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I. INTRODUCTION

Through a merger, an acquisition of stock or of assets, or a successful bid for a contract, a company may assume direction of work performed, prior to the takeover, by employees represented by a union and in accordance with a collective-bargaining agreement negotiated between the union and the previous employer. The new company's management, even if it considered potential labor problems, probably would confine precautions to a disclaimer of all obligations under the old agreement.[1] Nevertheless, the union may seek to force the new employer to abide by some or all of the provisions of the old contract, to bargain with it before imposing terms and conditions of employment different from those in the old contract, or at least to recognize it. To be sure, many heatedly debated questions about the new employer's obligations to do any or all of these things have been laid to a comparatively quiet, though still somewhat fitful, rest by the Supreme Court's recent decision in *NLRB v. Burns International Security Services, Inc.*[2] But many of the old questions persist, and new ones have been added by the Court's decision.[3]

The purpose of this article is to examine some of the implications of the *Burns* decision for management officials contemplating a takeover and more specifically to consider the extent to which a successor employer may be bound by the provisions of its predecessor's bargaining agreement. Although the article focuses on the *Burns* case itself, some consideration also is given to the Court's earlier decision in *John Wiley & Sons, Inc. v. Livingston*[4] and to the

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1. *See, e.g.*, Hotel Employes Union v. Howard Johnson Co., 482 F.2d 489 (6th Cir.), *cert. granted*, ___ U.S. ___, 94 S. Ct. 720 (1973); Eklund's Sweden House Inn, Inc., 203 N.L.R.B. No. 56 (May 2, 1973).

2. 406 U.S. 272 (1972).

3. *See* Christensen, *Successorships, Unit Changes, and the Bargaining Table*, in SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS 1973, at 197; Wachs, *Successorship: The Consequences of Burns*, 24 LAB. L.J. 221, 222 (1973).

4. 376 U.S. 543 (1964).

question whether *Wiley* provides a means of avoiding the mandates of *Burns*.

II. NLRB v. BURNS INTERNATIONAL SECURITY SERVICES, INC.

For about five years prior to July 1, 1967, the Wackenhut Corporation, pursuant to a series of one-year contracts, provided plant protection services for facilities of Lockheed Aircraft Service Company at the Ontario International Airport in California.[5] On February 28, 1967, a majority of Wackenhut's employees selected the United Plant Guard Workers of America (UPG) as their bargaining representative in an election held after Wackenhut and UPG had stipulated that the Lockheed facilities were an appropriate bargaining unit. On March 8, UPG was certified, and on April 21, Wackenhut and UPG entered into a three-year collective-bargaining agreement. On July 1, 1967, as a result of a successful bid for the contract, Burns International Security Services, Incorporated, took over performance of the Lockheed plant protection services.

Prior to submitting its successful bid, Burns had been informed of UPG's recent certification and of the existence of the bargaining agreement. After being notified on May 31 that its bid had been accepted, Burns hired 27 of the Wackenhut guards and brought in fifteen of its own guards from other locations. As it signed on the Wackenhut employees, Burns supplied them with membership cards for the American Federation of Guards (AFG), a union having collective-bargaining contracts with it at other locations, and told them they had to join AFG. On June 29, Burns recognized AFG, ostensibly on the theory that it had secured a card majority. On July 12, however, UPG requested that Burns recognize and bargain with it. After Burns refused to do so, UPG filed unfair labor practice charges, resulting in the issuance of a complaint, the holding of a hearing, and a succession of appellate proceedings.

The National Labor Relations Board, with Member Jenkins dissenting, adopted the findings and recommendations of the Trial Examiner and held, *inter alia*, that Burns violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act[6] by refusing to

5. The factual narrative that follows is based upon the descriptions found in the decisions of the Trial Examiner and of the National Labor Relations Board, William J. Burns Int'l Detective Agency, Inc., 182 N.L.R.B. 348 (1970), of the Court of Appeals for the Second Circuit, William J. Burns Int'l Detective Agency, Inc. v. NLRB, 441 F.2d 911 (2d Cir. 1971), and of the Supreme Court, NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272 (1972).

6. 29 U.S.C. §§ 158(a)(1) & (5) (1970).

recognize UPG and to abide by the 1967 Wackenhut agreement.[7] At the outset, the Board noted and adopted apparently without critical examination the Trial Examiner's finding that Burns was a successor to Wackenhut.[8] It then set forth what it deemed to be the ordinary, if not always hitherto recognized, consequences of such a finding. As Wackenhut's successor, Burns was obligated to recognize and bargain with UPG as the collective-bargaining representative duly selected by the majority of its employees, albeit prior to the change in employers. This obligation, the Board added, included "the negative injunction to refrain from unilaterally changing wages and other benefits established by a prior collective-bargaining agreement even though that agreement has expired."[9] Finally, the Board held that, "absent unusual circumstances,"[10] a successor is required to take over and honor a collective-bargaining agreement negotiated by its predecessor, regardless whether it expressly or by clear implication has assumed any obligations under the agreement. Imposing this obligation on a successor—and on Burns in particular—is essential, the Board reasoned, "to fully protect the employees' exercise of the right to bargain collectively and to promote the maintenance of stable bargaining relationships and . . . industrial peace. . . ."[11] It was not determinative that Burns had not signed or otherwise formally adopted the contract. It was sufficient that the contract was "reasonably related to Burns through its takeover of Wackenhut's Lockheed service functions and its hiring of Wackenhut employees."[12]

In its petition to review the Board's order, Burns contended that (1) the Lockheed facilities were not an appropriate bargaining unit, (2) Burns was not Wackenhut's successor, and (3) the refusal to honor the 1967 contract was not an unfair labor practice even if Burns was a successor.[13] The Court of Appeals for the Second Circuit enforced the Board's order except for that portion requiring Burns to honor the Wackenhut contract. The court held that "in ordering

7. William J. Burns Int'l Detective Agency, Inc., 182 N.L.R.B. 348 (1970). The Board also held that Burns had violated §§ 8(a)(1) & (2) of the Act by unlawfully recognizing and assisting AFG. This holding was not contested by Burns.

8. *See* 182 N.L.R.B. at 348-49.

9. *Id.* at 349.

10. *Id.* at 350. As not infrequently happens, the "unusual circumstances" were not long in occurring. *See* Emerald Maintenance, Inc., 188 N.L.R.B. 876 (1971).

11. 182 N.L.R.B. at 350.

12. *Id.*

13. Brief for Petitioner, William J. Burns Int'l Detective Agency, Inc. v. NLRB, 441 F.2d 911 (2d Cir. 1971).

Burns to honor the contract executed by Wackenhut, the Board has exceeded its powers."[14]

Five Justices of the Supreme Court agreed, for the most part, with all of the Second Circuit's conclusions and reasoning. All nine Justices concurred in the lower court's finding that Burns was not bound by the 1967 agreement.[15] At the outset, the majority noted, but did not review, the Trial Examiner's finding that the unit was appropriate.[16] It accepted the Board's findings that Burns had hired a majority of the Wackenhut employees and that Burns' operations did not differ significantly from Wackenhut's.[17] Having thus disposed, almost summarily, of the complex and disputed factual determinations underlying the finding of successorship, the majority had little difficulty in requiring Burns to bargain with UPG:

> [W]here the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the employer to bargain with the incumbent union.[18]

The Court went on to hold, however, that the duty to bargain in no way implies or includes an obligation to honor a predecessor's collective-bargaining agreement. So much at least is apparent from the decision. Less apparent is the rationale of the Court's holding. The problem first was approached from the standpoint of Congress' reluctance to impose—or to allow the Board to impose—any particular contractual terms upon parties engaged in collective bargaining. This reluctance is expressed most notably, the Court pointed out, in section 8(d) of the Act, which provides that the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession . . . ."[19] In *H.K. Porter Co. v. NLRB*,[20] the Supreme Court had earlier issued its authoritative interpretation of this provision, holding that it precluded the Board from requiring an employer to agree to a dues

14. 441 F.2d at 915.

15. Justice White, speaking for the majority, held that Burns was required to recognize and bargain with UPG, but was not bound by the 1967 agreement. Justice Rehnquist, speaking for the minority, would not have required Burns to recognize UPG.

16. 406 U.S. at 277-78.

17. *Id.* at 278-80.

18. *Id.* at 281. The majority reached this conclusion despite the dissent's objection 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." *Id.* at 297 (Rehnquist, J., dissenting).

19. 29 U.S.C. § 158(d) (1970).

20. 397 U.S. 99 (1970).

checkoff provision, though its adamant refusal to do so was admittedly evidence of bad-faith bargaining. The economic and social theories implicit in section 8(d), as articulated in *H.K. Porter*, "underlay the Board's prior decisions, which until [its decision in *Burns*] have consistently held that, although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them."[21]

Several commentators since *Burns* have noted that the issue of what contractual provisions, if any, should be binding upon a successor does not fit neatly within the framework of section 8(d).[22] The language in the provision was aimed at a union and an employer facing each other across the bargaining table and attempting to hammer out a bargaining agreement not yet in existence. It is doubtful that Congress, or the Court in *H.K. Porter*, considered the issue of what obligations an employer should be held to have assumed when it voluntarily takes over the operations of a business and the supervision of employees covered by an unexpired collective-bargaining agreement.

Perhaps recognizing this, the Court discussed at length, and appeared to rely heavily upon, what it described as the "serious inequities" that would result from imposing a predecessor's bargaining agreement upon the successor:

> [H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm.[23]

Whatever the merits of these social and economic speculations, they afford a more logical basis for the result in *Burns* than does section 8(d).

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21. 406 U.S. at 284.

22. Christensen, *supra* note 3, at 203; Note, *Labor Law—Successor Employers—Duty to Honor Predecessor's Collective Bargaining Agreement—NLRB v. Burns Int'l Security Services*, 14 B.C. IND. & COM. L. REV. 193, 195-200 (1972); Note, *Contract Rights and the Successor Employer: The Impact of Burns Security*, 71 MICH. L. REV. 571, 576-78 (1973); *cf.* United Steelworkers v. United States Gypsum Co., 339 F. Supp. 302, 306 (N.D. Ala. 1972).

23. 406 U.S. at 287-88.

Finally, the Court held that Burns did not violate section 8(a)(5) when it unilaterally established the initial terms on which it employed the former Wackenhut employees.[24] Burns, the Court reasoned, could not have changed any preexisting terms of employment because it had no prior relationship to the bargaining unit and because there were no outstanding terms of employment until the duty to bargain accrued on July 1, 1967, when Burns completed its hiring.

III. Successorship and the Conflict with *Wiley*

If a union invokes Board processes to force a successor to observe the bargaining agreement concluded by the prior employer, its claim probably will be denied on the authority of *Burns* as an infringement upon freedom of contract and upon the employer's right to rearrange its business.[25] What the Board has denied, however, may well be obtainable, at least in part, from court and arbitrator on the authority of the Supreme Court's earlier decision in *John Wiley & Sons, Inc. v. Livingston*,[26] which was distinguished but not expressly overruled in *Burns*.[27] That the two decisions emphasize different purposes of our national labor law is apparent.[28] Almost equally apparent is that the attempted reconciliation of the two cases by the majority in *Burns* is an uneasy one at best. While we mean eventually to chart a tentative course we believe the law should follow here, our discussion ought to begin with a brief retelling of the facts in *Wiley* and of the efforts by the *Burns* majority and minority to distinguish the prior case.

In *Wiley*,[29] the Supreme Court required a corporate employer (Wiley) to arbitrate under a bargaining agreement between a union

24. *Id.* at 292-95.

25. *See, e.g.*, Good Foods Corp., 200 N.L.R.B. No. 86 (Nov. 30, 1972); Milwaukee Engine & Equip. Corp., 198 N.L.R.B. No. 56 (July 21, 1972); St. Antoine, *Judicial Caution and the Supreme Court's Labor Decisions, October Term 1971*, 6 U. Mich. J.L. Reform 269, 276 n.35 (1973).

26. 376 U.S. 543 (1964).

27. *See* Hotel Employes Union v. Howard Johnson Co., 482 F.2d 489 (6th Cir.), *cert. granted*, ___ U.S. ___, 94 S. Ct. 720 (1973); United Steelworkers v. United States Gypsum Co., 339 F. Supp. 302, 306 & n.4 (N.D. Ala. 1972); Allied Employers, Inc., CCH Lab. Arb. Awards ¶ 8037, at 3145 (Jan. 29, 1973) (Foley, Arbitrator).

28. *See* St. Antoine, *supra* note 25, at 276. For a discussion of the varying emphases given the conflicting goals of industrial peace and freedom of contract prior to *Wiley* and *Burns* see Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. Pa. L. Rev. 467 (1964).

29. The following description is based on the Court's account of the facts. 376 U.S. at 544-46.

and another corporation (Interscience) that had merged with Wiley. At the time of the merger, Interscience was a relatively small concern, having a single plant and approximately 80 employees, 40 of whom were represented by the union. Wiley had approximately 300 employees, none of whom was represented by a union. Before and after the merger, the union and the respective employers were unable to reach any accord on the effect of the merger on the collective-bargaining agreement and on the rights under it of the Interscience employees hired by Wiley. Wiley refused to recognize the union as bargaining agent or to accede to its claim that certain rights of the Interscience employees had vested under the Interscience bargaining agreement and were binding on Wiley. Shortly before the expiration date of the Interscience agreement, the union commenced an action under section 301 of the Labor-Management Relations Act[30] to compel arbitration. It asserted no bargaining rights independent of the agreement, seeking only to arbitrate claims based on it. Wiley at no time agreed to be bound by the Interscience bargaining agreement.

The Court, in ruling upon the union's claim, first held that federal law controlled and that it was the policy of our "national labor laws" to emphasize the settling of labor disputes by arbitration. The Court concluded that it would weaken this policy if "a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established . . . ."[31] The right of employers to rearrange their businesses and even to eliminate themselves as employers had to be balanced by some protection of the employees from sudden changes 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.' "[32] That Wiley had not signed the contract did not override the "impressive policy considerations favoring arbitration."[33] In addition, the Court noted that the collective-bargaining agreement is not an ordinary contract, but a unique document, resulting from bargaining obligations imposed by law and intended to serve as the governing instrument for an industrial enterprise.

30. 29 U.S.C. § 185(a) (1970).

31. 376 U.S. at 549.

32. *Id.*, *quoting* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

33. 376 U.S. at 550.

For the duty to arbitrate to survive, however, there had to be "substantial continuity of identity in the business enterprise."[34] Otherwise, imposition of the duty to arbitrate would be "something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved."[35] The Court found proof of "continuity of identity" primarily in Wiley's hiring of the Interscience employees.[36] Moreover, the Court concluded that the duty to arbitrate did not expire merely because the Interscience employees did not constitute a majority of Wiley's work force or even an appropriate bargaining unit: "The fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises."[37]

The majority in *Burns* attempted to distinguish *Wiley* on three grounds: (1) *Wiley* was a section 301 suit to compel arbitration, not an unfair labor practice proceeding in which the Board is expressly limited by the provisions of section 8(d); (2) *Wiley* rested in large part upon the preference of national labor policy for arbitration; and (3) the decision was made against a background of state law holding the surviving corporation in a merger liable for the obligations of the disappearing corporation.[38] Without more, these points seem undeniably correct but dubiously significant.[39] The emphasis on the differences between a section 301 suit and an unfair labor practice proceeding and on the preference for arbitration suggests that the issue was a jurisdictional one, and that the union simply selected the wrong forum. But the Court's reliance in *Burns* upon the principle of freedom of contract and its evident desire to ensure the free transferability of assets belies such a narrow interpretation of its holding. The emphasis on state law seems to be at odds with the express holding in *Wiley* that federal law controlled, though the *Burns* majority may have intended only to indicate that a transfer of assets is essential to a finding that contractual obligations survive a change of employers.[40]

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34. *Id.* at 551.

35. *Id.*

36. "Although Wiley was substantially larger than Interscience, relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty." *Id.*

37. *Id.* at 551 n.5.

38. 406 U.S. at 285-87.

39. *See* St. Antoine, *supra* note 25, at 272-73.

40. The Court was careful to point out that "there was no merger or sale of assets, and

Justice Rehnquist, writing for the dissenters in *Burns*, followed a much different line of reasoning in distinguishing *Wiley* and in concluding that Burns was not bound by the Wackenhut bargaining agreement. The Justice objected not to the Board's interpretation of what obligations a finding of successorship entailed, but to the very finding of successorship itself. He observed, preliminarily, that there was no evidence that UPG was the choice of a majority of the Burns employees or that the unit was appropriate. The Board's and the majority's conclusion on those points rested on questionable presumptions or on the pro forma findings of the Trial Examiner. The imposition of a duty to bargain could be justified only on the theory that Burns was a successor, a concept left undiscussed but implicitly relied upon by the majority.[41]

According to Justice Rehnquist's interpretation of *Wiley*, "one of the bases for a finding of successorship is the need to grant some protection to employees from a sudden transformation of their employer's business that results in the substitution of a new legal entity, not bound by the collective-bargaining contract under contract law, as the employer, but leaves intact significant elements of the employer's business."[42] But protection of these expectations cannot be extended indefinitely, under the guise of the neutral application of a principle of successorship, without confiicting with other recognized aims of national labor policy—the right of an employer to rearrange its business, the right of employees to select their collective-bargaining agent, and the right of free collective bargaining itself.[43] For Justice Rehnquist, the proper balance between these purposes is struck by narrowly defining the circumstances in which successorship will be found:

> *Wiley* . . . speaks in terms of a change in the "ownership or corporate structure of an enterprise" connotes at the very least that there is continuity in the employer to perform an obligation voluntarily undertaken by the predecessor employer. . . . The notion of a change in the "ownership or corporate structure of an enterprise" connotes at the very best that there is continuity in the enterprise, as well as change; and that that continuity be at least in part on the employer's side of the equation, rather than only on that of the employees. 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

there were no dealings whatsoever between Wackenhut and Burns. On the contrary, they were competitiors for the same work . . . ." 406 U.S. at 286.

41. 406 U.S. at 297-99; *see id.* at 280 n.4.

42. 406 U.S. at 301.

43. *Id.* at 301-04.

have expected the first employer to have performed his contract with them.[44]

The differing views of the majority and of the dissent on the obligations of a successor are not necessarily irreconcilable. The majority noted, at the outset, that its resolution of the questions presented turned to a large extent on the "precise facts involved here."[45] It also acknowledged that in some situations a successor might be bound by the contract of the predecessor: "[I]n a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract."[46] Nevertheless, the majority's broad language emphasizing the need to encourage the transfer of capital is hard to square with the dissent's position that it is the transfer of assets itself that may lead to the imposition of contractual obligations and a duty to bargain.

IV. The Obligations of a Successor

Without taking issue with any member of the Court or with proponents of proposals for reconciling *Burns* and *Wiley*,[47] we tender the argument that the reasoning of the *Burns* majority is ultimately incompatible with the outcome in *Wiley*.[48] The point can best be approached by discussing two questions posed by the conflict between the two decisions: first, whether *Burns* established a new test of successorship applicable to the *Wiley* situation, and secondly, whether, consistently with *Burns*, a successor can be bound through arbitration by the predecessor's bargaining agreement.

Burns had an obligation to bargain with UPG because a majority of the employees hired by it were represented by a recently

44. *Id.* at 304-05. Drawing a novel analogy to state bulk sales acts, Justice Rehnquist added that "the doctrine of successorship in the federal common law of labor relations accords to employees the same general protection against transfer of assets by an entity against which they have a claim as is accorded by other legal doctrines to nonlabor-related claimants against the same entity." *Id.* at 305.

45. *Id.* at 274.

46. *Id.* at 291.

47. *See, e.g.*, Note, *Labor Law—Successor Employers, supra* note 22, at 212; Note, *Contract Rights and the Successor Employer, supra* note 22, at 582-90; Comment, *Contractual Successorship: The Impact of Burns*, 40 U. Chi. L. Rev. 617 (1973).

48. The following discussion is confined to the *Wiley* holding that the successor was required to arbitrate. We do not contend that *Burns* is in any way inconsistent with the holdings in *Wiley* that federal law controlled and that the arbitrator determines issues of procedural arbitrability.

certified bargaining agent.[49] Although the Court suggested at one point that the bargaining duty arises only when the successor plans to or does retain "all of the employees in the [predecessor's] unit,"[50] it is, or must be, the hiring by the successor of the predecessor's employees as a majority of its own work force that triggers the duty to bargain. Otherwise, as one commentator has noted, a would-be successor could avoid any duty to bargain simply by hiring all but one of the predecessor's employees.[51] Moreover, the successor might be forced to bargain with what would be in effect a minority union if the hiring of all—or a majority—of the predecessor's employees were the test. Instead, the language about hiring all of the predecessor's employees was intended, it appears, to suggest the narrow range of situations in which the duty to bargain might arise prior to any formal hiring.[52] In addition, the percentage of the predecessor's employees hired may well be an indicator of continuity in the employing industry. If only a small percentage of the predecessor's employees are hired, "discontinuity" seems apparent, even though the employees may constitute a majority of the successor's work force.[53]

It is arguable, of course, that the majority hiring test is inapplicable to a *Wiley* situation and controls only when the union seeks recognition as the exclusive bargaining agent for all of the successor's employees or all of the employees in an appropriate unit. The reasoning supporting the test applies equally, however, in each instance. The test seeks to avoid the difficulties—and potential illegality—of requiring the would-be successor to bargain with a minority union, and the difficulties are just as real when, as in *Wiley*, a union seeks to represent only a minority of employees for purposes of arbitration.[54] If the successor is already unionized and is forced to arbitrate with an "outside" union representing employees of the acquired predecessor, the successor's relationship with the union

49. *See* text accompanying note 18 *supra*.

50. 406 U.S. at 295. As one commentator stated: "It is unclear whether Justice White considers the critical 'majority' to be (1) a majority of the *predecessor's* employees going into the successor's work force, or (2) a majority of the *successor's* work force coming from the predecessor employer, or (3) both." St. Antoine, *supra* note 25, at 271 n.12.

51. Wachs, *supra* note 3, at 230.

52. *See id.*

53. *See* Atlantic Technical Servs. Corp., 202 N.L.R.B. No. 13 (Mar. 5, 1973); *cf.* Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw. U.L. REV. 735, 749-51 (1969).

54. *See* McGuire v. Humble Oil & Ref. Co., 355 F.2d 352 (2d Cir.), *cert. denied*, 384 U.S. 988 (1966).

representing a majority of its employees might be severely impaired, especially if arbitration led to the creation of a group of employees with higher benefits.

The majority hiring test used by the *Burns* majority appears, then, to state a prerequisite to the imposition of any kind of successorship obligation.[55] Under that test, Wiley would not have been a successor.

Assuming that the successor satisfies the majority hiring test, the question remains whether it might be held bound, through arbitration, to some of the provisions of the predecessor agreement. At the outset, it should be noted that requiring the successor to observe the contract of the predecessor is impossible to square with the Court's holding that a successor is ordinarily free to set the initial terms and conditions of employment.[56] That freedom means little if an arbitrator can block the successor's efforts to run the business in a new way by forcing on it provisions of the old agreement. This suggests that the basic rationale of *Burns* is inconsistent with the holding in *Wiley* that the successor had to arbitrate under the old contract and might be obligated, ultimately, to honor some of its provisions. The *Burns* majority stressed the free transferability of capital and the setting of terms and conditions of employment through the interplay of economic forces. To say that these policies are hardly novel is an understatement. They have been relied upon by the Court in other contexts,[57] are embodied in section 8(d), and are basic axioms of a free enterprise economy.[58]

Of course, there is no way of proving conclusively that absolving a successor of any duty to honor a predecessor's agreement will always and everywhere make capital more transferable and terms of employment more reflective of the economic strength of the parties. But we submit that common sense and practical experience tell us that in most instances it will further these aims. More important

55. This statement is not intended to imply that a company is necessarily a successor when a majority of its work force is composed of one-time employees of a business it has taken over. It is still necessary to find that there is continuity in the employing industry.

56. The Court's holding on this issue is consistent with, and indeed almost compelled by, the holding that Burns was not bound by the Wackenhut agreement. Depending upon the length of the unexpired term, there would often be little practical difference between holding a successor bound by the predecessor's contract and requiring it to bargain before instituting inconsistent terms of employment. *See* NLRB v. Bachrodt Chevrolet Co., 468 F.2d 963, 972 (7th Cir. 1972) (Stevens, J., dissenting), *vacated*, 411 U.S. 912 (1973); NLRB v. Wayne Convalescent Center, Inc., 465 F.2d 1039, 1043 (6th Cir. 1972).

57. *See, e.g.*, H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

58. *See generally* Swerdlow, *Freedom of Contract in Labor Law: Burns, H.K. Porter, and Section 8(d)*, 51 TEXAS L. REV. 1 (1972).

for present purposes, the reasoning in support of the result in *Burns* applies with equal force to the *Wiley* situation. There is no basis for arguing that a contract, or some part of it, should be binding upon a successor if enforced by an arbitrator, but not if enforced by the Board. Imposing this obligation, in whatever forum, restricts the free transfer of capital. The would-be successor cannot know at the time of the takeover just what obligations some third party, be he arbitrator or Board member, might later find it had assumed. While an arbitrator, because he has greater flexibility in interpreting contractual terms, might be able to impose upon a successor obligations consistent with the economic strength of the parties, that result would be largely fortuitous, since most collective-bargaining agreements are silent about what obligations are to survive a change of employers.

The dissenters in *Burns*, it is true, distinguished *Wiley* on the ground that a transfer of assets and dealings between the parties were involved in that case. Under such limited circumstances, they indicated, certain contractual obligations might survive a change of employers and be enforceable through arbitration. But these circumstances are neither limited nor rare. To make the transfer of assets the touchstone of a finding of successorship and to require a successor to honor the predecessor's bargaining agreement if successorship is found, as the dissent proposes, would lead to the imposition of the predecessor's agreement in a wide variety and large number of corporate combinations and reorganizations. The dissent's limitation on the successorship doctrine is no limitation at all and is inconsistent with the policies of encouraging the free transfer of capital and of facilitating business reorganization.

This is not to ignore completely the concern of the Court in *Wiley* that employees be protected against sudden changes in the employment relationship. It is merely a recognition that the balance between protection of employee expectations and encouragement of the transfer of capital is best struck by requiring only that the successor bargain with the predecessor union when a majority of its employees are former employees of the predecessor. It may be objected that this gives small protection to employee expectations because the bargaining obligation may be avoided simply by not hiring the predecessor's employees.[59] But this is true even if contractual obligations are held to survive a change of employers, since

59. Under current Board decisions, a potential successor is not obligated to retain the predecessor's employees. *See* Crotona Serv. Corp., 200 N.L.R.B. No. 97 (Dec. 5, 1972).

retention of the bulk of the predecessor's employees has long been deemed determinative evidence for a finding of successorship.[60] Moreover, as a practical matter, a successor may find it difficult to avoid taking on at least a part of the predecessor's work force. If the successor does not intend to transfer employees of its own into the newly acquired facility, it would have to hire new employees from the general labor market, and for obvious reasons, the predecessor's former employees might seek employment from the successor. They could not be denied employment because of their prior union affiliation,[61] and it would be difficult to find all of them unqualified. In addition, the successor often may desire to retain the employees of the predecessor since they may be both competent and familiar with the operations of the plant. In short, the obligation to bargain with the predecessor union not infrequently will be almost unavoidable.

The proposition urged herein, that the outcome in *Wiley* cannot be squared with the reasoning in *Burns*, is not inconsistent with the Supreme Court's most recent discussion of successorship. In *Golden State Bottling Co. v. NLRB*,[62] the Court held that a "bona fide purchaser of a business, who acquires and continues the business with knowledge that his predecessor has committed an unfair labor practice in the discharge of an employee, may be ordered by the National Labor Relations Board to reinstate the employee with back pay."[63] In reaching this conclusion, the Court expressly relied upon the language in *Wiley* concerning the need to protect employee expectations from sudden changes in the employment relationship. But it also noted that its conclusion did not in any way qualify its earlier discussion in *Burns*: "[U]nlike *Burns*, where an important labor policy opposed saddling the successor employer with the obligations of the collective-bargaining agreement, there is no underlying congressional policy here militating against the imposition of liability."[64]

In effect, the Court found that imposing liability for the predecessor's unfair labor practice did not interfere with the successor's right to rearrange its business. Left untouched is the reasoning in *Burns* that imposition of the predecessor's bargaining agreement does interfere with this right.[65]

60. *See* Goldberg, *supra* note 53, at 750-51.

61. *See* NLRB v. Tragniew, Inc., 470 F.2d 669 (9th Cir. 1972); Central American Airways, 204 N.L.R.B. No. 25 (June 14, 1973).

62. ___ U.S. ___, 94 S. Ct. 414 (1973).

63. ___ U.S. at ___, 94 S. Ct. at 418.

64. ___ U.S. at ___, 94 S. Ct. at 425.

65. The issue discussed above, the resolution of the conflict between *Burns* and *Wiley*, may soon be resolved by the Supreme Court. On December 10, 1973, the Court granted

certiorari in Howard Johnson Co. v. Hotel Employes Union, ___ U.S. ___, 94 S.Ct. 720 (1973), in which the Court of Appeals for the Sixth Circuit had held a successor obligated to arbitrate under the predecessor's agreement. The successor had not hired a majority of the predecessor's employees, nor did the predecessor's employees constitute a majority of the successor's work force. The finding of successorship rested instead on the continuity between the 2 businesses—the successor took over virtually all of the predecessor's assets, the location and identity of the businesses remained the same, and the products and services were virtually identical.