Contract Rights and the Successor Employer: The Impact of Burns Security

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Business Organizations Law Commons, Labor and Employment Law Commons, and the Supreme Court of the United States Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol71/iss3/8

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
NOTES

Contract Rights and the Successor Employer: The Impact of Burns Security*

The extent to which a new employer is obligated to a union that has established a bargaining relationship with a previous employer has troubled both the National Labor Relations Board and the courts. In this context, several interests central to national labor relations policy—freedom of contract, flexibility in the transfer of business assets, employee job security, and industrial stability—collide, and a satisfactory general solution has not yet been reached.

In NLRB v. Burns International Security Services, Inc.¹ the Supreme Court recently confronted this question in a factual setting quite unlike the usual successorship case.² While the Court, per Justice White, carefully noted that the decision turned largely on the "precise facts involved,"³ its opinion appears to establish the following proposition of general application in NLRB proceedings:

The Board in certain circumstances can require a new employer to recognize and bargain with the union that had established a collective-bargaining relationship with its predecessor employer, but the Board cannot compel it to honor the substantive terms of the agreement that had been negotiated by the predecessor employer and the union. In contrast, if not conflict, eight years earlier the Supreme Court held, in John Wiley & Sons, Inc. v. Livingston⁴ that in appropriate circumstances a successor employer—in that case the employer surviving a corporate merger—could be compelled by the courts, in an action brought under section 301 of the Labor-Management Relations Act,⁵ to arbitrate the extent to which the successor was bound under the collective-bargaining agreement that was negotiated by the union with the predecessor employer.

This Note will only briefly discuss the implications of Burns for NLRB proceedings. Instead, the focus will be on the impact of Burns on actions to compel arbitration under section 301. Is the rationale of Burns inconsistent with the rule established in Wiley

---

2. For other discussions of the case, see St. Antoine, Judicial Caution and the Supreme Court's Labor Decisions, October Term 1971, 6 U. Mich. J. L. Rev. 269, 270-77 (1972); Recent Decision, 41 Geo. Wash. L. Rev. 100 (1972); The Supreme Court, 1971 Term, 86 Harv. L. Rev. 59, 247-59 (1972); Note, Labor Law—The Obligations of a Successor Employer, 51 N.C. L. Rev. 337 (1972); Recent Development, 18 Vill. L. Rev. 126 (1972).
3. 406 U.S. at 274.
for section 301 actions? If it does not undermine Wiley, does Burns indicate when employers will be deemed successors in future actions under section 301 to compel arbitration? Before examining these questions, however, it is necessary to consider the decisions of Wiley and Burns.

In Wiley a union sought to compel arbitration concerning the effect of a merger on certain contract rights of the predecessor's employees who were retained by the successor. Stressing the strong "'federal policy of settling labor disputes by arbitration,'" Justice Harlan, writing for a unanimous Court, affirmed the order compelling arbitration:

The objectives of national labor policy ... 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 . . . .

The preference of national labor policy for arbitration . . . could be overcome only if other considerations compellingly so demanded. We find none. While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. "... [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." . . . [I]t is not in any real sense the simple product of a consensual relationship.

The Court noted that the survival of the duty to arbitrate is appropriate only where there is "'substantial continuity of identity in the business enterprise before and after a change.'" The "whole-sale transfer" of employees from Interscience, Wiley's predecessor, to Wiley indicated sufficient continuity, despite the fact that Wiley was a much larger publisher than Interscience.

In subsequent section 301 actions, Wiley was extended beyond merger situations to purchases of businesses, transfers of operations

6. The disputes involved contract provisions that covered seniority, welfare security benefits, discharge and lay-offs, severance pay, and vacations. 376 U.S. at 554 n.7.
8. Justice Goldberg took no part in the decision of the case.
10. 376 U.S. at 551.
11. 376 U.S. at 551.
12. United States Gypsum Co. v. United Steelworkers, 384 F.2d 38 (5th Cir. 1967), cert. denied, 389 U.S. 1042 (1968); United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964); Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d
from a recently terminated subsidiary to a newly acquired subsidiary, and judicial sales. At the same time, the NLRB was holding certain employers, which it found to be "successors," to a duty to bargain with the predecessors' union. Six years after Wiley, in *William J. Burns International Detective Agency, Inc.* the NLRB held for the first time that these employers were also required, under section 8(a)(5) of the National Labor Relations Act (NLRA), to honor the substantive terms of the contract negotiated by their predecessors.

On April 29, 1967, Wackenhut Corporation, which at that time provided plant protection services for the Lockheed Aircraft Service Co., signed a three-year contract with the United Plant Guard Workers of America (UPG). Several months later, the following year's service contract was awarded to Burns, which had been given notice of the union's status at the plant before submitting its bid. Although Burns hired forty-two guards, twenty-seven of whom had worked for Wackenhut and fifteen of whom had been brought in from other Burns job sites, it refused the UPG's demand that the UPG be recognized as the bargaining representative of the Lockheed guards and that Burns abide by the existing contract. Instead, Burns presented the twenty-seven employees with the cards of the American Federation of Guards (AFG), with which it had several existing contracts, and told them that membership in AFG was a prerequisite to employment.

The Board found that Burns had committed unfair labor practices by its refusals to recognize and bargain with the union and to

---


16. 182 N.L.R.B. 348 (1970). The respondent's name was changed from William J. Burns International Detective Agency, Inc., to Burns International Security Services, Inc., in the period between the decisions of the court of appeals, 441 F.2d 911 (2d Cir. 1971), and the Supreme Court.

17. Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees. Section 8(d) further defines the nature of this duty to bargain. 29 U.S.C. §§ 158(a)(5), (d) (1970).

18. 406 U.S. at 275.


20. 406 U.S. at 275-76.

honor the previously negotiated contract, as well as by its assistance and recognition of AFG. Specifically, the Board found that, "absent unusual circumstances," section 8(a)(5) required that a successor honor the previously negotiated contract, a decision expressly based on the approach taken by the Supreme Court in *Wiley*.

Board Member Jenkins dissented, arguing that *Wiley*’s emphasis on "arbitration and its inherent flexibility and adjustment to unforeseen circumstances," indicated that the agreement should not be imposed *in toto* by the Board.

The Supreme Court, affirming the decision of the Second Circuit, unanimously refused to enforce the Board’s order insofar as it required Burns to honor the agreement. However, the Board’s finding of a duty to bargain was upheld by a vote of five to four.

In addressing the question of Burns' duty to bargain with the union, the Court stressed several factors. First, it was noted that the trial examiner had found that the appropriate bargaining unit, covering those Burns employees who performed protection services at the Lockheed plant, was the same as that certified under Wackenhut, and that the Court had declined to review the propriety of this finding. Second, the Court pointed out that the union had been certified only several months earlier as the bargaining representative for Wackenhut’s employees, and that a majority of the employees hired by Burns had been employed by Wackenhut. Under these circumstances, the Court found it “not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees, and that Burns could not reasonably have entertained a good-faith doubt about that fact.” Consequently, Burns was required by the express

---

23. This conduct was found to violate sections 8(a)(2) and 8(a)(1) of the NLRA, 29 U.S.C. §§ 158(a)(2), (1) (1970). 182 N.L.R.B. at 348-49.
24. 182 N.L.R.B. at 350.
25. 182 N.L.R.B. at 349.
26. 182 N.L.R.B. at 351. Member Jenkins also argued that *Wiley* held that the arbitration clause of the predecessor's contract only survived for the purpose of determining the successor's obligation concerning certain "vested" rights. 182 N.L.R.B. at 351. This latter argument, however, appears to be erroneous, for the Court's reasoning in *Wiley* did not rely on the nature of the contract rights involved. Furthermore, it is not clear what rights are "vested." In one sense all contract rights are vested, as Judge Brown pointed out in rejecting an argument similar to that made by Jenkins. United States Gypsum Co. v. United Steelworkers, 384 F.2d 38, 44 (5th Cir. 1967).
28. 406 U.S. at 291. The finding of a violation in aiding the AFG was not challenged by Burns. 406 U.S. at 276.
29. 406 U.S. at 280-81.
30. 406 U.S. at 277-78.
31. 406 U.S. at 278.
32. 406 U.S. at 278.
mandates of sections 8(a)(5) and 9(a)\textsuperscript{38} of the NLRA to bargain with the predecessor's union.

One commentator has suggested that the Court's reasoning narrows the test for successorship in duty-to-bargain cases by focusing on whether a majority of the employees of the successor employer had been previously employed by the predecessor employer.\textsuperscript{34} Although the Court did not say that the hiring of a majority of the successor's employees from the predecessor's work force is the only test, it appears to have found it essential in holding Burns to a duty to bargain.\textsuperscript{35} This test, however, does not depart from the Board's prior approach. It is true that some decisions described the test for determining what is a "successor" for purposes of imposing a duty to bargain as being based on the absence of a substantial change in the employing industry.\textsuperscript{36} Another Board decision listed several factors that may evidence successorship—such as substantial continuity of business operations; use of the same plant; the same or substantially the same work force; the same jobs and working conditions; the same supervisors; the same machinery, equipment, and methods of production; and the same product or services.\textsuperscript{37} Yet, in cases where a majority of the successor's work force was not composed of its predecessor's employees, the Board has almost invariably found no duty to bargain.\textsuperscript{38} Therefore, in practice the majority-hiring test was often decisive even prior to Burns.

If the "recent certification" of the union as bargaining repre-


\textsuperscript{34} The Supreme Court, 1971 Term, supra note 2, at 252.

\textsuperscript{35} 406 U.S. at 279, 295. There is some ambiguity as to which "majority" the Court found determinative. Its opinion referred several times to the fact that the successor had hired a majority of the predecessor's employees. 406 U.S. at 278. Board decisions appear, on occasion, to have taken this factor into account. Georgetown Stainless Mfg. Co., 198 N.L.R.B. No. 41, at 7-8, 80 L.R.R.M. 1615, 1616 (1972); Lincoln Private Police, Inc., 189 N.L.R.B. No. 103, at 13, 76 L.R.R.M. 1727, 1730 (1971). However, the Court placed much more emphasis upon the fact that a majority of the successor's employees had been previously employed by the predecessor. 406 U.S. at 280-81.

\textsuperscript{36} E.g., NLRB v. Auto Ventshade, Inc., 276 F.2d 303, 304 (5th Cir. 1960); NLRB v. Alamo White Truck Serv., Inc., 273 F.2d 238, 240 (5th Cir. 1959); Lincoln Private Police, Inc., 189 N.L.R.B. No. 103, at 10, 76 L.R.R.M. 1727, 1729 (1971).


\textsuperscript{38} Professor Goldberg suggested in The Labor Law Obligations of a Successor Employer, 63 NW. U. L. Rev. 735, 798-801 (1969), that the most important factor in determining the extent of the successor's obligations in a Board proceeding is whether a majority of the successor's work force was employed by the predecessor. He found only two cases imposing a duty to bargain when there was no such majority, and a court of appeals denied enforcement in the later case. John Stepp's Friendly Ford, Inc., 141 N.L.R.B. 1065 (1963), enforcement denied, 338 F.2d 833 (9th Cir. 1964); Firchau Logging Co., 126 N.L.R.B. 1215 (1960). The author of this Note has found no other cases in which the Board found a successorship when this factor was not present. If a majority of the new employer's work force was employed by the predecessor, Goldberg suggested that the Board will almost certainly find it to be a successor absent a significant change in the method of doing business. There is judicial authority for this position. E.g., Emerald Maintenance, Inc. v. NLRB, 464 F.2d 698, 701-02 (5th Cir. 1972).
sentative, a factor mentioned several times by the Court, were necessary in order to impose a duty to bargain on a successor, Burns might narrow prior standards. But certification at all, much less a recent certification, should not be viewed as essential. When a majority of the new employer’s work force has been retained from the predecessor, a presumption is arguably raised that the incumbent union represents a majority of the new work force. While a recent certification supports this presumption, other evidence may be sufficient. Thus, at least one court after Burns has upheld the Board’s imposition upon a successor of a duty to bargain with a predecessor’s union that had never been certified.

Having determined that Burns had a duty to bargain with the incumbent union, the Court proceeded to hold that the Board could not require Burns to honor the substantive terms of its predecessor’s collective-bargaining agreement. Like the court of appeals, the Supreme Court based its decision on section 8(d) of the NLRA, which declares that the existence of a duty to bargain “does not compel either party to agree to a proposal or require the making of a concession.” Under the Court’s interpretation, this section makes free collective bargaining an “express statutory mandate” that limits the remedial powers of the Board. While some ambiguity may remain, the tone of the opinion suggests that the limitation is absolute. But the provision need not have been so interpreted. The Court could have followed the Board’s lead and used the Wiley fiction that a successor is treated as a party to the agreement negotiated by its predecessor even though it did not agree to the contract in a common-law sense. Moreover, there is no theoretical reason why section 8(d) need be read as absolute. The interest in free collective bargaining found in section 8(d) could have been balanced

40. See note 82 infra.
41. To be sure, dicta in Burns indicates that a good faith doubt could not have been claimed in the face of a recent Board certification. But that is not to say that Burns also supports the obverse. Lack of certification does not by itself sustain a finding of a good faith doubt. See 406 U.S. at 279, n.3 . . . . When, as here, there is at the least a prima facie showing that the union represented a majority of the employees within a year of the change in ownership, it must be presumed that the union’s status continued beyond the changeover.

42. 441 F.2d at 915-16.
44. 406 U.S. at 281-84.
45. See text accompanying notes 58-65 infra.
46. 182 N.L.R.B. at 350.
47. 376 U.S. at 550.
against the interests of employee security and industrial stability, as it was in Wiley.48

However, from a policy standpoint, the Court's interpretation of section 8(d) is understandable in the context of its discussion of Wiley. In distinguishing Wiley, the Court placed greatest emphasis on its procedural setting: "Wiley arose in the context of a [section] 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 [section] 8(d)."49 At first glance, this seems to make the union's remedy depend on a mere choice of forum, but it actually reflects a distinction based on the ability of each forum to deal with the problem. The Burns Court emphasized that Wiley was founded on the national preference for arbitration of labor disputes.50 It is submitted that there are strong policy reasons for preferring arbitration as a means of deciding if contract obligations are to be imposed on a successor, for an arbitrator has the advantages of flexibility and expertise in contract interpretation, which are not possessed by the Board. Wiley does not permit a union to enforce the contract as a whole in an initial action under section 301; were that the case, the remedy would depend on a choice of forums. Instead, it merely allows the union to compel arbitration, leaving the arbitrator to decide what specific obligations survive.51

The Court distinguished Wiley in two other respects, both of which focus on the relationship between the old and the new employer rather than on the procedural context of the litigation. First, it noted that Wiley's "narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation."52 If this distinction were persuasive, Burns would virtually limit Wiley to its precise facts. However, such an analysis would ignore the plain meaning of Wiley: On the authority of Textile Workers Union v. Lincoln Mills,53 the Wiley Court had no difficulty in concluding that federal law controlled;54 and the rationale of Wiley clearly extended beyond mergers to other changes in corporate structure

48. 376 U.S. at 549-51.
49. 406 U.S. at 285.
50. 406 U.S. at 285-86.
51. 376 U.S. at 555.
52. 406 U.S. at 286.
54. 376 U.S. at 548.

To hold that state law controls in a section 301 action might raise substantial constitutional questions if the parties are of nondiverse citizenship. See Textile Workers Union v. Lincoln Mills, 338 U.S. 448, 460-546 (1957) (Frankfurter, J., dissenting).
or ownership,\textsuperscript{55} an interpretation that lower courts have followed without exception.\textsuperscript{56} Thus, it is unlikely that the Burns Court intended to suggest that Wiley be limited to its facts.\textsuperscript{57}

Second, the Court pointed out that, while Wiley involved a merger, "[h]ere there was no merger, sale of assets, and there were no dealings whatsoever between Wackenhut and Burns. On the contrary, they were competitors for the same work."\textsuperscript{58} This distinction is substantial, for on this very point four Justices dissented from the Court's holding that imposed a duty to bargain on Burns.\textsuperscript{59} Consequently, it has been suggested that the question whether the Board can impose a duty to honor the contract where there is some transfer of assets between the two employers may still be open.\textsuperscript{60} First, the Court "studiously avoided" the use of the term "successor,"\textsuperscript{61} which might suggest that it would be willing to impose a duty to honor in cases involving traditional successor employers. Second, the Court noted that Burns' mere hiring of employees was "a wholly insufficient basis for implying . . . that Burns . . . must be held to have agreed to honor" the contract.\textsuperscript{62} This may leave open the possibility that had there been some more direct nexus between the old and the new employers, a sufficient basis might have been found. These indications, however, are not compelling on a reading of the opinion as a whole. The Court's discussion of the prohibition found in section 8(d) suggests a restriction that encompasses all Board proceedings, not merely those in which there have been no dealings between the employers. In addition, the policy of settling labor disputes through arbitration, which overrode the concern for freedom of contract in Wiley,\textsuperscript{63} is not a factor in any Board proceeding. Finally, Burns may reveal a shift in the Court's evaluation of competing national labor relations policies, with increased weight given to freedom of contract.\textsuperscript{64} Therefore, the most natural reading of the Court's opinion, and one that has been adopted by the NLRB,\textsuperscript{65} is that, while the Board can impose a duty to bargain on

\textsuperscript{55} The Wiley Court, describing its ruling, said, "[T]his is so much in cases like the present, where the contracting employer disappears into another by merger, as in those in which one owner replaces another but the business entity remains the same." 376 U.S. at 549.

\textsuperscript{56} See cases cited in notes 12-14 supra.

\textsuperscript{57} For a discussion of the consistency of Burns and Wiley, see text accompanying notes 89-127 infra.

\textsuperscript{58} 406 U.S. at 286.

\textsuperscript{59} See text accompanying notes 87-88 infra.

\textsuperscript{60} St. Antoine, supra note 2, at 276; The Supreme Court, 1971 Term, supra note 2, at 298.

\textsuperscript{61} 406 U.S. at 296 (Rehnquist, J., concurring and dissenting).

\textsuperscript{62} 406 U.S. at 287.

\textsuperscript{63} 376 U.S. at 549-51.

\textsuperscript{64} See text accompanying notes 89-94 infra.

\textsuperscript{65} E.g., Howard Johnson Co., 198 N.L.R.B. No. 98, 80 L.R.R.M. 1769 (1972).
certain new employers, it can never impose a duty to honor substan­tive contract terms.

If Burns is read this broadly, one qualification must be considered. It is arguable that such an interpretation of Burns fosters undesirable inconsistencies in the imposition of labor obligations. One observer of the labor scene, in commenting on Burns, has expressed the view that "in most of these successorship cases, bargain­ing rights and contract rights should stand together or fall to­gether," noting:

The same considerations of employee free choice, industrial stability, flexibility of business arrangements, and so on, that militate for or against the survival of bargaining rights also militate for or against the survival of contract rights.67

Certainly, the problem of inconsistency would most likely arise in Burns-type competitive-bidding situations, the context in which this suggestion was made, where there is a duty to bargain and may be no duty to arbitrate in a section 301 proceeding.68 However, to the extent that contract rights are enforceable through section 301 actions for arbitration, no inconsistency need exist.69 While Burns does preclude the imposition of a duty to honor substantive terms in Board proceedings, the more appropriate forum of arbitration is still available to determine if contract rights should be imposed.

Having decided the issues of duty to bargain and duty to honor, the Court went on to hold, unanimously, that the Board's order requiring Burns to compensate its employees for losses caused by Burns' failure to honor the contract could not be sustained on the ground that Burns had unilaterally changed existing terms and conditions of employment when it specified the initial terms on which it would hire the former Wackenhut employees.70 The Court stated:

It is difficult to understand how Burns could be said to have changed unilaterally any pre-existing term or condition of employ­ment . . . when it had no previous relationship whatsoever to the

66. St. Antoine, supra note 2, at 276.
67. Id.
68. For a discussion of the duty to arbitrate in these situations, see text accompany­ing notes 140-47 infra.
69. This discussion, of course, assumes that the collective-bargaining agreements in question contain arbitration clauses. This assumption is not unrealistic: one survey has found that 94 per cent of all collective-bargaining agreements have some form of arbitration clause. BNA, BASIC PATTERNS IN UNION CONTRACTS § 51:6 (7th ed. 1971). The obligations of a successor employer in a section 301 action when there is no arbitration clause remain unclear.
70. 406 U.S. at 292-96. In NLRB v. Katz, 359 U.S. 736 (1962), the Court upheld an order of the NLRB that found that section 8(a)(5) was violated when an employer instituted changes in the terms and conditions of employment without first consulting the union with which it was negotiating.
bargaining unit and ... no outstanding terms and conditions from
which a change could be inferred.71

Only when "it is perfectly clear that the new employer plans to
retain all of the employees in the unit" must it bargain with the
incumbent union over initial terms.72 In other cases it may set its
own terms until its obligation to bargain matures on the hiring of
its entire work force, a majority of whom were its predecessor's
employees.73

It has been suggested74 that this analysis overrules Overnite
Transportation Co.,75 in which the Board held that the successor
had a duty to bargain with the union from the day it took over the
predecessor's business. If the Burns holding on this point is limited
to situations where there have been no dealings between the two
employers, it may not encroach upon Overnite in traditional suc­
cessorship cases.76 Such a limitation, however, is unlikely because
the Court stated explicitly that "a successor employer is ordinarily
free to set initial terms on which it will hire the employees of a
predecessor,"77 and the new employer will be required to bargain
with the union before setting initial terms when "it is perfectly
clear" that all the old employees will be retained. In any event, the
Court did not expressly overrule Overnite, which was cited twice in
support of Justice White's argument.78 Perhaps the Court felt that
Overnite fell within the "perfectly clear" exception since Overnite
had retained all of its predecessor's employees.79 Moreover, the
Court made it clear that when the duty to bargain matures the
requirements of Overnite would come into effect.80 To the extent
that the Court's analysis is inconsistent with Overnite, it affects only
the timing of the duty to bargain and not the scope of that duty.

Justice Rehnquist, joined by Chief Justice Burger and Justices
Brennan and Powell, concurred in the Court's decision insofar as it
held that Burns had no duty to honor the substantive terms of

71. 406 U.S. at 294 (emphasis original).
72. 406 U.S. at 294-95.
73. 406 U.S. at 295.
74. The Supreme Court, 1971 Term, supra note 2, at 258.
75. 157 N.L.R.B. 1185 (1966), enforced, 372 F.2d 765 (4th Cir.), cert. denied, 389
U.S. 838 (1967).
76. The Supreme Court, 1971 Term, supra note 2, at 259.
77. 406 U.S. at 294.
78. 406 U.S. at 293, 294.
79. 372 F.2d at 768.
80. 406 U.S. at 294.
Wackenhut’s collective-bargaining agreement, but dissented from the Court’s imposing a duty to bargain on Burns.\footnote{406 U.S. at 296.} Justice Rehnquist initially expressed disagreement with two facets of the Court’s analysis. First, he pointed out that it was not “mathematically demonstrable” that the incumbent union was the choice of a majority of Burns’ work force. Even though twenty-seven of Burns’ forty-two employees had been previously employed by Wackenhut, there was no indication that they had all supported the union in the election at Wackenhut.\footnote{406 U.S. at 297.} Second, he criticized the Court’s reliance on the Board’s determination that the previous unit was still appropriate.\footnote{406 U.S. at 297-98.} Both of these determinations, Justice Rehnquist argued, themselves depended on the assumption that Burns was a successor.\footnote{406 U.S. at 297-99.} Therefore, the issue, as framed by Justice Rehnquist, became whether Burns was a successor.

Apparently finding Wiley controlling even though it did not arise in a Board proceeding,\footnote{406 U.S. at 299.} the dissent insisted that the policy of employee security on which Wiley was based should be limited to some degree by other interests, such as freedom of contract and the employer’s need to remain competitive.\footnote{406 U.S. at 302-04.} Justice Rehnquist argued that these limits would be passed were Burns found to be a successor in the absence of the transfer of a single asset from Wackenhut to Burns.\footnote{406 U.S. at 304-05.} He would require that there be continuity “at least in part on the employer’s side of the equation, rather than only on that of the employees” before an employer is held to be a successor for Board or section 301 purposes.\footnote{406 U.S. at 305.}

Thus, Justice Rehnquist’s opinion has direct implications for section 301 actions, as well as Board proceedings. First, however, it

\footnote{81. 406 U.S. at 296.} \footnote{82. 406 U.S. at 297.} \footnote{This analysis is correct if there were more than five antiunion votes in the election at Wackenhut. However, the NLRA does not require a union to redemonstrate continually its majority status. In fact, there are certain established rules, such as the contract bar and certification bar, that for policy reasons ensure the union’s status although it has in fact lost its majority status. E.g., Brooks v. NLRB, 348 U.S. 96, 98-99 (1954) (certification bar); Oilfield Maintenance Co., 142 N.L.R.B. 1384, 1387 (1963) (contract bar). Similarly, in imposing obligations on successors the presumption of continued majority status is defensible as a matter of policy because it eliminates time-consuming determinations, promotes industrial stability, and, in most cases, does in fact accord with the wishes of the employees. See Goldberg, supra note 38, at 789-92.} \footnote{83. 406 U.S. at 297-98.} \footnote{84. 406 U.S. at 297-99.} \footnote{85. Justice Rehnquist did show some awareness of the difference between the Board’s doctrine and that established under section 301 in Wiley when he referred to Wiley as employing “a form of the ‘successor’ doctrine.” 406 U.S. at 299 (emphasis added). For a discussion of differences in the two successorship doctrines, see text accompanying notes 128-32 infra.} \footnote{86. 406 U.S. at 302-04.} \footnote{87. 406 U.S. at 304-05.} \footnote{88. 406 U.S. at 305.}
must be determined whether Wiley retains any vitality after Burns. While Burns distinguished Wiley and did not expressly overrule it, much of the language in Burns suggests that the Court may be re-evaluating the role of the labor contract. Wiley described the collective-bargaining agreement as a "'generalized code'" that was "not in any real sense the simple product of a consensual relationship." In contrast, both the majority and the dissent in Burns stressed notions of consent that are derived from common-law contract theory. Moreover, Justice White suggested that the policies of employee job security and industrial stability that Wiley found "could be overcome only if other considerations compellingly so demanded" must be subordinated to other policies such as freedom of collective bargaining.

Is there a valid distinction between the two cases that would explain this apparent shift in tone? It was suggested above that Justice White emphasized the difference between a Board proceeding, subject to section 8(d), and section 301 actions to compel arbitration; but section 8(d) in itself is not a sufficient reason for treating the two forums differently. The issue, therefore, must be viewed on a policy level: Assuming that Burns precludes the imposition of contract rights in all Board actions, does it make sense to say that such rights may still be imposed through arbitration? If not, Burns may be the first in a line of narrowing decisions that eventually would limit Wiley to its facts or even expressly overrule the 1964 case. The thesis of the following discussion is that there are legitimate policy reasons for leaving the imposition of substantive contract terms to the arbitrator.

First, the arbitrator has "special skill and experience" in contract interpretation, as was recently acknowledged in Collyer Insulated Wire, where the Board stated its policy of deferring to arbitrators.

---

89. It is clear that Burns has narrowed the scope given to Wiley by at least one commentator, who had urged that the policies emphasized by Justice Harlan required the Board to impose a duty to honor the contract under section 8(a)(5). Goldberg, supra note 38, at 809-18.
91. 406 U.S. at 287.
92. 406 U.S. at 303.
93. 376 U.S. at 549-50.
94. 406 U.S. at 287.
95. See text accompanying notes 42-51 supra.
96. See text accompanying notes 42-48 supra.
97. The Court's use of subsequent, inconsistent cases as a rationale for overruling a decision is described in Israel, Gideon v. Wainwright: The "Art" of Overruling, 1963 SUP. CT. REV. 211, 223-26.
in such matters. Second, the arbitrator, whose role is created by a given contract, has greater flexibility than the Board. He need not formulate general rules but can focus on the contract that is before him. Nor is he required to follow precedent, other than that established in the industry in question. Thus, the arbitrator may examine fact situations in detail, evaluate considerations of fairness, and devise flexible remedies when determining what obligations are to be imposed under a contract.

There may be some question concerning the degree of flexibility that the arbitrator has in modifying obligations under the contract to reflect the unusual problems that might arise under a successor employer, and the tone of the Supreme Court's decision in *Burns* could itself have an inhibiting effect on arbitrators. However, it is settled that the arbitrator's function is to resolve problems that are not adequately provided for in the contract. A successorship situation, almost by definition, will not be adequately covered by the contract, for, even when a transfer is anticipated, it is difficult to predict what changes will occur. The ability of the arbitrator to react flexibly in these circumstances was expressly approved by the Court in *Wiley* and elaborated in later cases applying that decision.

---

99. *But cf.* NLRB v. Strong, 393 U.S. 351 (1969) (Board can order employer to sign contract and pay benefits under contract when employer wrongfully refuses to sign the negotiated agreement).


103. Compare United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891, 895 (3d Cir. 1964), with Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954, 958 (9th Cir. 1964).


106. Discussing the potential infringement on the interests of the successor's non-unionized employees, the Court said, "[W]e have little doubt that within the flexible procedures of arbitration a solution can be reached which would avoid disturbing labor relations in the Wiley plant." 376 U.S. at 552 n.5.

not founded on the predecessor's contract,\textsuperscript{108} or apply statutory law or common law, rather than the terms of the contract,\textsuperscript{109} he should be given a broad latitude in interpretation.

The Board, on the other hand, is constricted by the need to formulate general rules and follow precedent. The complex factual situations that arise in the successorship area pose special difficulties for the Board because procedural and time limitations prevent it from closely evaluating every clause at issue between a successor and a union. Perhaps for this reason, the Board in \textit{Burns} took an all-or-nothing approach: ordinarily, the entire contract would be binding on the successor, while in "unusual circumstances," left undefined, the successor would not be held to any contract obligations.\textsuperscript{110} Several of the Board's subsequent decisions suggest that such an approach is inadequate when it would be equitable to impose part but not all of a contract.

In \textit{Emerald Maintenance, Inc.},\textsuperscript{111} one of the first cases in which the Board found "unusual circumstances,"\textsuperscript{112} the new employer was awarded a government contract to provide maintenance and housing services, previously provided by two other contractors, on a United States Air Force base. The Board held that Emerald, although it was a successor employer with a duty to bargain, was not bound to honor its predecessors' collective-bargaining agreements.\textsuperscript{113} First, the Board felt that an exception was necessary because the United States Comptroller General had refused to consider the agreed-upon increase in wages when specifying the prevailing rates to bidders for the government service contract.\textsuperscript{114} However, it is questionable whether the actions of federal "agencies primarily charged with

\begin{itemize}
  \item \textsuperscript{108} Wiley states that the union cannot use arbitration to gain new rights against the successor employer. 376 U.S. at 554-55.
  \item \textsuperscript{109} An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).
  \item \textsuperscript{110} 182 N.L.R.B. at 350.
  \item \textsuperscript{111} 188 N.L.R.B. No. 139, 76 L.R.R.M. 1437 (1971), enforced in part, 464 F.2d 693 (5th Cir. 1972). The Fifth Circuit upheld the Board's finding that Emerald need not honor the previously negotiated contract on the basis of the Supreme Court's decision in \textit{Burns}. Also on the basis of that decision, the court refused to enforce the Board's order of restitution of economic benefits withheld or denied. The court said that it was not "perfectly clear" that the employer planned to retain all of the predecessor's employees when it made unilateral changes in the terms and conditions of employment. 464 F.2d at 701. But the court did enforce the Board's order requiring Emerald to bargain with the union. 464 F.2d at 701-03.
  \item \textsuperscript{112} For another instance of "unusual circumstances," see G.T. & E. Data Servs. Corp., 194 N.L.R.B. No. 102, 79 L.R.R.M. 1083 (1971).
  \item \textsuperscript{113} 188 N.L.R.B. No. 139, at 6-8, 76 L.R.R.M. at 1438-39.
  \item \textsuperscript{114} 188 N.L.R.B. No. 139, at 6-8, 76 L.R.R.M. at 1438-39.
\end{itemize}
administration of the Federal Service Contract Act" should be permitted to disturb national labor relations policy. In addition, the bidders had been notified by the union before submitting their bids so the increases could have been included in their calculations. Second, the Board suggested that its decision in Burns had assumed that the successor was able to adjust the terms of the contract during negotiations to accommodate the demands of the collective-bargaining agreement, while Emerald, the Board said, "suggests the hazards" of applying that remedy in annual-bidding situations. These hazards, however, were present in Burns, which itself involved annual bidding. In fact, the Board in that case felt that this factor increased the need for stability, which would be served by the survival of the collective-bargaining agreement. 

Neither the nature of the government contract nor the problems inherent in the annual-bidding situation seem to justify a general exception to Burns. Rather, the Board seems to have taken an ad hoc approach. Its reluctance to follow Burns may have been due to the unfairness of imposing a wage increase on an employer that had relied on the federal bureaucracy in failing to include the increase in its bid. While it may be unjust to enforce the entire contract in such circumstances, there is no need to disregard it completely. An arbitrator could adapt the remedy to the particular situation.

Conversely, on at least one occasion, the Board failed to find "unusual circumstances" when it might have been appropriate to do so. In Interstate 65 Corp., the Board imposed the entire contract on a successor that argued that it had acquired the business under economic duress through an informal foreclosure. The decision of the trial examiner, accepted in this respect by the Board, said that the employer's argument went to the form of the transfer, which was not controlling in determining whether there was a successor. However, economic duress raises instead the question whether it is fair to impose obligations on an employer even if it is a successor. The Board may have been reluctant to approach the problem in these terms because it was trying to develop a uniform general approach, while an arbitrator would have had no such restraints.

115. 188 N.L.R.B. No. 139, at 8, 76 L.R.R.M. at 1439.
116. 188 N.L.R.B. No. 139, at 5, 76 L.R.R.M. at 1438.
117. 188 N.L.R.B. No. 139, at 6, 76 L.R.R.M. at 1438.
118. 188 N.L.R.B. No. 139, at 8, 76 L.R.R.M. at 1439.
119. 182 N.L.R.B. at 330.
120. 188 N.L.R.B. No. 139, at 5, 76 L.R.R.M. at 1438.
122. 186 N.L.R.B. No. 41, at 3, 75 L.R.R.M. at 1405.
123. 186 N.L.R.B. No. 41, at 12-13, 75 L.R.R.M. at 1405.
The flexibility of arbitration, as the Court pointed out in the Steelworkers Trilogy,\textsuperscript{124} can serve the ends of employee security and industrial stability without sacrificing the interests of the employer. The best approach would read Wiley and Burns together as affirming the arbitrator's special expertise in determining the contractual obligations of successors.\textsuperscript{125}

One problem with this approach remains to be considered. Subject to a limited exception, the Burns Court would not find a section 8(a)(5) violation when a new employer has unilaterally set the initial terms under which it hired a predecessor's employees.\textsuperscript{126} It can be argued that allowing arbitration and enforcement of different terms of employment set out in its predecessor's collective-bargaining agreement would be inconsistent with Burns and thus would violate the policy favoring consistent interpretation of a statutory scheme.\textsuperscript{127} However, the Court in Burns established no affirmative right to set initial terms, but merely held that to do so did not constitute an unfair labor practice. More importantly, even if there is some theoretical conflict, the policy against inconsistency should be outweighed by the stronger policies favoring arbitration as a means of fostering industrial stability.

While Burns need not undermine Wiley, it may affect what will be deemed to be a successor employer for section 301 purposes. Under Wiley a new employer can be compelled to arbitrate the extent of his obligation under a predecessor's collective-bargaining agreement when there is "substantial continuity of identity" in the employing industry.\textsuperscript{128} In contrast to its role in the majority-hiring test for imposing a duty to bargain,\textsuperscript{129} the number of the predecessor's employees hired by the new employer is not determinative in


\textsuperscript{125} As will be recalled, Member Jenkins argued in his dissent in Burns that Wiley did not apply to Board proceedings because the Court had emphasized the flexibility of arbitration. See text accompanying note 25 supra.

\textsuperscript{126} See text accompanying notes 70-80 supra.

\textsuperscript{127} Cf. United States v. Hutcheson, 312 U.S. 219 (1941), in which the Court interpreted the exemption from the antitrust laws for certain union activities contained in section 20 of the Clayton Act, 29 U.S.C. § 52 (1970), in light of the ban on enjoining labor disputes contained in the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1970). Saying that legislation must not be interpreted in a "spirit of mutilating narrowness," the Court held that it would be "strange indeed" to allow a criminal indictment under the antitrust laws when the activities involved could not be enjoined. 312 U.S. at 235. However, the Court did not base its holding only on the possible inconsistency, but also on the belief that "[t]he underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated . . . by unduly restrictive judicial construction." 312 U.S. at 235-36.

\textsuperscript{128} 376 U.S. at 551.

\textsuperscript{129} See text accompanying notes 34-38 supra.
section 301 actions, although it may be considered. For example, in Wiley itself a duty to arbitrate was imposed upon the successor despite the fact that the predecessor's employees formed only a small part of the successor's work force; the new employer's hiring of a majority of its predecessor's employees was merely evidence of "similarity and continuity of operation." The substantial-continuity test serves the interests of employee job security and industrial stability by meeting the expectations of the employees. Nor did Wiley ignore the employer's interests. Its acknowledgement that the new employer, unlike the employees, can negotiate over the terms of the transfer may suggest that the Court believed that the employer's interests were adequately protected. After Burns the substantial-continuity test remains applicable in section 301

130. It should be noted that the Wiley test, unlike the Board majority-hiring test, may be satisfied even if the new employer does not hire any of its predecessor's employees. The courts have left the decision to the arbitrator when the union disputes a new employer's failure to hire the former employer's employees. Monroe Sander Corp. v. Livingston, 377 F.2d 6 (2d Cir.), cert. denied, 389 U.S. 851 (1967); Detroit Local Joint Exec. Bd., Hotel Employees v. Howard Johnson Co., 81 L.R.R.M. 2329 (E.D. Mich., Aug. 22, 1972). However, an arbitrator's order to rehire might not be enforced by a court, especially if enforcement would require the large-scale displacement of the successor's employees. Fearing that such an order, or apprehension concerning the possibility of such an order, might cause employee unrest, Chief Judge Lumbard dissented from the arbitration order in Monroe Sander. He would have held that the union's demand that some of the successor's employees be discharged to make room for the predecessor's employees was "so plainly unreasonable" as to be "nonarbitrable." 377 F.2d at 14, quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 555 (1964).

Of course, discrimination in hiring against union members employed by its predecessor may subject a successor employer to an unfair labor practice charge under section 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), for "discrimination in regard to hire or tenure of employment" in order to discourage union membership.


132. 376 U.S. at 551.

133. If the union's contract with the predecessor contains a successorship clause, stating that a new employer will be bound under the contract, there is more objective evidence of the expectations of the employees. However, such a clause is not essential to holding a new employer to his predecessor's labor obligations. Neither Wiley nor Burns involved contracts containing successorship clauses, and in neither case was their absence considered relevant to the question of what the new employer's obligations should be. Furthermore, no case has been found in which the court considered the presence of a successorship clause to be determinative or even evidentiary of whether a new employer was a successor, with the possible exception of Detroit Local Joint Exec. Bd., Hotel Employees v. Howard Johnson Co., 81 L.R.R.M. 2329, 2333 (E.D. Mich., Aug. 22, 1972). It is true that these clauses give no indication of the successor's intent; but they are evidence of the union's intent, and they give the new employer notice of possible obligations. Arbitrators, unlike courts, have recognized their evidentiary importance. See Wamco, Inc., 57 Lab. Arb. 1220 (1971) (Roper, Arbitrator) (no successorship clause); Printing Indus., Inc., 56 Lab. Arb. 296 (1971) (Jackson, Arbitrator) (successorship clause present); Sanborn's Motor Express, 44 Lab. Arb. 846 (1965) (Wallen, Arbitrator) (successorship clause present).

134. 376 U.S. at 549.
actions, for there is little possibility that the Court intended to limit Wiley to its facts. 135 But it is another matter to determine in what particular fact situations such continuity may be found.

The dissent of Justice Rehnquist is a reliable indication that at least four Justices will limit Wiley to situations in which there is some transfer of assets, tangible or intangible, between the old and the new employing entities. 136 This requirement should not mean that there must be direct transactions between the employer with which arbitration is sought and the employer that negotiated the contract. Where, for example, the business passes through a third party that is an intermediary, the situation may be viewed conceptually as a chain of successors, each of which acquires labor obligations for the period, however short, in which it holds the business. This might be the situation when, for example, a franchisee sells to a franchisor that in turn sells to a new franchisee. It should also be noted that the dissent considered the transfer of intangible assets also to be evidence of continuity on the employer's side. Thus, Justice Rehnquist's requirements might be met even in a service industry context, if the new employer acquires "goodwill," contract rights, or a franchise license from a predecessor.

The most troubling question is raised in a competitive-bidding situation such as Burns. In such a case, there is no transfer of assets, since the service contract is not passed from one employer to the other, but is created anew with each employer; therefore, Justice Rehnquist's conditions would not be met. But the majority opinion in Burns appears to have left open the question whether arbitration could be enforced in section 301 actions in this situation.

It may be contended that the policies of industrial stability and employee job security in some cases require that an employer be found to be a successor even where there are no dealings between the employers. 137 On the other hand, Justice Rehnquist, concerned with fairness to the employer, suggests that the "legitimate expectations of the employees" require at most that the employer be bound only when there is some transfer of assets. 138 This test, however, is unnecessarily limited. A more complete test for continuity would examine the similarity of the operations as a whole—the business functions, the jobs performed by the employees, and the method of supervision, as well as any transfer of assets. Even in a competitive-bidding case, these other factors evidence both the expectations...

135. See text accompanying notes 49-57 supra.
136. 406 U.S. at 305.
137. See Goldberg, supra note 38, at 749-50.
138. 406 U.S. at 305.
139. Wiley itself focused on the “relative similarity and continuity of operation,” not on any transfer of assets. 376 U.S. at 551.
of the employees and the ease with which the new employer can assume the labor obligations of the old employer. It is true that at first glance the terms "competitor" and "successor" seem to be directly opposed. However, such labels, while they provide some guidance, may oversimplify a complex problem. In essence, "successor" is a conclusory term, which may mean nothing more than a new employer upon which an old employer's labor obligations are imposed. Specifically, the question should be whether it is fair to both employer and employees, and desirable in terms of national labor relations policies, to impose a duty to arbitrate in a given competitive-bidding case.

If the question is viewed in this light, several impediments to applying Wiley in a competitive-bidding case must be considered. First, as Justice Rehnquist suggests, the imposition of continuing labor obligations may disrupt the competitive status of all the bidders, as well as that of the industry to which the bids are submitted. Yet, Wiley indicated that the employer's interest in competition must be limited when it infringes on the security of the employees and threatens industrial stability. Stability and security require special protection in an annual-bidding situation. Moreover, while holding a winning bidder to a duty to arbitrate may in some cases disturb competition by "import[ing] unwarranted rigidity into labor-management relations," failing to apply Wiley is even more likely to put the employer that has the existing contract at a competitive disadvantage. It will be held to the terms of the negotiated collective-bargaining agreement if it is awarded the next contract, while all other bidders would be exempt from any such obligation.

Reluctance to find that a competitive bidder is a successor may also stem from the fear that the bidder may have had no notice of its possible obligations to the union. Absent notice, it may well be unfair to impose labor obligations on an employer that had no chance to make appropriate adjustments in its bid. But if the new

140. 406 U.S. at 307-08.
141. Justice Rehnquist, of course, would not impose a duty to bargain on a new employer in an annual-bidding situation. This approach could discourage employee organization in the service industries. Unions would be at a disadvantage if they were forced to reorganize employees and reprove their majority status each time a new employer won the contract. The Supreme Court, 1971 Term, supra note 2, at 252 n.35.
142. 376 U.S. at 549.
143. It might be contended that the duty to bargain imposed by the Court in Burns gives sufficient protection to employee expectations and industrial stability. But imposing only a duty to bargain would mean that agreements would have to be negotiated each time the employer changed, possibly every year. This would subject employees and the recipients of their services to the possibilities of annual strikes and might deny them the benefits of longer-term contracts.
144. 406 U.S. at 508 (Rehnquist, J., concurring and dissenting).
145. The Court in Wiley said, "[W]e do not rule out the possibility that a union
employer has had notice from the union of the employees' expectations, it is less inequitable to require it to arbitrate under its predecessor's collective-bargaining agreement, for it could have consulted that document to determine the extent of the obligation.\textsuperscript{146} Therefore, while a collective-bargaining agreement might logically be imposed through arbitration against a "successor" even in a competitive-bidding situation when there is substantial evidence of continuity in the operations considered as a whole, the imposition of such obligations should be conditioned on the union's informing all bidders of the negotiated contract. Giving the successor notice poses no special difficulties. In industries with regular bidding there would be little danger that the union would be unaware of the existence of prospective new employers and thus fail to notify them.

It should be noted that even if a bidder has notice, it will not be able to predict the extent to which the arbitrator will hold it to the predecessor's contract and thus may not be able to determine its labor costs precisely. However, bidding necessarily involves risks and estimates. Holding the winning bidder to arbitrate with the union under section 301 would not increase its risks, but would rather define one of the variables more precisely. Since the arbitrator could give the union only rights included in the contract,\textsuperscript{147} the bidder would know the upper limit on its labor costs for the term of the contract.

In conclusion, \textit{Burns} need not be read as a drastic curtailment of the Court's earlier decision in \textit{Wiley}. While considerable question may exist in regard to competitive-bidding situations, section 301 actions to compel arbitration should remain available, at least in the ordinary successorship case. Read together, \textit{Burns} and \textit{Wiley} can ensure that the imposition of contract obligations on successor employers will be handled with a desirable measure of flexibility.

\textsuperscript{146} See, e.g., Walker Bros., 41 Lab. Arb. 844 (1963) (Crawford, Arbitrator).
\textsuperscript{147} John Wiley \& Sons, Inc. v. Livingston, 376 U.S. 543, 555 (1964).