85] Use of the "substantial continuity" test[86] to determine the question of successorship assures that neither the employing enterprise nor the employment relationship has been changed

81. 14 B.C. INDUS. & COM. L. REV. 193, 206-07 (1972).

82. Fed-Mart, 165 N.L.R.B. 202 (1967); Goldberg, *supra* note 4, at 811.

83. Doppelt, *supra* note 4, at 184-85.

84. *See* Note, *Contractual Successorship: The Impact of* Burns, 40 U. CHI. L. REV. 617, 621-22 (1973) [hereinafter cited as *Contractual Successorship*].

85. For a similar view, see *id.* at 627.

86. *See* note 25 *supra* and accompanying text.

greatly. Former employees of the predecessor hired by the successor would view their job situations as substantially unaltered and would expect and demand no more and no less than fulfillment of the provisions of their contract.[87] Meeting these expectations would encourage stability in the employment relationship by generating respect and good will between the parties and by avoiding confrontations that lead to frustration, anger, distrust, and ultimately to labor unrest.[88]

Imposing the predecessor's labor contract on the successor is a necessary means of achieving industrial stability by protecting employees' legitimate expectations because it is the only effective means by which employees can enforce their rights under their collective bargaining agreement. Employee interests are not represented in take-over negotiations.[89] In fact, in the majority of mergers, acquisitions, or purchases of assets, employees are unaware of the pending change of employer until they are notified by the predecessor employer that their employment is soon to be terminated.[90] As one commentator has stated: "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."[91]

---

87. "There is no reason to believe that the employees will change their attitude merely because the identity of their employer has changed." NLRB v. Armato, 199 F.2d 800, 803 (7th Cir. 1952) (concerning successor's duty to bargain with union); William J. Burns Int'l Detective Agency, Inc., 182 N.L.R.B. at 349.

88. "The substantial continuity test serves the interests of employee job security and industrial stability by meeting employee expectations." *The Impact of Burns Security, supra* note 5, at 587. *See also* Goldberg, *supra* note 4, at 749.

89. As pointed out by the *Wiley* Court,

> [e]mployees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations.

376 U.S. at 549.

90. *See, e.g.*, Wackenhut Corp. v. Plant Guard Workers Local 151, 332 F.2d 954 (9th Cir. 1964) (purchase agreement entered into three months before union was notified of sale); Local Joint Executive Board, Hotel & Restaurant Employees v. Joden, Inc., 262 F. Supp. 390 (D. Mass. 1966) (union notified two weeks before sale of assets); Retail Store Employees Local 954 v. Lane's of Findlay, Inc., 260 F. Supp. 655 (N.D. Ohio 1966) (employees notified one day prior to sale of assets).

91. Slicker, *supra* note 2, at 1052. If employees do become aware of a possible transaction, the only means by which they might protect themselves against a future change in employer depends entirely on the existence of a "successors and assigns" clause in their existing contract. Relying upon such a clause, the union possibly could sue successfully to enjoin the anticipated merger or sale of assets until the question whether the predecessor must require the successor to honor the labor contract is arbitrated. In Food Employees Local 590 v. National Tea Co., 346 F. Supp. 875 (W.D. Pa. 1972), the employer had negotiated a

After the change in employer has taken place, only the successor employer can provide an effective remedy for the employees. This is true in mergers and acquisitions because the predecessor corporation disappears. Despite suggestions to the contrary,[92] a predecessor that continues in existence following a purchase and sale of assets is incapable of providing total and effective remedies for meritorious union claims.[93] The only relief that the predecessor could provide is monetary damages for such claims as those involving severance pay, accrued vacation benefits, and pension plan contributions.[94] Claims of much more vital concern to the employees, involving, for example, continued employment, discharge without just cause, and violation of seniority rights can be honored and remedied only by the successor employer, who has acquired the assets and is operating the business.[95] The union should be free to arbitrate its claims with the party who can provide meaningful, effective relief for the union's meritorious claims.

Furthermore, imposing the predecessor's contract creates industrial stability and continuity by providing a smooth transition from one employer to another.[96] This is achieved by retaining the

---

tentative agreement for the sale of 36 of its stores. The agreement did not contain a clause binding the successor to the existing contract hetween the Union and the employer, which included a "successors and assigns" clause. The court ordered the employer to arbitrate the Union's claims and issued an injunction, pending enforcement of the arbitrator's award, prohibiting the employer from consummating a contract for the sale of his stores unless it made the existing labor contract binding on the successor. Similarly, the court in National Maritime Union v. Commerce Tankers Corp., 325 F. Supp. 360 (S.D.N.Y. 1971), enforced an arbitration award which forbade the employer from selling one of his ships unless the purchaser agreed to honor the employer's collective bargaining agreement, which included a "successors and assigns" clause.

Whether the union finally succeeds in the arbitration proceeding depends upon the arbitrator's interpretation of the "successors and assigns" clause. In Dawn Farms Corp., 66-1 Lab. Arb. Awards ¶ 3529 (1965) (Wolff, Arb.), the arbitrator held that a "successors and assigns" clause obligated the predecessor to assure that the new employer would honor the labor contract. In direct contrast, the "successors and assigns" clause in C-F-M Co., 37 Lab. Arb. & Disp. Settl. 980 (1962) (Kates, Arb.), was interpreted as binding the successor to the contract, but as imposing no obligation on the predecessor to see that the successor was bound.

92. Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. at 257-58; McGuire v. Humble Oil & Ref. Co., 355 F.2d at 353; Retail Store Employees Local 954 v. Lane's of Findlay, Inc., 260 F. Supp. at 659.

93. Courts have held that, even though the predecessor's contract might be binding on the successor, the predecessor is still bound by his labor contract with the union. Although the predecessor cannot provide an adequate remedy for the employees, the union still can compel him to arbitrate alleged violations of the contract. Local 82, United Packinghouse Workers v. United States Cold Storage Corp., 430 F.2d 70 (7th Cir. 1970); District Lodge 71, Int'l Ass'n of Machinists v. McIntosh Motors, Inc., 335 F. Supp. 987 (W.D. Mo. 1971).

94. Food Employees Local 590 v. National Tea Co., 346 F. Supp. at 882.

95. Goldberg, *supra* note 4, at 755.

96. *See Contractual Successorship, supra* note 84, at 621-22; Note, *Labor Law—Effect*

labor contract that best accommodates the needs of the parties and thereby promotes tranquility. The benefits of free collective bargaining emanate from the familiarity of the bargaining parties with the working environment and the problems of the plant because these parties are best equipped to solve those problems and to establish contract terms beneficial to both sides.[97] The predecessor's contract is a product of just such an arrangement. The union and the predecessor negotiated the contract knowing details regarding employees, working conditions, and past practices at the plant and formulated a contract to meet the needs and peculiarities of that particular situation. Again, remembering that the "continuity of business identity" test assures that no meaningful change in the plant's operations or in the employment relationship has occurred, it is valid to assume that the predecessor's contract remains the most appropriate charter for regulating the working environment of the business.

Moreover, free collective bargaining taking place at the beginning of a new employer-employee relationship is of little value as an exercise of freedom of choice. Since the union's experience with the employer is insignificant, it has no basis upon which to determine if its choice of contract terms should be altered or in what manner and to what degree they should be changed. The employer, in addition to being unfamiliar with the union, would be unfamiliar with the plant, its method of operations, its employees, and its past practices. Thus it would be difficult for him to know what contract

---

on Successor Employer of Predecessor's Collective Bargaining Agreement, 86 HARV. L. REV. 247, 250-51 (1972) [hereinafter cited as *Effect on Successor Employer*]; 21 U. KAN. L. REV. 97, 99-101 (1972).

97. *See* N. CHAMBERLAIN, COLLECTIVE BARGAINING 463-64 (1951); J. DUNLOP, COLLECTIVE BARGAINING: PRINCIPLES AND CASES 29-34 (1949).

In his dissenting opinion in the Board's *Burns* decision, Member Jenkins argued:

> Our goal should be to permit the parties flexibility in working out their new arrangements, if either desires to do so, rather than to impose the existing contract when one side may be seriously dissatisfied with it. The new employer is not a party to the contract and the union did not join in shaping and executing it with his circumstances in mind. Thus, to impose the contract on the new relation may in cases prove a source of friction and disruption rather than stability.

182 N.L.R.B. at 351 (Jenkins, dissenting). This argument is unpersuasive for several reasons. First, allowing either party unilaterally to end the contract creates a great degree of uncertainty, which leads to instability in the industry. Second, the risk of economic warfare is substantial since the parties would begin negotiations from directly opposite positions—one desiring to retain the predecessor's contract, the other refusing to do so. Third, the requirement of substantial continuity in the business before and after the change in employers assures that no significant change has occurred in the business operations and that the predecessor's contract will accommodate satisfactorily the needs and interests of both parties for the remaining period of the contract.

terms would accommodate most efficiently and satisfactorily that particular working environment in order to promote stable business operations in the future. Since collective bargaining in this context generally would be meaningless as an expression of free choice and because no real basis exists for assuming that a change in contract terms would be beneficial to either party, the predecessor's contract should be imposed.

In contrast, bargaining negotiations conducted upon the termination of the predecessor's contract would promote both freedom of choice and industrial stability. After the parties have "lived" with each other for the remaining period of the predecessor's contract, their increased familiarity with each other and additional understanding of the working environment would render bargaining negotiations a significant opportunity for expressing their free choice. Also, this increased familiarity would enhance the likelihood that they will reach an agreement successfully without a strike.

The predictability and certainty that would result from a rule requiring the successor to arbitrate under the predecessor's contract also would reduce potential conflicts and confrontations and, accordingly, would promote stability.[98] From the outset, the parties

---

98. Several commentators have emphasized the need for predictability in the successorship situation and have criticized *Burns* for creating uncertainty. *See* Abodeely, *supra* note 4, at 530; *Contractual Successorship, supra* note 84, at 621-22. As the law stands now, a rule imposing the predecessor's labor contract on the successor still would not achieve absolute predictability. A degree of uncertainty would remain because the standards for determining successorship are not absolutely clear. The holding in *Howard Johnson* establishing that a "substantial continuity of the work force" is necessary to find successorship aids in creating clearer guidelines. Still, the question of how many or what percentage of the predecessor's employees must be hired by the successor to constitute substantial continuity remains.

On February 1, 1977, Senate Labor Committee Chairman Harrison Williams (D-N.J.) introduced a bill (S. 528) that would amend § 8(d) of the NLRA to: (1) make a new employer's refusal to assume all the terms of his predecessor's collective bargaining agreement an unfair labor practice; (2) explicitly empower the Board to order the successor to honor the predecessor's contract; and (3) create federal court jurisdiction over suits alleging a violation of the assumed contract.

When introducing his bill, Senator Williams charged the Supreme Court with having created uncertainty by its decisions in *Burns* and *Howard Johnson* and asserted that his bill would "give guidance to the Supreme Court in a much clouded area of labor law." He stated that:

> [I]nstead of stability, the product of the Supreme Court's series of decisions during the past four years is uncertainty. Business planners and unions have been left without clear guidelines to facilitate smooth business transfers. . . .
>
> The Supreme Court's rule produces uncertainty because it replaced contract law principles with a labor law rule of its own creation, which is that the only obligation which may lawfully be imposed upon the new employer is the duty to hargain. This means that a stable bargaining relationship based on contract is automatically replaced by negotiations which, if unsuccessful, can lead to industrial strife.

23 DAILY LAB. REPS. A-4 (Feb. 2, 1977).

would be fully aware of their respective rights and responsibilities throughout the remaining period of the contract.[99] Such predictability would facilitate smooth business transfers; successor employers would have a reasonable basis upon which to estimate labor costs,

---

Congress already has established a successorship doctrine for service contracts entered into by the federal government. In 1972 the Service Contract Act, 41 U.S.C. § 353(c) (1970), was amended to require successor employers, when there is suhstantial continuity in the services to be provided, to pay service employees the same wages and fringe benefits that the predecessor contractor's collective bargaining agreement provided. The Service Contract Act now also requires successors to pay future wage and benefit increases contained in the predecessor's contract.

California has passed a statute requiring a successor employer to honor the terms of his predecessor's collective bargaining agreement. The statute states in part:

> (a) Where a collective bargaining agreement between an employer and a labor organization contains a successor clause such clause shall be binding upon and enforceable against any successor employer who succeeds to the contracting employer's business until the expiration date of the agreement stated in the agreement. No such successor clause shall be binding upon or enforceable against any successor employer for more than three years from the effective date of the collective bargaining agreement between the contracting employer and the labor organization.
>
> (b) As used in this section "successor employer" means any purchaser, assignee, or transferee of a business the employees of which are subject to a collective bargaining agreement, if such purchaser, assignee, or transferee conducts or will conduct substantially the same business operation, or offer the same service, and use the same physical facilities, as the contracting employer.
>
> . . . .
>
> (d) An employer who is a party to a collective bargaining agreement containing a successor clause has the affirmative duty to disclose the existence of such agreement and such clause to any successor employer. Such disclosure requirement shall be satisfied by including in any contract of such sale, agreement to purchase, or any similar instrument of conveyance a statement that the successor employer is bound by such successor clause as provided for in the collective bargaining agreement.

CAL. LAB. CODE § 1127(a), (b), (d) (West Supp. 1977).

99. Doppelt, *supra* note 4, at 184-85. One commentator has suggested that "a theory of contract continuity would create an industrial atmosphere of constant confrontation—the union seeking to bind the new employer and the successor in turn arguing that specific terms and conditions were unreasonable, inequitable or impossible of performance." *The Impact of John Wiley Revisited, supra* note 27, at 892 n.121. The *Wiley* rule admittedly leaves for the arbitrator the question of the successor's obligation under the contract's substantive terms. Thus numerous grievances could be filed in which the union and the successor constantly dispute the successor's obligations under the contract. Such a multiplicity of disputes is highly unlikely. Once arbitration is ordered by a court, a union, desiring a quick and efficient resolution of all of its claims in order to achieve a stable working environment and to minimize the costs of arbitration which it must share, would bring all its claims against the successor in one arbitration proceeding. Furthermore, even if continuous confrontations through arbitration occurred, they would not be the same kinds of confrontations that occur at the bargaining table. First, economic warfare would be highly unlikely; employees would remain at their jobs and industrial stability would continue through the arbitration process. Second, a confrontation through arbitration would not be as extensive or intense as the confrontation that occurs during bargaining negotiations because the basic contract terms already would have been established and the parties would have agreed to abide by the arbitrator's decision.

thereby reducing the likelihood of financial decline or failure of the employer—the severest form of instability and unrest.[100] In addition, the new employer would be protected from an attempt by his employees and their union to take advantage of a change in employer to escape their obligations under the existing contract.[101]

Furthermore, the certainty that a successor would be required to arbitrate with the union his additional future obligations under the predecessor's contract might encourage a prospective purchaser, dissatisfied with that contract, to meet with union representatives and discuss both his interests and the needs of employees.[102] The holding of such meetings prior to the actual change in employers would foster the goals of freedom of choice and industrial stability. If a new labor agreement were reached at such meetings, then both parties would have agreed freely upon the contract terms. If a new agreement were not reached, the employees still would be covered by the contract for which they freely bargained with the predecessor, and the potential new employer with full knowledge of the existing contract could choose either to withdraw from or to continue with the business transaction.[103]

The advantages of arbitration alone argue for imposing this duty on the successor employer.[104] Arbitration "promotes industrial harmony through a fair, fast and flexible system utilizing neutral

100. This argument was asserted by the successor employer in Bath Iron Works Corp. v. Bath Marine Draftsmen's Ass'n, 393 F.2d 407, 410 (1st Cir. 1968). In that case, the successor wanted to assume the predecessor's labor contract, but the Union representing the predecessor's employees wanted the successor to arbitrate its obligations under the successor's labor contract. The court allowed the Union to compel arbitration under the successor's contract.

101. *See* 21 U. KAN. L. REV. 97, 103 (1972).

102. *See The Duties of Successor Employers, supra* note 27, at 502.

103. One commentator has argued against requiring the successor to arbitrate his obligations under the predecessor's labor agreement, stating that "[c]rippling restraints placed upon employer and union alike through imposition of the predecessor's contract will serve to retard industrial peace more surely than the stability inherent in contract survival will tend to promote it." 14 B.C. INDUS. & COM. L. REV. 193, 206-07 (1972). This argument has two basic faults. First, any employer who is aware that he will be bound by the predecessor's contract, and who considers that contract to be "crippling" will not proceed with acquisition of the enterprise. Second, because the union initially agreed to the contract terms and the business has remained substantially the same, the assertion that the contract will impose "crippling restraints" on either the employer or the union has no basis.

104. For cases enunciating the numerous attributes of arbitration as a means of achieving industrial peace and avoiding economic warfare, see Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962); Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962); Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. 254 (1962); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

but knowledgeable 'peace-makers.' "[105] The arbitrator, by virtue of his expertise and attitude, is better qualified than the courts to understand the effects of a change of employer on the working environment and of a potential loss of contractual rights on the employees and thus is more likely to arrive at an equitable, workable resolution of the union's grievances against the successor.[106] Furthermore, the speed of arbitration often works as a catalyst in effecting labor peace, since it quickly creates certainty in the employment relationship while keeping the employees on the job.[107]

In addition, imposition of a duty to arbitrate under the predecessor's contract promotes the employees' free choice and preserves industrial stability by protecting the existing collective bargaining relationship. Federal labor policy and the NLRA provide a number of protections for legally established collective bargaining relationships.[108] Requiring the successor employer to arbitrate under and possibly to abide by the terms of the predecessor's contract also serves to protect the bargaining relationship in successor situations. An employer's unilateral termination of a collective bargaining agreement would foster grave doubts in the minds of employees about the strength and vitality of their union. The employer's action "dilutes membership confidence in the union's ability to negotiate" and causes employees to withhold their full support from the union.[109] These considerations combine to undermine the union's effectiveness in subsequent negotiations, for the union would become less able to persuade employees to support a strike or the use of some other economic weapon. The union would be further weakened by the additional expenditure of time, effort, and money necessary for renegotiating and possibly striking in an attempt to reach a new bargain. "Requiring this continual effort would likely exhaust the strength of many unions and consequently would interfere both with the employees' initial choice of bargaining representative and

105. International Ass'n of Machinists v. Howmet Corp., 466 F.2d at 1253; *See also* Acheson v. Falstaff Brewing Corp., 523 F.2d 1327, 1330 (9th Cir. 1975); Slicker, *supra* note 2, at 1075-76.

106. Peerless Pressed Metal Corp. v. International Union of Electrical Workers, 451 F.2d 19, 20-21 (1st Cir. 1971). *See also* Local 358, Bakery & Confectionery Workers v. Nolde Bros., 530 F.2d 548, 551-53 (4th Cir. 1975), *aff'd*, 430 U.S. 243 (1977).

107. United Steelworkers v. American Int'l Aluminum Corp., 334 F.2d 147, 153 n.11 (5th Cir. 1964); Note, *Recent Developments in Labor Law Successorship*, 26 SYRACUSE L. REV. 798, 810 (1975).

108. For a discussion of various protections of the collective bargaining relationship, including "certification bar" and "contract bar," see Goldberg, *supra* note 4, at 789-91.

109. 14 B.C. INDUS. & COM. L. REV. 193, 206-07 (1972); 48 NOTRE DAME LAW. 978, 990 (1973).

with industrial stability"[110] by undermining the existing collective bargaining relationship.

In a more general sense, if employees lose the rights secured for them in a labor agreement every time a change in employers occurs, the collective bargaining process and the contract resulting from it diminish in importance. The unanticipated termination of their contract can give rise to employee skepticism about the utility of bargaining or participating in a strike to achieve satisfactory contract terms.[111] Without the imposition of the predecessor's contract on the successor, employees might interpret their NLRA rights as insignificant and might decline to exercise those rights.[112] As one commentator has stated: "[U]nless collective bargaining agreement rights are given protection through a body of remedial law that increases the certainty that these rights will be enforcable, parties will not be encouraged to enter collective bargaining agreements. This frustrates the purpose of § 301."[113] On the other hand, imposing the terms of a predecessor's contract on a successor encourages employees to engage in collective bargaining because it assures them that their contract rights will survive at least until the expiration date.[114]

(2) Impinging upon Free Collective Bargaining

Perhaps the strongest argument—at least in the Supreme Court's mind—for not imposing upon a successor the duty to arbitrate the terms of a predecessor's contract is the effect that such a duty might have on free collective bargaining. The Supreme Court in *H.K. Porter Co. v. NLRB*[115] reaffirmed the policy against governmental interference in the free collective bargaining process as basic to national labor law. Deep concern with the dangers of governmentally imposed collective bargaining agreements motivated Congress to amend the NLRA to include section 8(d),[116] which expressly prohibits the forcing of contract terms upon unconsenting

110. Slicker, *supra* note 2, at 1052; *Effect on Successor Employer, supra* note 96, at 252 n.35.

111. Doppelt, *supra* note 4, at 184-85.

112. Barksdale, *Successor Liability Under the National Labor Relations Act and Title VII*, 54 TEX. L. REV. 707, 716 (1976); 88 HARV. L. REV. 759, 767 (1975). *See also* Golden State Bottling Co. v. NLRB, 414 U.S. 168, 185 (1973) (dealing with successor's duty to remedy predecessor's unfair labor practices).

113. Doppelt, *supra* note 4, at 176-78.

114. Stern, *supra* note 79, at 19.

115. 397 U.S. 99 (1970); *see* note 45 *supra* for the facts of the case.

116. 29 U.S.C. § 158(d) (1970); *see* note 46 *supra* for the text of § 8(d).

parties.[117] The vice of governmental intervention in free collective bargaining is twofold. First, in as diverse an economy as exists today, governmental bodies, such as the NLRB or the courts, are incapable of determining what contract terms will accommodate the needs and interests of the employer and employees at a particular job location. The employer and employees are the parties most knowledgeable about the working environment and thus are best qualified to decide upon contract terms that are fair, manageable, and specifically designed to suit the particular job situation.

Second, governmental intervention necessarily tips the balance of economic bargaining power in favor of one of the bargaining parties. Under the theory of free collective bargaining, the terms of the collective bargaining agreement should reflect the relative economic strengths of the negotiating parties, with the government assuming only the role of neutral enforcer of the contract. Whenever the government imposes a contract term on the parties, it does so irrespective of their economic strengths, thereby creating a contractual term that one or the other of the parties was unable to attain through negotiation.

Contrary to the view of the Court in *Burns,* however, neither of these vices inheres in a rule that imposes a predecessor's labor agreement on the successor employer. In a successor situation, the existing labor contract has been freely negotiated by the union and the predecessor employer. Therefore, the contract reflects the judgment of the parties directly involved in the employment relationship concerning which terms best will meet their needs. The government has had no part in the writing of any of the terms of that agreement. The government is merely determining that, in light of the "substantial continuity of the business enterprise," the predecessor's contract still will best satisfy the parties' needs and should be binding on the new employment relationship.[118] Furthermore, by imposing the predecessor's contract on the successor employer, the

117. A House report commented:

> Notwithstanding this language of the Court, the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. . . . Unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective-bargaining agreements.

H.R. REP. No. 245, 80th Cong., 1st Sess. 19-20 (1947).

118. The court in NLRB v. Interstate 65 Corp., 453 F.2d 269 (6th Cir. 1971), in finding a "substantial continuity in the business enterprise" also found "no meaningful, perceptible effect on the employer-employee relationship." *Id.* at 273. The government's imposition of the predecessor's contract thus is not an outside imposition of contract terms, but rather is a continuation of bargained-for terms. Goldberg, *supra* note 4, at 746.

government is not aligning itself with either the employer or the employees. The government simply is taking the original contract, written by the original parties, and is imposing it on the new parties regardless of which party benefits from the contract's terms or desires to terminate it.

The *Wiley* rule requiring a successor to arbitrate under and to be bound by the predecessor's contract to the extent an arbitrator finds necessary is a minimal interference with the normal freedom of the parties to establish the terms and conditions of employment through collective bargaining. As previously discussed, the employer's interests are well protected by the "substantial continuity" test. Satisfaction of that test assures that the terms of that contract still will be reasonable in the new employment context and will not impose any undue burdens on the successor employer. Furthermore, the predecessor's contract could be imposed on the successor only for the unexpired period of that contract. The great majority of collective bargaining agreements extend for a term of less than three years,[119] and the successor is just as likely to assume the new business in the latter half of that term as in the earlier half. Therefore, the imposition of the predecessor's contract and the resulting interference with collective bargaining probably would be of limited duration.

The successor can avoid even the limited interference with collective bargaining created by *Wiley* since several "free bargaining" options are available to him prior to arbitration. The successor can negotiate with the predecessor so that the terms of the merger or purchase of assets financially compensate him for assuming the labor agreement.[120] Additionally, nothing in the national labor law prevents the prospective successor from negotiating contract alterations with the union prior to the completion of the sale or merger, without the threats of economic or legal sanctions.[121] If the potential

119. As of 1965, 95% of all collective bargaining contracts were for a term of three years or less. 2 COLLECTIVE BARGAINING NEGOTIATIONS & CONTRACTS 36:1 (1965).

120. The NLRB in *Burns* stated:

> [W]e perceive no real inequity in requiring a "successor employer" to take over his predecessor's collective-bargaining agreement, for he stands in the shoes of his predecessor. He can make whatever adjustments the acceptance of such obligation may dictate in his negotiations concerning the take over of the business.

182 N.L.R.B. at 350. *See also* Perma Vinyl Corp., 164 N.L.R.B. 968 (1967), *enforced sub. nom.* United States Pipe & Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1968); Doppelt, *supra* note 4, at 185; Vernon, *supra* note 26, at 1205; 42 N.Y.U. L. REV. 1202, 1205 (1967).

121. One commentator has proposed that § 8(a)(5) of the NLRA be amended so that the "duty to bargain" would require a potential successor to discuss with the union the application and survival of various provisions of the labor agreement once purchasing negotia-

new employer and the union fail to agree on satisfactory terms, the successor can refuse to complete the business transaction. With these options available to the successor, the imposition of the predecessor's labor contract on him is not inequitable nor unduly restrictive of his right to free collective bargaining.[122]

---

tions with the predecessor had begun. Following these negotiations, the potential successor could either consummate the sale or merger or terminate the transaction. If the prospective employer proceeded with the sale or merger, he then would be required to arbitrate any unresolved claims under the predecessor's contract. *The Impact of John Wiley Revisited, supra* note 27, at 892-94.

122. *See* Goldberg, *supra* note 4, at 776-77; Laner, *A Buyer Views the Purchase of a Unionized Business,* 47 CHI. B. REC. 93, 100 n.17 (1965).

Although the duty to arbitrate and possibly to honor other provisions of the predecessor's contract would be imposed on the successor, the duty would not require the successor to hire any of the predecessor's former employees. As the court in *Burns* stated:

> The Board has never held that the National Labor Relations Act itself requires that an employer who submits the winning bid for a service contract or who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be assumed by the employer.

406 U.S. at 280 n.5. Before the *Burns* decision, some asserted that a rule imposing the predecessor's contract on the successor would require the successor to hire all of the predecessor's employees. The reasoning was that, if the contract survived, the contract provisions prohibiting lay-offs and discharges without "just cause" necessarily would survive also. Therefore, the successor could not refuse to hire any of the predecessor's employees unless he had "just cause" for doing so. *See* K.B. & J. Young's Super Markets, Inc. v. NLRB, 377 F.2d 463, 465 (9th Cir. 1967); Doppelt, *supra* note 4, at 186-87; Morris & Gaus, *supra* note 5, at 1370. The fallacy in this argument lies in its failure to recognize that the predecessor discharges his employees for "just cause," and the successor merely hires them anew. Furthermore, when the predecessor's contract is imposed on the successor it applies only to employees hired by the successor and does not apply until they are hired. This point was reiterated in *Howard Johnson* when the Court declared that "employees of the terminating employer have no legal right to continued employment with the new employer." 417 U.S. at 264. *See also* Golden State Bottling Co. v. NLRB, 414 U.S. at 184 n.6; Bartenders Local 340 v. Howard Johnson Co., 535 F.2d 1160 (9th Cir. 1976); Acheson v. Falstaff Brewing Corp., 523 F.2d 1327, 1330 (9th Cir. 1975); Tri State Maintenance Corp. v. NLRB, 408 F.2d 171, 173 (D.C. Cir. 1968); Lone Star Steel Co., 231 N.L.R.B. No. 88 (1977).

Several commentators have argued that the successor's right to choose his work force unilaterally, combined with the requirement of "substantial continuity in the work force," provides the successor with a means of manipulating the successorship rule to avoid obligations under the contract and to frustrate the employees' expectations. As one author succinctly stated, the Court in *Howard Johnson* was confronted with "the crucial successorship question of whether a purchasing company may for valid economic non-discriminatory reasons refuse to hire a predecessor's employees and whether by such action he may avoid the 'successor' label and the labor obligations flowing therefrom." The *Howard Johnson* Court answered this critical question in the affirmative. Spelfogel, *A Corporate Successor's Obligation to Honor His Predecessor's Labor Contract: The Howard Johnson Case,* 25 LAB. L.J. 298, 300 (1974). *See also Contractual Successorship, supra* note 84, at 628; 11 WAKE FOREST L. REV. 510, 523 (1975). This argument is premised on the belief that, because a successor will not be bound by any of the provisions of the predecessor's labor agreement unless he hires a sufficient number of the predecessor's former employees, the successor will therefore fail to hire those employees. Although this is theoretically possible, it is not practical for several reasons. The new employer could not refuse to hire the predecessor's employees solely on the

(3) Practical Results of *Wiley*

As pointed out by the court in *United Steelworkers v. United States Gypsum Co.*,[123] "*Wiley* has undoubtedly had a significant impact on the labor relations policies of both union and management officials in cases presenting successorship problems."[124] A wholly unanticipated result of the Supreme Court's decision in *Wiley* is that, of the nine cases in which a federal court has ordered the successor employer to arbitrate claims based on the predecessor's contract,[125] only two actually have resulted in arbitration proceedings.[126] In the other seven cases, the union's grievances were resolved through collective bargaining between the union and the successor employer.[127] Two possible explanations exist for this phenomenon. The first possibility is that, in view of the court's arbitration order and its accompanying implication that the entire contract might be binding on him, the successor has expressed a willingness to accede to the union's claims or, at least, to agree to a compro-

---

basis of their union membership. NLRB v. Burns Int'l Security Servs., 406 U.S. at 280 n.5; International Ass'n of Machinists Dist. Lodge 94 v. NLRB, 414 F.2d at 1138; Tri State Maintenance Corp. v. NLRB, 408 F.2d 171, 174 (D.C. Cir. 1968). Therefore, if the successor employer refused to hire union members in an attempt to evade the imposition of the labor agreement, he would have committed an unfair labor practice under NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970). The successor must have a valid business reason for refusing to hire the former employees. Quite often, however, legitimate business reasons produce the opposite result and prompt the successor actively to recruit the predecessor's former employees. Frequently, they are the only available labor source in a particular locality, but more often, they are the only personnel with sufficient skill, training, and experience to operate the business smoothly and efficiently immediately after the successor takes over. Since pragmatic reasons will motivate the successor to hire the predecessor's employees, allowing the successor complete freedom in selecting his work complement accomplishes both the goals of minimizing government intervention and protecting employee rights. Accordingly, the likelihood that a successor will hire his predecessor's employees, despite his freedom not to, weighs heavily in favor of imposing the predecessor's labor agreement on the successor.

123. 492 F.2d 713 (5th Cir. 1974).

124. *Id.* at 725.

125. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); United States Gypsum Co. v. United Steelworkers, 384 F.2d 38 (5th Cir. 1967); Monroe Sander Corp. v. Livingston, 377 F.2d 6 (2d Cir. 1967); United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964); Wackenhut Corp. v. Plant Guard Workers Local 151, 332 F.2d 954 (9th Cir. 1964); Retail Clerks Local 1552 v. Lynn Drug Co., 299 F. Supp. 1036 (S.D. Ohio 1969); Local Joint Executive Bd., Hotel & Restaurant Employees v. Joden, Inc., 262 F. Supp. 390 (D. Mass. 1966); International Bhd. of Pulp, Sulphite & Paper Mill Workers v. Great Northwest Fibre Co., 263 F. Supp. 167 (E.D. Wash. 1965); Mates & Pilots v. American Oceanic Corp., 67 L.R.R.M. 2951 (S.D.N.Y. 1968).

126. United States Gypsum Co., 56 Lab. Arb. & Disp. Settl. 363 (1971) (Valtin, Arb.); Interscience Encyclopedia, Inc., 55 Lab. Arb. & Disp. Settl. 210 (1970) (Roberts, Arb.).

127. This result was revealed by Professor Goldberg's correspondence with the counsel for the parties in each of those cases. *See* Goldberg, *supra* note 4, at 764 n.45. *See also* Slicker, *supra* note 2, at 1085-86.

mise favoring the union.[128] The alternative explanation is that the parties, uncertain of the possible arbitration award, have preferred to resolve their own conflicts rather than to entrust such an important decision to an uninvolved third party.[129]

Regardless of the motivation, the rule established in *Wiley* is resulting in promotion of, rather than interference with, collective bargaining. *Wiley* is altering only the potential consequences of unsuccessful collective bargaining in successorship situations. If parties who voluntarily enter into collective bargaining after having been ordered to arbitrate under the predecessor's contract are unable to reach a satisfactory agreement, they still are bound by the arbitration order. Consequently, their disputes will be settled by the arbitrator without any resort to economic weapons. In direct contrast, parties whose negotiations are unrestricted by any of the provisions of the predecessor's contract,[130] such as in *Burns*, and who fail to agree on contract terms are more likely to resort to strikes and other forms of economic warfare to resolve their differences.

These practical results of *Wiley* strongly support a rule requiring the successor to arbitrate his potential obligations under the predecessor's contract. They not only undercut the criticism that *Wiley* would inhibit free collective bargaining, but quite to the contrary demonstrate that *Wiley* is encouraging both collective bargaining and the avoidance of industrial strife.[131]

---

128. This alternative has been disputed by one commentator who states that it "seems unlikely in view of the time, effort and expense involved in procuring the court's decision." Slicker, *supra* note 2, at 1085.

129. *Id.* at 1086. A union presumably would be willing to bargain in this situation because the arbitration order would add to its bargaining power. Furthermore, the union would have nothing to lose because it would merely proceed with arbitration if bargaining was unsuccessful. *See* text accompanying note 130 *infra*.

130. In this situation not only is the arbitration clause not binding on the parties, but neither is any express or implied no-strike clause.

131. Furthermore, the paucity of federal court decisions ordering arbitration suggests that tbe majority of unions and successor employers are settling their disputes among themselves without resorting to the courts. In the twelve years after the *Wiley* decision, from 1964 to 1976, only approximately forty federal cases have dealt with the issue of a successor employer's future obligations under his predecessor's labor contract. In a large number of successorship situations, the successor employer as a matter of course has assumed the predecessor's collective hargaining agreement. *See* Wal-Lite Div. of United States Gypsum Co. v. NLRB, 484 F.2d 108 (8th Cir. 1973); International Ass'n of Machinists v. Northeast Airlines, Inc., 473 F.2d 549 (1st Cir. 1972); International Ass'n of Machinists v. Howmet Corp., 466 F.2d 1249 (9th Cir. 1972); Metropolitan Terrazzo Co., 60 Lab. Arb. & Disp. Settl. 345 (1973) (McGury, Arb.); National Heat & Power Co., 73-1 Lab. Arb. Awards ¶ 8225 (1973) (Turkus, Arb.); Elesco Smelting Corp., 56 Lab. Arb. & Disp. Settl. 1256 (1971) (Sembower, Arb.); Federal Elec. Corp., 70-2 Lab. Arb. Awards ¶ 8590 (1970) (Updegraff, Arb.). In numerous other instances, the successor, although not assuming the contract, has voluntarily agreed to binding arbitration of his obligations under it. *See* B&B Foods, Inc., 1975 Lab. Arb. Awards

B. *Effect of* Burns *on the* Wiley *Holding*

Resolution of the questions whether a court in the future may order a successor to arbitrate under his predecessor's contract and whether an arbitrator may find the successor bound by that contract depends largely on an analysis of the effects of the *Burns* decision on the holding in *Wiley.*

(1) Distinguishing *Burns* from *Wiley*

Several commentators have argued that it is possible to distinguish *Burns* from *Wiley* on its facts and to conclude that each represents the current state of the law for its particular fact situation.[132] Indeed, each federal court that has addressed the question of *Wiley*'s continued viability has distinguished the two cases and has stated that a court may order a successor to arbitrate under his predecessor's labor contract and that an arbitrator may bind the successor to other substantive contract terms.[133] In reaching these

---

¶ 8141 (Keefe, Arb.); Houston Beverage Co., 72-1 Lab. Arb. Awards ¶ 8232 (1972) (Post, Arb.); Wamco, Inc., 57 Lab. Arb. & Disp. Settl. 1220 (1971) (Roper, Arb.); Shippers Truck Serv., Inc., 57 Lab. Arb. & Disp. Settl. 1041 (1971) (Williams, Arb.); Kent Enterprises, Inc., 55 Lab. Arb. & Disp. Settl. 777 (1970) (Roberts, Arb.).

Another explanation for these results is that predecessor employers frequently have required as one of the terms of the merger or sale of assets the successor employer to honor the existing labor agreement. Such action by the predecessor usually is prompted by the existence of a "successors and assigns" clause in his contract with the union. Under this type of clause, the predecessor could be liable to the union for damages if he transferred his business assets without insuring that the successor would assume the contract.

132. *See* Morris & Gaus, *supra* note 5, at 1360-67; *Contractual Successorship, supra* note 84, at 618-19; Note, *Contract Rights and the Successor Employer: The Impact of Burns Security,* 71 MICH. L. REV. 571, 586 (1973) [hereinafter cited as *The Impact of Burns Security*]; 48 NOTRE DAME LAW. 978, 980 (1973).

In contrast to this view, one commentator has suggested that "[b]y 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," thus implying that after *Burns* courts still could order a successor to arbitrate his obligations under the predecessor's contract, but the arbitrator could impose the terms of that contract only by looking to the successor's intent. Slicker, *supra* note 2, at 1102. Another author has stated:

> *Burns* holds that the agreement does not survive a change in ownership absent assumption in fact or in law by the successor, but without a bargaining agreement, what is left to arbitrate? *Wiley* now presents the paradoxical situation of a duty arising from the prior agreement, although the prior agreement does not survive. *Burns* thus limits the situations in which arbitration is even a possibility. . . .

Thus this commentator suggests that arbitration may be ordered only when the successor has assumed the labor contract. Note, *Labor Law—The Obligations of a Successor Employer,* 51 N.C.L. REV. 337, 343 (1972) [hereinafter cited as *The Obligations of a Successor Employer*].

133. Local 358, Bakery & Confectionery Workers v. Nolde Bros., 530 F.2d 548 (4th Cir. 1975); Boeing Co. v. International Ass'n of Machinists, 504 F.2d 307 (5th Cir. 1974), *aff'g* 351 F. Supp. 813 (M.D. Fla. 1972); Teamsters Local 249 v. Bill's Trucking, Inc., 493 F.2d 956

conclusions, various circuit courts have noted that "[a]s the Supreme Court emphasized, however, the decision in that case [*Burns*] was an exceedingly narrow one. The pronouncements laid down in *Burns*, therefore, can hardly be read to settle every successorship problem that may arise."[134] Another circuit court has pointed out that "[a]lthough the potential implications of the *Wiley* case have since been narrowed . . . the Court has not retreated from its recognition that in some instances the national labor policy can impose an arbitration duty upon the unconsenting party."[135]

The *Burns* Court, subsequent lower courts, and commentators have emphasized three bases on which *Wiley* and *Burns* are distinguishable. The first and most persuasive difference is that *Wiley* involved a section 301 suit to compel arbitration, whereas *Burns* arose in the context of an unfair labor practice proceeding in which the Board was expressly limited by the provisions of section 8(d). Relying on this distinction, several authorities have argued that *Burns* should be interpreted as a limitation on the Board's authority to provide contractual remedies in a successor situation, rather than as a statement of substantive policies contrary to those established in *Wiley*.[136] This interpretation draws support from several considerations. First, the *Burns* holding rested primarily upon a finding that the Board did not have the power to impose the predecessor's contract on the successor. The Supreme Court's phrasing of the question at issue—"whether the National Labor Relations Board could order Burns to observe the terms of a collective bargaining contract signed by the union and Wackenhut that Burns had not voluntarily assumed"[137]—demonstrates the centrality of the Court's concern with the scope of the Board's powers. In finding that the Board did not have this authority, the Court emphasized that the Board is bound by the provisions of the NLRA and that the section 8(d) prohibition against compelling agreement on substantive terms also

(3d Cir. 1974); United Steelworkers v. United States Gypsum Co., 492 F.2d 713 (5th Cir. 1974); Textile Workers v. Cast Optics Corp., 464 F.2d 577 (3d Cir. 1972).

134. Teamsters Local 249 v. Bill's Trucking, Inc., 493 F.2d at 959.

135. Local 358, Bakery & Confectionery Workers v. Nolde Bros., 530 F.2d at 551.

136. *See* Teamsters Local 249 v. Bill's Trucking, Inc., 493 F.2d at 961; United Steelworkers v. United States Gypsum Co., 492 F.2d at 725-26; Morris & Gaus, *supra* note 5, at 1360; *Contractual Successorship, supra* note 84, at 618; Note, *Labor Law—Effect on Successor Employer of Predecessor's Collective Bargaining Agreement*, 86 HARV. L. REV. 247, 256 (1972) [hereinafter cited as *Effect on Successor Employer*].

137. 406 U.S. at 274. Similarly, the circuit court in *Burns* had held that "in ordering Burns to honor the contract executed by Wackenhut, the Board has exceeded its powers." 441 F.2d at 915.

restricts the Board's ability to impose the predecessor's contract on the successor.[138]

The distinction thus is based upon the fact that section 8(d) limits the powers of the Board; it does not limit the powers of federal courts or of arbitrators.[139] Since national labor policy greatly favors arbitration as a means of settling disputes, the courts are empowered and encouraged to require successors to arbitrate under predecessor's labor contracts. After a court has ordered arbitration, the arbitrator derives his power to impose the predecessor's contract terms on the successor from the contract itself and is not restricted by the NLRA. Finally, several policy reasons have been suggested as justifications for prohibiting the Board from ordering arbitration, while permitting the courts to do so. Relying on the general policy against Board administration of contracts,[140] the NLRB in its *Burns* decision adopted an all-or-nothing approach to the successor's duties under his predecessor's contract. If the employer was found to be a successor, he was bound to honor the entire contract. If he was not, he had no obligations under the contract.[141] As the Court noted

138. In arriving at this interpretation of § 8(d), the Court relied heavily on H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). "*Porter* axiomatically finds the broad remedial powers of the Board are limited by and cannot transcend the policy or the express statutory provisions of the NLRA." Stern, *supra* note 79, at 25; *see* Bakaly & Bryan, *supra* note 5, at 120-21; Flaherty & Vartain, *1973-1974 Annual Survey of Labor Relations Law*, 15 B.C. INDUS. & COM. L. REV. 1105, 1163 (1974).

A further indication that the finding of a limit on the powers of the Board was essential to the *Burns* holding is contained in Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973). In *Golden State* the Court upheld a Board order requiring a successor employer to remedy the unfair labor practices of its predecessor. The Court distinguished *Burns* on the grounds that in *Golden State* no statutory policies prohibited the imposition of a remedial, but noncontractual, obligation on the successor. *Id.* at 183-85. *See also* Flaherty & Vartain, *supra*, at 1161-62; United Steelworkers v. American Int'l Aluminum Corp., 334 F.2d at 152; Sinclair Ref. Co. v. NLRB, 306 F.2d at 576-78.

139. A district court in the Fifth Circuit has observed: "Yet, acting under the same act of Congress that authorizes courts to compel such arbitration, the NLRB 'is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement.' " United Steelworkers v. United States Gypsum Co., 339 F. Supp. 302, 305 (N.D. Ala. 1972), *rev'd in part on other grounds*, 492 F.2d 713 (5th Cir. 1974). *See also* Teamsters Local 249 v. Bill's Trucking, Inc. 493 F.2d at 961; Swerdlow, *supra* note 79, at 15.

140. *Effect on Successor Employer*, *supra* note 136, at 256 n.6. "The Supreme Court, in my opinion, should properly keep the NLRB out of the business of adjudicating individual contract claims under collective bargaining agreements, consigning them to the courts or arbitrators." St. Antoine, *Judicial Caution and the Supreme Court's Labor Decisions, October Term 1971*, 6 U. MICH. J.L. REF. 269, 272 (1973).

141. "Apparently the Board felt that it was barred from taking a middle ground by requiring the successor to honor selective portions of the agreement . . . ." Detroit Local Joint Executive Bd. v. Howard Johnson Co., 482 F.2d 489, 496 (6th Cir. 1973), *rev'd on other grounds*, 417 U.S. 249 (1974). *See also* Morris & Gaus, *supra* note 5, at 1380; *The Impact of Burns Security*, *supra* note 132, at 586.

in *Burns*, such an approach would lead to rigidity in labor relations because the Board would be establishing general rules applicable in all successor situations and binding to some degree as precedent.[142]

Arbitration, on the other hand, fosters flexibility in contract administration. The arbitrator can examine fact situations in detail and may consider changed circumstances and unforeseen factors.[143] Also, the arbitrator may fashion a remedy that modifies or eliminates portions of the predecessor's contract that are inequitable or unreasonable in view of the change in employer.[144] Furthermore, the arbitrator has special skill and experience in contract interpretation and is quite familiar with employment conditions and the law of the shop.[145] Therefore, the argument concludes, the imposition of substantive contract terms on the successor is a function that is better satisfied by an arbitrator than by the NLRB.

The argument that the *Burns* decision merely represents a limitation on the power of the NLRB encounters several difficulties. *Burns*'s emphasis on free collective bargaining and voluntary agreement as the proper means for establishing the terms and conditions of employment cannot be ignored. That case's freedom of contract rationale justifies denying the power to require nonconsenting successors to arbitrate to both the courts and the Board, for the *Burns* Court condemned not only the Board's imposition of the predecessor's contract, but also any "variety of official compulsion over the actual terms of the contract."[146] Moreover, nothing in section 301 or

142. 406 U.S. at 288. The circuit court in *Howard Johnson* stated that "[a]s noted by the Supreme Court in *Burns* the Board's position would lead to rigidity in labor relations. This factor we feel is primarily the Supreme Court's reason for rejection of the Board's position. In arbitration proceedings as ordered below such rigidity is not present." 482 F.2d at 496. *See also The Impact of Burns Security, supra* note 132, at 586.

143. *See* Abodeely, *supra* note 4, at 523. *See also* text accompanying notes 28-34 *supra*.

144. *See Effect on Successor Employer, supra* note 136, at 256. *See also* text accompanying notes 28-34 *supra*.

145. *See* text accompanying notes 104-07 *supra*.

146. *Contractual Successorship, supra* note 84, at 618-19, 625. One commentator has stated that:

> equally unpersuasive is the Court's legalistic assertion that § 8(d) does not apply to arbitration. That conclusion may be analytically correct for § 8(d) purports only to define the scope of good faith bargaining and not to reach the content of particular provisions within the contract. If it means anything at all, however, the policy of § 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. . . . In its wisdom Congress opted for a regulatory scheme requiring collective bargaining, but compelling no particular content to the contract 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

in the legislative history of section 8(d) indicates that courts should be permitted to impose contract obligations in circumstances in which the Board is prohibited from interfering with the freedom of contract. Although the federal courts are empowered to develop the law of labor contract enforcement, they must do so in compliance with the principles of the NLRA and express statutory mandates.[147] If the application of section 8(d) is appropriate in successorship cases,[148] then federal courts apparently are bound by that provision's express policy against imposing contract terms upon an unconsenting party. Thus the federal courts may not impose the predecessor's arbitration clause on the successor.

Another weakness in the argument that *Burns* merely represents a limitation of the Board's power lies in the fact that imposition by the Board of a predecessor's contract on a successor would not lead to rigidity and inflexibility. Quite to the contrary, such imposition would leave the ultimate resolution of the contract's applicability and meaning in the hands of an arbitrator. When the Board orders the imposition of the predecessor's contract, it enforces that contract "in gross." In so doing, the Board has not made any decision on the proper interpretation of the contract or on the applicability of certain contract terms and has not ordered specific performance.[149] The Board has determined merely that the new employer is a successor who cannot repudiate the predecessor's entire contract.[150] All potential disputes over the applicability or interpretation of particular contract clauses are left to the arbitrator for resolution. The Board, therefore, would not be doing any more than *Wiley* did by implication.

> to hold that the statutory limitation of § 8(d) is inapplicable to arbitration is to permit indirectly what the Congress prohibits directly.

Slicker, *supra* note 2, at 1099.

147. Lodge 743, Int'l Ass'n of Machinists v. United Aircraft Corp., 337 F.2d 5, 8 (2d Cir. 1964). *See also* Note, *The Impact of Howard Johnson on the Labor Obligations of the Successor Employer*, 74 MICH. L. REV. 555, 570 (1976) [hereinafter cited as *Impact of Howard Johnson*].

148. It will be argued later that § 8(d) is inapplicable to successorship situations. *See* text accompanying notes 168-75 *infra*.

149.
> The employer who declines to honor its predecessor's contract normally does not rely on arguments of contract interpretation, but simply on the proposition that it is not a successor and, hence, need not recognize the incumbent union or honor its contract, whatever the intent of tbe contracting parties. For the Board to order the employer to abide by the contract as well as recognize the union would thus involve no problems of contract interpretation.

Goldberg, *supra* note 4, at 812.

150. *Id.*

The *Burns* Court provided a second basis upon which to distinguish *Burns* and *Wiley*. The Court noted that *Wiley* involved only an order requiring the successor to arbitrate, which rested, in large part, upon the national labor policy favoring arbitration. *Burns*, on the other hand, involved a Board order requiring the successor to honor all of the contract's substantive provisions.[151] Several authorities have urged that the Court was implying that the principles and policy considerations applicable to unfair labor practice proceedings differ from those relevant to section 301 suits to compel arbitration.[152] In unfair labor practice proceedings involving section 8(d), the Court absolutely has prohibited any interference with freedom of contract, even if occasional industrial strife must be tolerated to protect that freedom. In section 301 cases, however, the importance of freedom of contract is diminished, and the benefits of arbitration and the need to protect employees' contract rights are emphasized. Accordingly, in section 301 proceedings the Court has determined that arbitration is preferable to industrial strife and thus has permitted this intrusion on freedom of contract. On the basis of this second distinction between *Wiley* and *Burns*, it has been argued that *Wiley*, with its reliance on the policy favoring arbitration, still authorizes the courts to order a successor to arbitrate under his predecessor's contract.[153]

The suggestion that the different policy considerations that control section 8(d) and section 301 cases justify different results is wholly without merit. In the first place, *Burns*'s attempt to distinguish *Wiley* as a case based solely on the policy in favor of arbitration was inaccurate and

> ignore[d] the fact that the Supreme Court in *Wiley* in effect compelled a successor to agree to a substantive contractual provision of a contract concerning arbitration. Although the Supreme Court in *Wiley* emphasized the central role of arbitration in effectuating national labor policy, the national labor policy being effectuated in *Wiley* was stability and industrial peace in an employing industry, the same policy behind the Board's decision in *Burns*.[154]

---

151. 406 U.S. at 285-86.

152. Because the law of labor contract has a function and development quite distinct from the law of unfair labor practices the possibility has always existed that for some pivotal questions the two halves of the LMRA might be treated as separate tracks, whose paths are not necessarily parallel at every point.

Morris & Gaus, *supra* note 5, at 1374. *See also* Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. at 268 (Douglas, J., dissenting); Teamsters Local 249 v. Bill's Trucking, Inc. 493 F.2d at 960; United Steelworkers v. United States Gypsum Co., 492 F.2d at 724; 11 WAKE FOREST L. REV. 510, 519 (1975); *Successor's Bargaining Obligation Upheld, supra* note 132, at 980.

153. *See Contractual Successorship, supra* note 84, at 627; *Impact of Howard Johnson, supra* note 147, at 565; *The Obligations of a Successor Employer, supra* note 132, at 341.

154. 25 OKLA. L. REV. 132, 136 (1972).

Even if the distinction had been a valid one, the Court in *Howard Johnson* nullified it by stating that the courts in a section 301 suit cannot disregard the basic policies that control in an unfair labor practice context. The Court held, therefore, that the policies and considerations emphasized in *Burns* would be applicable in future section 301 suits.[155]

The third basis upon which the *Burns* Court distinguished *Wiley* was that *Wiley* involved a merger occurring against a background of state law, while *Burns* involved two competing companies that had never had any prior dealings with each other.[156] One implication of this distinction is that the applicable state law in *Wiley*, which holds the surviving corporation in a merger situation liable for the disappearing corporation's obligations, was a basis for requiring the successor to arbitrate his obligations under the predecessor's contract. This is not a viable basis on which to distinguish *Burns* and *Wiley*, for it has long been established, as the *Wiley* Court itself stated, that federal law, not state law, controls in successor situations.[157]

---

155. 417 U.S. at 255-56. One commentator has interpreted this conclusion as implying that the courts and the Board are not permitted to reach different results on the extent of a successor's obligations under the predecessor's contract and therefore that both the courts and the Board are bound by the labor policy against imposing contract terms on unconsenting parties. *Impact of Howard Johnson, supra* note 147, at 570.

In Bartenders Local 340 v. Howard Johnson Co., 535 F.2d 1160 (9th Cir. 1976), a § 301 suit seeking to impose the substantive provisions of a predecessor's labor contract on the successor, the Ninth Circuit stated that "the fundamental policies outlined in *Burns* cannot be disregarded in a court proceeding under section 301." *Id.* at 1162. In accordance with the *Burns* holding that the Board may not order a successor to abide by the substantive terms of its predecessor's contract, the Ninth Circuit held that a court may not impose substantive contract terms upon a nonconsenting successor. The court, however, also upheld "the rule of *Wiley* that in some circumstances a duty to arbitrate may be imposed upon a successor-employer [as] an accommodation between the legislative endorsement of freedom of contract and the judicial preference for peaceful arbitral settlement of labor disputes." *Id.* at 1163. The Ninth Circuit further stated that the obligation to arbitrate could be imposed on a successor because "the superiority of arbitration over administrative and judicial remedies as a means of furthering the interests in peaceful settlement of disputes . . . justifies a moderation of the insistence upon strict freedom of contract." *Id.* at 1164.

The court declined to decide whether the policies of *Burns* and *Wiley* irreconcilably conflict because the union had asked only for the imposition of the predecessor's entire contract and not for arbitration. Nevertheless, in response to the union's argument that requiring the successor to arbitrate necessarily presupposes that the predecessor's labor agreement may be binding on the successor, the Ninth Circuit noted that "there is no incisive response, in purely conceptual terms, to this argument." *Id.* at 1163.

The Ninth Circuit thus has indicated that it would answer affirmatively the question whether a court may require a successor to arbitrate under the predecessor's labor contract. Yet, that court has hesitated and failed to indicate that an arbitrator may find the substantive terms of the predecessor's agreement binding on the successor.

156. 406 U.S. at 286-87.

157. John Wiley & Sons, Inc. v. Livingston, 376 U.S. at 547-48. *See also* Textile Workers

Of greater importance is the Court's focus on the fact that there was "no merger, no sale of assets, and there were no dealings whatsoever between Wackenhut and Burns" and the Court's holding that the mere hiring of Wackenhut employees was 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 contract."[158] Several authorities have interpreted this language to mean that the form by which the change of employer takes place will affect the successor employer's duties under the predecessor's contract and have suggested that if the Court had found a transfer of assets or some other direct relationship between Burns and Wackenhut, then it would have imposed the labor contract on Burns.[159] The argument that *Burns* is limited to a competitive bidding situation or to some similar situation in which no direct nexus connects the two employers is quite difficult to accept. *Wiley* itself and numerous other federal courts consistently have held that the means by which the succession of employers occurs has no effect on the successor's obligations under his predecessor's contract.[160] Furthermore, section 8(d), with its limitation on the powers of the NLRB, is in no way confined to a competitive bidding situation, but rather is applicable also to a merger, reorganization, or sale of assets. This broad applicability of section 8(d) is evidenced by *NLRB v. Denham*[161] and *Ranch-Way, Inc. v. NLRB*[162] in which the *Burns* prohibition against the Board's imposition of the predecessor's contract on the successor has been invoked in more conventional successor situations. A more reasonable reading of the Court's concern with the absence of a transfer of assets is that the lack of a direct nexus between Burns and Wackenhut was relevant to the Court's determination of whether Burns could be deemed to have assumed his predecessor's contract.[163]

Union v. Lincoln Mills, 353 U.S. 448 (1957); Acheson v. Falstaff Brewing Corp., 523 F.2d 1327, 1329 (9th Cir. 1975); St. Antoine, *supra* note 140, at 273.

158. 406 U.S. at 287.

159. *See* Textile Workers v. Cast Optics Corp., 464 F.2d 577 (1972); St. Antoine, *supra* note 140, at 273; *Impact of Howard Johnson, supra* note 147, at 561-65; 41 GEO. WASH. L. REV. 106, 117 (1972); 18 VILL. L. REV. 126, 134 & 137 (1972); *The Impact of Burns Security, supra* note 132, at 578.

160. 376 U.S. at 549; United Steelworkers v. Reliance Universal Inc., 335 F.2d 891 (9th Cir. 1964); Wackenhut Corp. v. Plant Guard Workers Local 151, 332 F.2d 954 (9th Cir. 1964); Retail Clerks Local 1552 v. Lynn Drug Co., 299 F. Supp. 1036 (S.D. Ohio 1969).

161. 469 F.2d 239 (9th Cir. 1972), *rev'd on other grounds,* 411 U.S. 239 (1973) (sale of assets).

162. 406 U.S. 940 (1972), *vacating for further consideration* 445 F.2d 625 (10th Cir. 1971) (sale of assets).

163. UAW v. Saga Foods, Inc., 407 F. Supp. 1247, 1252 (N.D. Ill. 1976).

Perhaps courts will rely upon these three distinctions either individually or as a group in future decisions. None of them, however, is compelling and an analysis that focuses solely on them would overlook the *Burns* Court's shift in emphasis and approach. The *Wiley* Court displayed a major concern for preserving industrial peace through arbitration and for protecting the contract rights of employees. *Wiley* found these policies so strong that they outweighed the fact that the successor was not a signatory to the collective bargaining agreement. In marked contrast, the predominant emphasis of the *Burns* decision was on the voluntary nature of collective bargaining and the unimpeded transfer of assets. The *Burns* Court was willing to advance the policy favoring free collective bargaining even at the expense of industrial peace and stability.[164] Therefore, the assertion that the two decisions can be reconciled and can co-exist as effective statements of the law is extremely difficult, if not impossible, to support.[165] *Wiley's* order to arbitrate necessarily indicated that the successor also could be bound by other substantive terms of that contract.[166] *Burns*'s refusal to impose any of the predecessor's contract terms, not even the arbitration clause, and its firm insistence on the superiority of free collective bargaining imply that an unconsenting successor employer cannot be bound by his predecessor's contract under any circumstances. Thus *Burns* directly conflicts with *Wiley*.

(2) Analysis of the *Burns* Opinion

The incompatibility of the *Burns* and *Wiley* decisions, however, does not necessarily lead to the conclusion that *Wiley* should be abandoned. Quite to the contrary, the analysis undertaken above[167] has established that *Wiley's* insistence that a successor arbitrate under the predecessor's contract is preferable on policy grounds to the *Burns* requirement that collective bargaining negotiations commence at the very beginning of the new employment relationship. In addition, a close analysis of the *Burns* decision will reveal

164. The *Howard Johnson* opinion is also seen as indicating a change in interest from protecting employee rights toward protecting the free transfer of capital hy virtue of its emphasis on the employer's right to hire whomever he chooses and its insistance that the principles of *Burns* are applicable to § 301 suits to compel arbitration. *See* 11 WAKE FOREST L. REV. 510, 522 (1975).

165. Several other commentators have concluded that *Wiley* and *Burns* probably cannot be reconciled. *See* Morris & Gaus, *supra* note 5, at 1385-96; Slicker, *supra* note 2, at 1102; *Contractual Successorship, supra* note 84, at 618, 625; *The Impact of Burns Security, supra* note 132, at 582.

166. *See* text accompanying note 72 *supra*.

167. *See* text accompanying notes 77-114 *supra*.

that its legal bases are unsound and fail to support the Court's ultimate conclusions.

The *Burns* Court's decision rested primarily upon the language of section 8(d) of the LMRA.[168] Relying on *Porter's* interpretation of that language,[169] the Court asserted that section 8(d) prevented the imposition of the predecessor's contract on the successor because of that section's express limitation on the Board's power to do so, which embodied a national labor policy absolutely prohibiting any interference with free collective bargaining.[170] The Court's reliance on section 8(d) and *Porter* in a successorship case is completely misplaced. Section 8(d) was intended to apply to situations in which the union and the employer are negotiating the terms of a collective bargaining agreement not yet in existence.[171] Section 8(d) does not apply to a successor situation because a labor contract already exists.[172] The legislative history indicates that section 8(d) was intended to foster the freedom of contract and to "completely insulate *negotiating* parties from directly or indirectly being required to comply with a Board order which compels concession to a substantive term."[173] It is highly unlikely that Congress ever considered whether a new employer who voluntarily takes over the operation of a business and hires employees covered by an unexpired contract could be required to honor the existing contract.[174]

Moreover, *Porter* itself fails to support the *Burns* Court's interpretation of section 8(d). Although *Porter* affirmed the national

---

168. *See* note 46 *supra.*

169. *See* note 45 *supra.*

170. 406 U.S. at 281-86; *see* Equal Employment Opportunity Comm'n v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1090 (6th Cir. 1974).

171. Although it did not discuss the applicability of § 8(d), the *Wiley* Court displayed an awareness of the distinction between imposing the predecessor's contract on the successor and requiring parties to agree to substantive contract terms. The Court stated:

> This case cannot readily be assimilated to the category of those in which there is no contract whatever or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy.

376 U.S. at 550-51.

172. *See* Bakaly & Bryan, *supra* note 5, at 121; Stern, *supra* note 79, at 24; 14 B.C. INDUS. & COM. L. REV. 193, 201-02 (1972).

173. Stern, *supra* note 79, at 26. The Senate Committee on Education and Labor stated:

> The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.

S. REP. No. 573, 74th Cong., 1st Sess. 12 (1935).

174. Bakaly & Bryan, *supra* note 5, at 121.

labor policy prohibiting any interference with voluntary collective bargaining, it did so in a refusal-to-bargain case in which no contract existed rather than in a successorship case.[175] The Supreme Court's refusal in *Porter* to permit the Board to force the employer to agree to a specific provision in a proposed agreement is not a controlling precedent in *Burns* because the contract in question already had been negotiated through free collective bargaining. Thus *Porter* merely limited the Board's power to settle bargaining disputes between negotiating parties by denying it the authority to impose contract terms on either party and accordingly applies only in bargaining, and not successor, situations.

The inapplicability of section 8(d) and *Porter* to the *Burns* successorship situation has several implications for the approach and analysis utilized by the *Burns* Court. First, it establishes that the Board and the courts are not statutorily prohibited from requiring a successor to honor portions of its predecessor's labor contract. Furthermore, this analysis of section 8(d) demonstrates that the *Burns* Court was incorrect in asserting that the policy favoring free collective bargaining is the predominant goal of national labor law in successor situations. Once it has recognized that the policy favoring free collective bargaining is not superior to all other labor policies and, on occasion, may be infringed upon, the Court could consider the national labor policies relied upon in *Wiley* and could devise a remedy that satisfactorily accommodates them. The *Burns* Court did not repudiate the principles established in *Wiley*, but as has been shown, simply felt that section 8(d) prohibited application of those principles when an intrusion on free collective bargaining would result.[176]

---

175. *See* United Steelworkers v. United States Gypsum Co., 492 F.2d at 729; United Steelworkers v. United States Gypsum Co., 339 F. Supp. 302, 306 (N.D. Ala. 1972); Stern, *supra* note 79, at 28; Swerdlow, *supra* note 79, at 6; *Effect on Successor Employer, supra* note 136, at 254 n.8; *Obligations of a Successor Employer, supra* note 132, at 340 n.18; 14 B.C. INDUS. & COM. L. REV. 193, 198 (1972); 25 OKLA. L. REV. 132, 135. *See also* Vernon, *supra* note 26, at 906. The Board in *Burns* emphasized the language of § 8(d), which states: "[W[here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce . . . no party to such contract shall terminate or modify such contract." The NLRB determined that § 8(d) reflected Congress' paramount interest in maintaining industrial peace by requiring adherence to existing collective bargaining agreements. 182 N.L.R.B. at 350.

176. *Porter* also cannot be read as a repudiation of the *Wiley* principles.

> *Wiley* did not purport to authorize outside agencies such as arbitrators, NLRB, or courts to write a new contract governing relations in an industrial community. Rather it held that a new entrant to that community can, for policy reasons, be bound to an existing contract for that community notwithstanding its lack of consent thereto. In *H.K. Porter*

The continued viability of the *Wiley* policies is evidenced by *Golden State Bottling Co. v. NLRB.*[177] In upholding the Board's exercise of discretion in requiring a successor to remedy the unfair labor practices of his predecessor, the *Golden State* Court found that the Board's order struck an equitable balance among the conflicting legitimate interests of the bona fide successor, the public, and the affected employee. The Court felt that, at a minimal cost to the successor, the Board's order best effectuated the national labor policies of avoiding labor strife, of encouraging the exercise of the rights guaranteed to employees by section 7 of the NLRA, and of protecting the victimized employee.[178] The Court thereby adopted the *Wiley* principles of preserving industrial peace and providing protection for employees from sudden changes in their employment relationship. Freed from the misinterpretation of section 8(d) in *Burns,* the Court properly could implement these policies in a successorship context.

Additionally, once the policies of section 8(d) correctly are excluded from the analysis, the *Burns* emphasis on lack of privity becomes an unpersuasive reason for failing to impose the predecessor's contract on the successor. *Burns* repeatedly stressed notions of consent and ultimately held that the successor would be bound by the predecessor's contract only if he had expressly or impliedly assumed that contract.[179] This result was based primarily upon the Court's interpretation of section 8(d) and the belief that it could not infringe upon the policy favoring voluntary agreement to contract terms. Since section 8(d) is inapplicable to a successor employer, the Court's emphasis on consent was not valid.

Furthermore, the *Burns* Court's emphasis on privity, which reflected a return to common law principles of contract theory, was an unwarranted departure from prior case law. *Wiley* had established that a collective bargaining agreement is not an ordinary contract and is not controlled by formalistic concepts of contract and privity.[180] Instead, a collective bargaining agreement constitutes

---

however the question was writing a new contract, rather than determining who was bound by an existing one.

United Steelworkers v. United Gypsum Co., 339 F. Supp. at 306.

177. 414 U.S. 168 (1973); *see* Teamsters Local 249 v. Bill's Trucking, Inc., 493 F.2d at 961 n.24; UAW v. Saga Foods, Inc., 407 F. Supp. at 1252; Flaherty & Vartain, *supra* note 138, at 1163; *Impact of Howard Johnson, supra* note 147, at 568.

178. 414 U.S. at 181-85.

179. 406 U.S. at 281-87; *see The Impact of Burns Security, supra* note 132, at 582.

180. 376 U.S. at 550.

A collective bargaining contract is not an ordinary contract, both because the bargaining which produces it is compulsory, not voluntary, and because in many areas, public

a compact establishing the basic legal framework of the employment relationship, which is to be governed by the policies and statutes of national labor law.[181] The duty of a successor to honor a predecessor's contract, therefore, is not derived from a private contract, from an assumption of obligations, or from a transfer of assets. Instead, the duty is imposed by operation of law as a consequence of a change in ownership.[182] *Burns*'s regression to common-law contract principles is unjustified because a finding of successorship for the purposes of the NLRA does not require privity between the old and the new employer,[183] but only a "substantial continuity of identity in the business enterprise." The test thus focuses upon the similarity in the employing industry and not upon the relationship between the predecessor and successor employers. The cases that have imposed contractual obligations on the successor regardless of the form of succession are further evidence that privity between the employers is immaterial.[184]

The concept of privity in no way relates to the effectuation of the basic goals and purposes of the successorship doctrine.[185] The successorship rule is intended to achieve industrial peace by settling through peaceful arbitration labor disputes arising from a sudden shift in employer identity. The courts should attempt to achieve this goal regardless of whether a direct sale of assets or the transfer of a service contract from one competitor to another effects the change of employer. The existence or absence of privity is not relevant to determining whether imposing the duty to arbitrate under the predecessor's contract will achieve industrial peace. Rather, the important question is whether the conditions that result from the employer succession will generate industrial instability. Tying the duty

---

> policy permeates the bargain itself. In construing a collective bargaining contract, therefore, courts like arbitrators must look "to the law" for help in determining the sense of the contract.

Ratner, *The Emergent Role of District Courts in National Labor Policy*, 38 F.R.D. 81, 85 (1966); *see* United States Gypsum Co., 56 Lab. Arb. & Disp. Settl. 363, 387 (1971) (Valtin, Arb.); Stern, *supra* note 79, at 34-35; Vernon, *supra* note 26, at 911.

181. *See Contractual Successorship*, *supra* note 85, at 620; Note, *Obligations of Successor Employers: Recent Variations on the John Wiley Theme*, 2 GA. L. REV. 574, 580 (1968).

182. Tom-A-Hawk Transit, Inc. v. NLRB, 419 F.2d 1025, 1027-28 (7th Cir. 1969).

183. NLRB v. DIT-MCO Inc., 428 F.2d 775, 780 (8th Cir. 1970); Tom-A-Hawk Transit, Inc., NLRB, 419 F.2d at 1027-28; Maintenance, Inc., 148 N.L.R.B. 1229, 1301 (1964); Walker Bros., 41 Lab. Arb. & Disp. Settl. 844, 848 (1963) (Crawford, Arb.).

184. United States Gypsum Co. v. United Steelworkers, 384 F.2d 38 (5th Cir. 1967), *cert. denied*, 389 U.S. 1042 (1968); Monroe Sander Corp. v. Livingston, 377 F.2d 6 (2d Cir. 1967), *cert. denied*, 389 U.S. 831 (1968); United Steelworkers v. Reliance Universal Inc., 335 F.2d 891 (3d Cir. 1964); Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964).

185. *See* Slicker, *supra* note 2, at 1090-91; Vernon, *supra* note 26, at 914-15.

to arbitrate under the predecessor's contract to the existence of a contractual connection between the two employers would thwart the accomplishment of industrial peace because the adverse effect on employees and the likelihood of industrial strife will remain the same irrespective of whether privity exists.

Implementation of a privity requirement would have the greatest impact in the competitive service industries because of the frequent changes of employers.[186] Since privity obviously does not exist between competitors, employees in industries based on frequently renewed service contracts awarded through competitive bidding could not enforce their labor contracts on new employers. Accordingly, the employees either would lose the benefits they had bargained for or would disrupt the industry by striking to maintain those rights.

As a further basis for refusing to require the successor to honor the predecessor's contract, the *Burns* Court expressed the concern that imposition of the predecessor's agreement would inhibit greatly the free transferability of assets.[187] The Court reasoned that prospective purchasers would refuse to take over failing companies if they would be bound by labor contracts that prevented them from reducing labor costs or making structural changes in the business. The Court's fear is not wholly justified. Imposition of the predecessor's contract on the new employment relationship may have exactly the opposite result and may encourage the transfer of capital: "[Successorship] is a multifaceted concept that, properly applied, may permit and even facilitate orderly transfers of capital and assets that take due account of appropriate interests of employees and thus by providing transitions with a minimum of disruption may advance the cause of industrial peace."[188] The new employer would be assured of the predictability of labor costs and would be guaranteed that no strike, other type of economic unrest or drawn out court litigation will occur. An employer more probably would hesitate to purchase a business if a union with bargaining rights existed, but was not covered by a collective bargaining agreement. The employer would be faced with the certainty of difficult contract negotiations at the onset of his take-over of the business. Indeed, at least one arbitrator has suggested that most people purchasing businesses do

186. *See* Severson & Willcoxon, *Successorship Under Howard Johnson: Short Order Justice for Employees*, 64 CALIF. L. REV. 795, 816-17 (1976).

187. 406 U.S. at 287-88. The same concern was expressed by the court in NLRB v. Wayne Convalescent Center, Inc., 465 F.2d 1039, 1043 (6th Cir. 1972).

188. International Ass'n of Machinists Dist. Lodge 94 v. NLRB, 414 F.2d at 1139 (Leventhal, J., concurring).

so with the expectation that they will acquire the existing labor contract.[189]

Imposition of the existing contract might not impede the transfer of capital because a potential successor could go directly to the union and bargain with it over the terms of the contract. The buyer could inform the union that the negotiation of a new labor contract is a condition precedent to his take over of the business. In the case of a failing company, with which the *Burns* Court was most concerned, a union faced with the choice of either accepting new contract terms from a new and prosperous employer or maintaining its contract with a moribund business quite probably will agree to the new employer's contract proposals. Having resolved his labor contract worries, the potential successor would be more likely to proceed with the purchase. Therefore, the Court's conclusion that imposition of the predecessor's contract will prevent the transfer of capital assets is of questionable validity.

It also has been suggested that the *Wiley* rule would deter corporate acquisitions and mergers because arbitration is expensive and time consuming and the possibility of a protracted dispute would discourage a potential buyer.[190] This argument is discredited easily because it reflects an inaccurate view of the arbitration process. Arbitration is an "informal, inexpensive and expeditious" forum in which to determine the applicability of the predecessor's contract terms and often serves as a catalyst in the process of achieving labor peace.[191]

The *Burns* Court failed to offer any reason why the unimpeded transfer of capital should be encouraged at the expense of industrial stability and employee rights. As one circuit court judge has stated:

> [R]ooted in our competitive enterprise system is a strong policy in favor of free transfer of assets and flexibility of new management attuned to economic efficiency. This is not, however, an absolute. It must be balanced against the policies of protection for labor and stability of labor relations that are embodied in the federal labor statutes.[192]

189. "No rational man buys a manufacturing business today without ascertaining the facts as to unionization, labor contracts, status of employee relations, and the expectancy that he probably will acquire the labor contract with the business." Walker Bros., 41 Lab. Arb. & Disp. Settl. 844, 849 (1963) (Crawford, Arb.).

190. Benetar, *Successorship Liability Under Labor Agreements,* 1973 WIS. L. REV. 1026, 1031.

191. Patrick, *Implications of the John Wiley Case for Business Transfers, Collective Agreements, and Arbitration,* 18 S.C.L. REV. 413, 430-31 (1966); *see* International Ass'n of Machinists v. Howmet Corp., 466 F.2d at 1253; United Steelworkers v. American Int'l Aluminum Corp., 334 F.2d at 153 n.11; Siegel, *supra* note 31, at 892 n.122.

192. International Ass'n of Machinists Dist. Lodge 94 v. NLRB, 414 F.2d at 1139 (Leventhal, J., concurring).

A balancing of all these policies in a successor situation weighs in favor of requiring the successor to arbitrate under his predecessor's contract because the likelihood of industrial instability is great[193] whereas the possibility of inhibiting corporate acquisitions is questionable. The employees' right to bargain with the successor employer also may deter substantially the free transfer of assets, yet the right to bargain is not sacrificed because of that possibility. The fruits of the employees' right to bargain should be as well protected as the right to bargain itself. Accordingly, the fear of impeding the transfer of capital is an unsatisfactory reason for refusing to bind the successor to his predecessor's contract.

Equally unpersuasive is the Court's argument that imposing the predecessor's contract on the new employment relationship would be inequitable because the union might have made concessions to an economically failing predecessor employer that it would not have made to a thriving employer.[194] Such an argument is disingenuous. Unions frequently make concessions to borderline or struggling companies in contract negotiations, for it is in the best interest of all the parties to make sacrifices. At the time a union makes such concessions, it is surely aware that a merger or sale of assets is a possibility, especially in the modern business world where such occurrences are commonplace. If the union, in order to achieve stability in its present employment relationship, is willing to take the risk that later it might be bound by the disadvantageous terms by a new, more prosperous employer, the Court ought not interfere with the union's free choice. The union should not be able to take advantage of a fortuitous change in employers in order to escape contract terms to which it voluntarily agreed.

Furthermore, labor unions are quite capable of protecting their own interests in situations calling for concessions to failing employers. A union can negotiate a short term contract so that it will be bound by the disadvantageous terms for only a short period of time. Also, a union can insist on an automatic reopening clause or an automatic arbitration clause, effective upon a change in the identity of the employer,[195] that would permit the modification of substantive contract terms.

The *Burns* opinion therefore produces an undesirable and legally unjustifiable result. Consequently, *Burns* should not be read as invalidating *Wiley,* but should be discredited as an unsound

193. *See* text accompanying notes 80-83 *supra.*

194. 406 U.S. at 288.

195. *See* Stern, *supra* note 79, at 38.

resolution of the question. This conclusion permits affirmative answers to both of the unanswered questions—whether a court may still order a successor to arbitrate under his predecessor's contract and whether an arbitrator may impose other substantive terms of the contract on the successor. *Wiley,* unaffected by *Burns,* provides precedential support for such a conclusion and best accommodates the national labor policies of achieving industrial stability, freedom of choice, and minimal government intervention in the employment relationship.

IV. Arbitral Standards

In the event that an actual arbitration proceeding does result from a court's order requiring the successor to arbitrate his obligations under his predecessor's contract,[196] some definite and recognizable standards must be established to guide the arbitrator in resolving the grievances before him. *Wiley* failed to provide concrete guidelines,[197] but rather merely expressed confidence in the "flexible procedures of arbitration"[198] and suggested that in determining the effects of the merger on the predecessor's contract the arbitrator should inquire "whether or not the merger was a possibility considered by Interscience and the Union during the negotiation of the contract."[199] A few basic precepts have been established, however, in cases subsequent to *Wiley.* It is clear that the question of successorship is a question of law for the courts, not the arbitrator, to decide. Therefore, the court must determine whether the new employer is bound by the predecessor's contract and whether he must arbitrate under it.[200] The court may not delegate its responsibility to determine arbitrability and its determinations may not be reviewed by an arbitrator.[201]

196. As has been shown, even when a court orders arbitration, it is unlikely that an arbitration proceeding will ultimately result. *See* text accompanying notes 125-31 *supra.*

197. *See* Barbash, *Status of the Collective Bargaining Agreement Under* Wiley v. Livingston: *A Management Counsel's View,* 18 N.Y.U. Ann. Conf. on Labor 259, 273 (1966); Slicker, *supra* note 2, at 1077.

198. 376 U.S. at 552 n.5.

199. *Id.* at 557.

200. Livingston v. John Wiley & Sons, Inc., 313 F.2d 52, 66 (2d Cir. 1963) (Kaufman, J., concurring), *aff'd,* 376 U.S. 543 (1964); Retail Clerks Local 1552 v. Lynn Drug Co., 299 F. Supp. at 1040; Retail Store Employees Local 954 v. Lane's of Findlay, Inc., 260 F. Supp. at 658; Drivers Local 75 v. Wisconsin Employment Relations Bd., 29 Wis. 2d 272, 278, 138 N.W.2d 180, 183 (1965); Goldberg, *supra* note 4, at 772.

201. A determination by the Court tbat a dispute is arbitrable cannot be frustrated by a contrary determination of an arbitrator that the Court was in error. To permit an arbitrator thus to "second-guess" the Court, would seriously disrupt the proper allocation of function and responsibility between the Court and arbitrator as they were formu-

After finding that a successor is obligated to arbitrate, however, a court should not express further views on the merits of the union's claims.[202] The Supreme Court in *Wiley* purposefully avoided expressing any opinion on the extent to which the substantive terms of the predecessor's contract bound the successor or on the merits of the union's grievances. Instead, the Court stated that "[w]hether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts."[203] Several courts and commentators have agreed that a court ought not pass on the merits of union claims by granting specific enforcement of the predecessor's entire contract.[204] Accordingly, the *Wackenhut* holding that the predecessor's entire labor contract was binding on the successor[205] has been discredited, and the *Reliance* opinion[206] has been adopted as the better view.

The arbitrator's role, therefore, is to determine which of the substantive provisions of the predecessor's contract bind the successor and then to interpret and apply those provisions.[207] The *Wiley* Court left to the arbitrator determination of whether all, only some, or none of the predecessor's contract provisions should be enforced.[208] Thus *Wiley* authorized the arbitrator both to enforce

---

lated in *Wiley*. If the mandate of *Wiley* is to have any meaning at all it is inconceivable that the arbitrator should possess authority to dilute the Court's ruling by finding the dispute not arbitrable.

Piano & Musical Instrument Workers Local 2549 v. W.W. Kimball Co., 239 F. Supp. 523, 525 (N.D. Ill. 1965).

202. The courts in both Retail Clerks Local 1552 v. Lynn Drug Co., 299 F. Supp. 1036 (S.D. Ohio 1969), and Retail Store Employees Local 954 v. Lane's of Findlay, Inc., 260 F. Supp. 655 (N.D. Ohio 1966), refused to grant specific enforcement of the predecessor's contract because such action would "usurp the function of the arbitrator to whom the *Wiley* Court had specifically delegated the responsibility of determining the merits of each situation and of applying the terms of the surviving contract." Vernon, *supra* note 26, at 13.

203. 376 U.S. at 555. The circuit court in *Wiley* noted that "[i]t is not our function to express any opinion on the subject, provided the agreement contemplates that such a question or congeries of questions was to be decided by arbitration." 313 F.2d at 59.

204. *See* Local 358, Bakery & Confectionery Workers v. Nolde Bros., 530 F.2d at 553; Bath Marine Draftsmen's Ass'n v. Bath Iron Works Corp., 266 F. Supp. at 716; Local 24, IBEW v. Wm. C. Bloom & Co., 242 F. Supp. 421, 428 (D. Md. 1965); Benetar, *supra* note 190, at 1028; Slicker, *supra* note 2, at 1077.

205. *See* text accompanying notes 23-27 *supra*.

206. *See* text accompanying notes 28-34 *supra*.

207. *See* McGuire v. Humble Oil & Ref. Co., 247 F. Supp. 113, 115 (S.D.N.Y. 1965), *rev'd on other grounds*, 355 F.2d 352 (2d Cir. 1966); *Contractual Successorship, supra* note 85, at 631-32.

208. The circuit court in *Wiley* recognized that ordering the union's grievances to be resolved through arbitration created the possibility that the arbitrator might decide that none of the substantive contract terms survived the merger. 313 F.2d at 59. *See also* Note, *Labor Law: Duty of Employer to Arbitrate with Union Representing Employees of Purchased Company*, 66 COLUM. L. REV. 967, 972 (1966).

"accrued" rights as well as to impose future obligations on the successor[209] and to formulate a proper remedy through which to implement his decision.[210]

In determining the extent to which a successor is bound by the substantive provisions of his predecessor's labor agreement, the arbitrator should establish a presumption that not only the arbitration clause, but also the other terms and conditions of the predecessor's labor contract bind the successor.[211] This presumption is justified by the national labor policy of achieving industrial peace by protecting employees' contractual rights with a limited intrusion on free collective bargaining.[212] The presumption would be rebuttable by clear and convincing evidence that the original contracting parties, the predecessor and the union, did not intend that their contract or certain portions of it would bind the successor.[213] The ab-

---

The court in Teamsters Local 249 v. Bill's Trucking, Inc., 493 F.2d 956 (3d Cir. 1974), determined that after *Burns* a court still could order a successor to arbitrate under his predecessor's contract, stating that

> [u]pon remand, the district court might determine that the facts of this case warrant enforcement against BTI of all, some, or none of the ETI-Union contract provisions. For example, if it is found that that contract was entered into by the Union with the specific understanding that its terms would not be deemed to survive a sale of the controlling interest in the corporation, it should not be enforced against BTI.

Id. at 961 n.26. Although the intent of the Union and the predecessor are the appropriate factors to consider in determining whether a certain contract provision should apply to the successor (*see* text accompanying notes 212-14 *infra*), this determination sbould be made by the arbitrator, not by the court as this case suggests. The court should determine only whether national labor policies require the successor to arbitrate under the predecessor's labor agreement.

209. 376 U.S. at 555. *See also* Benetar, *supra* note 190, at 1032.

210. 376 U.S. at 552 n.5. The circuit court in *Wiley* also acknowledged that the determination of a proper remedy for enforcing the Union's rights would be left to the arbitrator. 313 F.2d at 59.

211. These principles for guiding the arbitrator's application and interpretation of a predecessor's contract are derived from a previous article by Professor Goldberg. For a full discussion of the reasoning supporting these principles, see Goldberg, *supra* note 4, at 772-787.

212. Another commentator has suggested that *Wiley* should be interpreted as implying a presumption of survival of the predecessor's contract. Slicker, *supra* note 2, at 1081. The argument was made in one arbitration case that "if there is sufficient continuity surviving a change of ownership to justify arbitration, there is sufficient continuity surviving a change in ownership to justify the application of the substantial terms of the contract to the successor . . . ." This argument in effect calls for a presumption of contract survival. Lake States Leasing Corp., 46 Lab. Arb. & Disp. Settl. 935, 938 (1966) (Gundermann, Arb.) (successor ordered to arbitrate under the predecessor's labor contract by the Wisconsin Employment Relations Board; decision based on other grounds).

213. *See* Local 358, Bakery & Confectionery Workers v. Nolde Bros., 530 F.2d at 553; Retail Clerks Local 1552 v. Lynn Drug Co., 299 F. Supp. at 1041. Although conceding that an arbitrator *could* determine the intent of the union and the predecessor by "looking to the scope of the negotiations leading up to the contract or by examining the content of a 'successors and assigus' clause," one commentator criticizes this approach as constituting a

sence of a "successors and assigns" clause in the predecessor's labor contract should not be interpreted, however, as establishing a lack of intent by the original parties to bind a successor to their contract. In order to avoid obligations under a predecessor's contract, the successor must demonstrate explicit language clearly indicating that the original parties agreed not to impose any obligations on a successor.[214]

Contrary to this general approach, however, the arbitrator should not apply this presumption whenever changed or unforeseen circumstances would make application of a specific contract term unreasonable or inequitable in the new employment relationship.[215] When such circumstances arise, the arbitrator should determine whether to apply the predecessor's agreement in compliance with considerations of equity and rational industrial policies.[216]

"legal fiction" since a labor contract and a "successors and assigns" clause are negotiated without any knowledge of the circumstances under which a future succession in employers takes place. Slicker, *supra* note 2, at 1077-78.

214. We reach this conclusion [that the merger does not terminate the contract] despite the fact that the agreement contains no statement that its terms are to be binding on successors and the further fact that neither of the parties had a possible consolidation in mind when the terms of the agreement were negotiated and settled. Not only would a contrary rule involve manifest injustice, a circumstance not to be lightly disregarded or brushed aside, it would be a breeder of discontent and unharmonious relations between employer and employees and a source of unnecessary and disrupting litigation.

Livingston v. John Wiley & Sons, Inc., 313 F.2d at 56.

215. Other authorities have agreed that an arbitrator properly may give weight to a change in circumstances that would result in inequities if certain terms in the predecessor's contract were binding on the successor. *See* Boeing Co. v. International Ass'n of Machinists, 504 F.2d at 320 n.19; Morris & Gaus, *supra* note 5, at 1378; Patrick, *Implications of the John Wiley Case for Business Transfers, Collective Agreements, and Arbitration*, 18 S.C.L. REV. 413, 430 (1966); *Effect on Successor Employer*, *supra* note 136, at 256-57. In contrast, another author has stated that

a labor contract is a series of mutually dependent clauses where the quantity of wages is dependent on the 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.

Slicker, *supra* note 2, at 1081. This comment is unjustifiable for several reasons. First, the arbitrator does not have the right to "pick and choose," but only to refuse to apply contract terms that would be inequitable in the new circumstances. Also, the arbitrator is the adjudicator best qualified to understand the parties' interests and methods by which to achieve long-term industrial stability. He would be unlikely to apply the contract so as to disrupt the balance between the parties and create unrest.

216. One work has stated that it is doubtful if an arbitration award based on equity and contrary to a contract provision could be enforced, for it would be contra to United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). Shaw & Carter, *Sales, Mergers and Union Contract Relations*, 19 N.Y.U. ANN. CONF. ON LABOR 357, 371 (1967). This is not necessarily true, however, because, "while *Enterprise* forbids a decision against the parties' expressed will, it does not require the arbitrator to ignore changed circumstan-

A comparison of these standards to those actually used in the two arbitration proceedings that resulted from court orders will demonstrate their viability. In *Interscience Encyclopedia, Inc.*,[217] the arbitrator found that the substantive provisions of the predecessor's contract were binding on the successor employer until either "its contract termination date or until there is a change of conditions that altered the separate identity within the new business enterprise, whichever occurred sooner."[218] Noting the national labor policies relied upon by the *Wiley* Court in ordering arbitration, the arbitrator held that a "substantial continuity of identity in the business enterprise" would render a collective bargaining agreement as applicable to the new industrial community as it was to the old.[219] By initiating his analysis of the successor's obligations in this manner, the arbitrator in effect utilized a presumption that continuity in a business's identity sufficient to support a court order of arbitration is sufficient grounds upon which to bind the successor to the predecessor's entire labor contract.

The successor employer attempted in *Interscience* to argue that past negotiations in which a union unsuccessfully attempted to include a "successors and assigns" clause in the contract would prove the parties' intent not to impose their labor agreement on successor employers. The arbitrator disposed of this argument, asserting that after *Wiley* "[i]t [is] immaterial that the Union unsuccessfully sought to get by contract what it achieved as a matter of law."[220] This scenario indicates that both the parties and the arbitrator were following the analysis suggested above. The successor attempted to show his obligations, or rather his lack of obligations, under the predecessor's contract by proving the intent of the original bargaining parties. He was unsuccessful in this attempt because he failed to establish by clear and convincing evidence an express intent of

---

ces—even though his decision may be contrary to the literal terms of the agreement." Goldberg, *supra* note 4, at 782.

One equitable consideration to be applied in determining whether the successor should be bound to certain terms of the predecessor's contract is whether the predecessor still exists, able to fulfill some of the contractual obligations. The courts in *Howard Johnson* and in *Lane's of Findlay* used this consideration to distinguish those cases from *Wiley*. Their decisions not to order the successor to arbitrate were based in part on this fact. 417 U.S. at 253; 260 F. Supp. at 659. This factor is more appropriately applied in an arbitrator's determination whether a specific contract term binds a successor than in a court's determination whether a successor should be bound to arbitrate.

217. 55 Lab. Arb. & Disp. Settl. 210 (1970) (Roberts, Arb.). This was the arbitration proceeding that resulted from the Court's order in *Wiley*.

218. *Id.* at 218.

219. *Id.*

220. *Id.* at 220.

the original parties not to bind him to their agreement. The arbitrator further acknowledged that the absence of a "successors and assigns" clause is in itself insufficient to overcome the presumption, which recognizes the benefits of imposing the substantive terms of the contract on the successor.[221]

In the second case, *United States Gypsum Co.*,[222] the arbitrator was asked to resolve grievances based in part upon assertions that the successor company had refused to recognize and comply with the predecessor's contract, had failed to deduct union dues and to

---

221. The arbitrator found that the predecessor's contract was binding on the successor only for the approximately four months from the date of the merger to the time the former Interscience employees were transferred to the Wiley plant and integrated with the Wiley employees. The arbitrator felt that as long as the former Interscience employees remained at the Interscience plant and performed their old jobs, their status as a separate, continuing enterprise justified imposing the contract on the successor. The arbitrator found, however, that when the former Interscience employees were transferred to the Wiley plant they became a "minority accretion" to the Wiley employee unit. At that time the union ceased to be the employees' exclusive bargaining representative and the agreement between the union and the predecessor was no longer enforceable. *Id.* at 218.

What apparently happened, in effect, is that the arbitrator felt he had the right and responsibility to re-examine the question of successorship previously resolved by the Court in *Wiley*. *See* Abodeely, *supra* note 4, at 516-20. "The same considerations which were employed to find an accretion were also used to prove the absence of a successor relationship." *Id.* at 516. The Supreme Court found in *Wiley* that the substantial continuity of identity in the Interscience enterprise necessary for Wiley to be a successor existed even though the former Interscience employees and the Wiley employees were functionally integrated. In direct contradiction, the arbitrator found that no continuity of identity in the Interscience enterprise existed after the merger of employees had occurred and, accordingly, that Wiley's successorship and the predecessor's collective bargaining agreement terminated at the time of the merger.

The question of who made the proper determination regarding the existence of a substantial continuity in the identity of Interscience is immaterial. The important point is that the arbitrator in *Interscience* misperceived his function and infringed upon the role of the courts by assuming the right to determine the question of successorship. The Court already had exercised its function appropriately by finding Wiley to be a successor and by ordering Wiley to arbitrate under the Interscience contract. The arbitrator's duty was solely to decide which contract terms applied to the successor. A decision failing to apply contract terms could have been based properly either on the parties' intent or on inequities resulting from such an application, but a finding that the contract did not apply because Interscience no longer had a separate identity was inappropriate.

In accordance with his decision that the predecessor's contract was no longer enforceable after the integration of the two employee groups, the arbitrator required Wiley to honor the accrued seniority rights, job security provisions, and accrued vacation benefits from the time of the corporate merger to the date on which the Interscience employees were moved to the Wiley plant. No obligations were imposed on Wiley regarding the union's welfare and pension fund claims because an accord and satisfaction had been reached on those claims. No duties were imposed under the severance pay provisions because the union and the successor had agreed to a new severance formula during their private negotiations.

222. 56 Lab. Arb. & Disp. Settl. 363 (1971) (Valtin, Arb.). This was the arbitration proceeding that resulted from the court order in *United States Gypsum Co. v. United Steelworkers*.

recognize seniority rights in accordance with the contract, and had refused to abide by a provision for reopening negotiations for a wage increase and paid holidays by refusing to recognize or deal with union representatives.[223] Relying heavily upon *Wiley, Reliance,* and *Wackenhut,* the arbitrator held that the successor employer was bound by the predecessor's entire labor contract. Based upon his reading of *Reliance* and *Wackenhut,* the arbitrator adopted a presumption that the agreement be applied to the successor.[224]

The arbitrator found that Gypsum had violated the union dues check-off provision and ordered the company to pay with interest to the union the amount of the dues that should have been checked off. Furthermore, the arbitrator held that the company was obligated to pay the dues without deducting anything from the employees' wages, since the company had prevented the union from rendering full representation by depriving it of its dues and because too many administrative difficulties would arise in billing former employees.[225] The company also was found in violation of the contract for refusing to negotiate with the union over wage increases and holiday benefits under the reopener provision. The arbitrator declined to order the parties to negotiate under the reopener clause because the union had been decertified four years earlier. Equally unacceptable to the arbitrator, however, was the prospect of the company's wrongdoing going unremedied. With great hesitation, the arbitrator ordered the company to pay retroactive wages in the amount that he determined the parties would have agreed upon had negotiations taken place. With regard to holiday benefits, he ordered no corrective action because he had determined that no gain would have been achieved through negotiations. The arbitrator, however, did order the company to pay a retroactive wage increase plus interest to all current employees and to those employed during the violation.[226]

In an action to enforce the arbitrator's award, the district court reversed that portion of the award requiring the company to pay a retroactive wage increase.[227] The court held that the arbitrator's remedy, based as it was on his determination of what the parties would have agreed to had negotiations taken place "had the result of the arbitrator's making a new contract . . . [and] violates the

223. *Id.* at 367.
224. *Id.* at 388.
225. *Id.* at 390-91.
226. *Id.* at 392-94.
227. United Steelworkers v. United States Gypsum Co., 339 F. Supp. at 307.

principle enunciated in *H.K. Porter* . . . ." In addition, the court modified that part of the order requiring the company to pay the uncollected dues to the union. The court held that it was proper to penalize the company by making it pay the dues of former employees, but held that requiring the company to do the same for its present employees would cause Gypsum to violate section 302(a) of the LMRA. Accordingly, the order was amended to permit Gypsum to withhold dues from its present employees' future wages.[229]

On appeal, the circuit court reversed both of the district court's modifications and ordered enforcement of the arbitrator's original award.[230] In upholding the wage increase order, the court emphasized the arbitrator's flexibility in formulating remedies and held that the nexus between the breach of the reopener clause and the remedy was "sufficient to support the conclusion that the remedy 'draws its essence' from the contract."[231] The company had deprived the union of its right to renegotiate for increased wages. Thus a remedy that provides what the employees would have received had no breach occurred is not arbitrary or capricious, but rather is a logical remedy for the breach. Indeed, in this case the arbitrator's award was the only approach available by which to remedy the breach. The court also found that neither the holding nor the rationale of *H.K. Porter* applied to this situation because *Porter* dealt with the imposition of a substantive contract provision upon negotiating parties, while this case involved the imposition of a remedy intended to relieve a breach of an already existing collective bargaining agreement. Furthermore, the court reinstated that portion of the arbitrator's award requiring the company to pay uncollected dues to the union without reimbursement from present employees. According to the court, section 302(a) of the LMRA was intended to "protect employers from extortion and to insure honest, uninfluenced representation of employees" and, therefore, would not be violated by such an order.[232]

The arbitrator in *Gypsum* adhered to the recommended guidelines regarding the application of the predecessor's contract to the successor by applying a presumption of continued survival for the entire contract. *Gypsum* demonstrates to a greater degree an arbitrator's application of equitable considerations and industrial policies in formulating an effective remedy. The arbitrator recognized

228. *Id.*
229. *Id.* at 308.
230. United Steelworkers v. United States Gypsum Co., 492 F.2d 713 (5th Cir. 1974).
231. *Id.* at 731.
232. *Id.* at 734.

that the union had lost more than interest by being deprived of its members' dues for a long time. The arbitrator's ability to perceive this fact was based on his understanding of the industry's working conditions. The equitable powers of the arbitrator enabled him to fashion a remedy that compensated for this additional loss by prohibiting the employer from withholding the amount of the dues from the employees' wages. Furthermore, the arbitrator based his wage increase order on the "median, nationwide, collectively bargained wage increase for all industries."[233] This method of computation assured an equitable result for both the employees and the employer, but was an approach available only because of the inherent flexibility of the arbitration process.

V. Conclusion

In the future, courts should find that, despite the *Burns* decision, the national labor policies expressed in *Wiley* require them to order successor employers to arbitrate under their predecessor's contract. Such a holding will best achieve the national labor policy of preserving industrial peace by protecting employees' contractual rights and by settling labor disputes through arbitration rather than through economic warfare. Furthermore, these goals are achieved at the cost of only a minimal interference with the free collective bargaining process.

The *Burns* decision should be rejected as a barrier to requiring a successor to arbitrate under the predecessor's labor agreement because sound policy considerations and persuasive legal reasoning militate against its conclusions. *Burns* was based upon an erroneous application of section 8(d) and that section's prohibitions against infringing on free collective bargaining. The opinion's requirement that collective bargaining occur at the onset of the new employment relationship can only result in economic unrest and industrial instability.

Finally, to best effectuate the goals of *Wiley*, an arbitrator, in applying a predecessor's contract to a successor, should apply a presumption that the entire contract survives the change of employer. This presumption should be rebuttable only by a showing of the original parties' express intent that their contract not bind a successor or by a demonstration that inequity would result because of changed circumstances.

---

233. 56 Lab. Arb. & Disp. Settl. at 393.