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Labor Pains in the Second Circuit: William Burns Recent Case

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RECENT CASE

LABOR PAINS IN THE SECOND CIRCUIT: WILLIAM BURNS

"New York Times—April 27, 1974: The International Bottle-Blowers Union is threatening to shut down the beer industry in the United States. The union has called for a nationwide walkout of beer bottle blowers because the Bottle Corporation of America, the nation's largest beer bottle manufacturer, has refused to agree to the union's wage demands.

"The Bottle Corporation of America recently purchased the plant and business of International Bottle, the company with whom the Bottle Blowers had a collective bargaining agreement. The union demands that the Bottle Corporation pays the same wages as called for under the old contract. The Bottle Corporation has steadfastly refused to concede to the union demand. Spokesmen for the union said that this whole problem would not have arisen had the Bottle Corporation been bound by International Bottle's contract."

This hypothetical situation has a distinct possibility of occurring because the Second Circuit recently held in *William J. Burns Int'l Detective Agency v. N.L.R.B.*,[1] that a new employer is not bound by his predecessor's collective bargaining agreement.[2] The old employer in *Burns* was the Wackenhut Corporation. Wackenhut provided the security guards for the Lockheed Aircraft Service Company facility at Ontario Airport, Ontario, California. On March 8, 1967, the United Plant Guard Workers of America, Local 162, was certified by the National Labor Relations Board (hereinafter referred to as the Board) as the exclusive bargaining agent of Wackenhut's employees at Lockheed. A collective bargaining agreement was signed by Wackenhut and the union which was to run from April 26, 1967, until April 28, 1970. Subsequently, Wackenhut's one year contract with Lockheed expired. Pursuant to its agreement with Wackenhut, Lockheed requested bids for the guard service contract. Lockheed then awarded the contract to the low bidder, William J. Burns International Detective Agency. When Burns commenced work it employed 42 guards at the Lockheed facility, 27 of whom had worked for Wackenhut. The union demanded that Burns recognize it as the bargaining agent of Burn's Lockheed employees and honor the con-

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1 441 F.2d 911 (2d Cir. 1971), *cert. granted*, 92 S. Ct. 99 (1971).

2 *Id.* at 916.

tract between the union and Wackenhut. When Burns refused to honor these demands, the union filed unfair labor practice charges with the Board. The union charged Burns with violations of sections 8(a)(1) and 8(a)(5) of the Labor Management Relations Act of 1947.[3] The Board found that Burns was a successor-employer and, as such, was obligated to bargain with the union and honor the contract. Burns appealed to the Second Circuit who refused to enforce that part of the Board's order which required Burns to honor the existing collective bargaining agreement. The court stated that:

1. Burns was Wackenhut's successor and was required to bargain with the union;[4]

2. The Board may not impose a collective bargaining agreement upon a party who has had no part in the negotiation of the agreement;[5]

3. The successor may be compelled only to arbitrate issues arising under the contract;[6]

4. The Board's hardship rule in *Emerald Maintenance, Inc.*[7] should not be applied.[8]

The holding of the Second Circuit is in direct conflict with the decision of the United States Court of Appeals for the Tenth Circuit in *Ranch-Way, Inc. v. N.L.R.B.*[9] In order to resolve the question of a successor's obligation under his predecessor's labor contract, the United States Supreme Court has granted the Board's petition for certiorari to review the Second Circuit's decision in *Burns*.[10] The following discussion will critically analyze the four points raised by the Second Circuit and suggest that the Supreme Court overrule the decision of the Second Circuit and reach a conclusion similar to that of the Tenth Circuit.

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[3] 29 U.S.C. § 158 (1947).

[4] 441 F.2d at 915.

[5] *Id.*

[6] *Id.* at 916.

[7] 188 N.L.R.B. No. 139, 76 L.R.R.M. 1437 (1971).

[8] 441 F.2d at 916.

[9] 445 F.2d 625 (10th Cir. 1971). The Tenth Circuit compelled the purchaser of a feed mill to honor the collective bargaining agreement his predecessor had negotiated. The Tenth Circuit found that 18 of the 25 employees covered by the union contract were hired by Ranch-Way, the successor, that the business conducted was substantially the same as it had been before the sale, and that over seventy-five percent of the former customers continued with Ranch-Way. The *Ranch-Way* case is not discussed herein, because the court did not discuss in depth its reasons for enforcing the contract.

[10] 441 F.2d 911 (2d Cir. 1971), *cert. granted*, 92 S. Ct. 99 (1971).

SUCCESSORSHIP

Before a contract will bind a new company, the company must be a successor. A successor-employer is a term used by the Board to define a company which takes over or replaces another company and remains in substantially the same type of business with a majority of the old company's employees. The old company is known as the predecessor-employer.[11] This determination is essential to finding that a successor is bound to his predecessor's labor contract because successorship establishes that the new company has carried on the same business as the old company. In order to determine whether the business has remained the same, the Board and courts have traditionally placed emphasis upon such factors as whether the same plant is used, the same product is made or services rendered, the same jobs are continued under the same working conditions, and substantially the same work force is employed.[12] When the business has been continued, enforcing the collective bargaining agreement is not an unreasonable burden on the new company. The labor contract is directly related to the new employer because he has taken over the business which is covered by the collective bargaining agreement.[13]

The Second Circuit found that Burns was Wackenhut's successor. The court ordered Burns to bargain with the union, but refused to enforce the existing labor contract.[14] In so holding the court makes an unreasonable distinction. Although the reasons for compelling bargaining and imposing a contract on a successor are motivated by different reasons, successorship which supports the duty to bargain also supports the duty to honor a preexisting collective bargaining agreement.

The Duty to Bargain

When a union has been certified by the Board as the bargaining agent for a group of employees, section 8(d) of the Labor Management Relations Act of 1947[15] imposes upon the company the

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11 William J. Burns Int'l Detective Agency, 182 N.L.R.B. No. 50, at 5, 74 L.R.R.M. 1098, 1100 (1970).

12 *See* Tom-A-Hawk Transit, Inc. v. N.L.R.B., 419 F.2d 1025 (7th Cir. 1969); Makela Welding, Inc. v. N.L.R.B., 387 F.2d 40 (6th Cir. 1967); Overnite Transp. Co. v. N.L.R.B., 372 F.2d 765 (4th Cir. 1967); N.L.R.B. v. McFarland, 306 F.2d 219 (10th Cir. 1962); N.L.R.B. v. Auto Ventshade, Inc., 276 F.2d 303 (5th Cir. 1960); N.L.R.B. v. Armato, 199 F.2d 800 (7th Cir. 1952).

13 *See* notes 29-32 and accompanying text, *infra*.

14 441 F.2d at 916.

15 Section 8(d) reads as follows: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the

duty to bargain with the union. The duty to bargain continues until the employees no longer wish to be represented by the union. If the company is sold or replaced, as in *Burns*, the duty to bargain may continue. In order for the bargaining obligation to pass to the new employer, he must be a successor.[16] That is, the business the old company conducted must remain the same under the new company. This requirement has been established by the Board because the employees would have no reason to terminate the union as their representative when the business of the company remains the same despite a change in ownership. In fact, the status of successorship may create a presumption that the employees desire the incumbent union to continue as their bargaining agent.[17]

Hiring the old Employees. In determining who is a successor, the greatest emphasis has been placed upon the number of the old company's employees who are hired by the new company. In almost every case where an employer was found to be a successor, the court emphasized that a majority of the old employees were retained by the successor.[18]

By stressing this factor, the courts have recognized two things. First, the employees of the successor company have the right to form, join, or assist labor orgainizations of their own choosing.[19] If a majority of a predecessor's employees work for the successor, it is likely that they are content with the labor union they have chosen. The successor should not be allowed to object to his employees' choice of representatives. Conversely, where less than a majority of the predecessor's employees work for the successor, the new employees should be allowed to select their representative. Second, where the new company employs a majority of the old company's

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representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, . . ." 29 U.S.C. § 158 (1947).

[16] *See* William J. Burns Int'l Detective Agency v. N.L.R.B., 441 F.2d 911 (2d Cir. 1971).

[17] *See* Makela Welding, Inc. v. N.L.R.B., 387 F.2d 40, 46 (6th Cir. 1967):

> If, because of essential similarity of operations, Kemp can properly be regarded as Makela's successor, the absence of proof of majority status at the time of the bargaining demand would not necessarily undermine the Board's finding. [Where the Board ruled that a successor had to remedy a predecessor's unfair labor practice].

[18] *See* Ranch-Way, Inc. v. N.L.R.B., 445 F.2d 625 (10th Cir. 1971); William J. Burns Int'l Detective Agency v. N.L.R.B., 441 F.2d 911 (2d Cir. 1971); Tom-A-Hawk Transit, Inc. v N.L.R.B., 419 F.2d 1025 (7th Cir. 1969); N.L.R.B. v. Auto Ventshade, Inc., 276 F.2d 303 (5th Cir. 1960). Where an employer hired less than a majority of his predecessor's employees, *see* N.L.R.B. v. Alamo White Truck Service, Inc., 273 F.2d 238 (5th Cir. 1959).

[19] *Cf.* N.L.R.B. v. Armato, 199 F.2d 800, 803 (7th Cir. 1952).

work force, it is probable that the nature of the predecessor's business has been continued by the new employer.[20] A new employer is not likely to retain employees unless they are capable of producing his product or providing the services he performs. In *Burns*, the William Burns Detective Agency retained Wackenhut's work force because they were able to perform the same duties for Burns as they did for Wackenhut. The fact that Burns hired the old employees indicates that Burns conducted a business similar to Wackenhut's.

Challenging the Union. In determining if the union still represents a majority of the successor's employees, the Board looks to the time of succession, not some later date.[21] The fact that at a later date, as in *Burns*, the union no longer represents a majority of the predecessor's employees because of a turnover in the successor's personnel is not evidence per se that there is no longer a majority interest in the union.[22] If this were the case, a union certification could be challenged whenever the predecessor's employees who voted for the union ceased to comprise a majority of the successor's employees. This would be an unacceptable infringement upon the employees' right to pick the union of their choice,[23] particularly in an industry with a large turnover. In order to oust the union, it must be shown that a substantial number of the successor's employees no longer wish to be represented by the union.[24]

There are two additional provisions which protect the employees' choice of representatives. The certification bar[25] prevents a challenge to the incumbent union for a period of 12 months from the date of certification of the union by the Board. The contract bar[26] prevents questioning the majority status of the union for the duration of the collective bargaining agreement.

It is not proper for an employer to refuse to recognize a union because he believes the union no longer represents a majority of his employees. The choice of union representatives is the prerogative of the employees and it is up to them to file for decertification.[27] If the predecessor's collective bargaining agreement is still in force and

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20 *Cf.* Maintenance, Inc., 148 N.L.R.B. No. 114, at 1300 (1964).

21 N.L.R.B. v. Auto Ventshade, Inc., 276 F.2d 303, 307 (5th Cir. 1960).

22 N.L.R.B. v. Armato, 199 F.2d 800, 803 (7th Cir. 1952).

23 Labor Management Relations Act § 7, 29 U.S.C. § 157 (1947).

24 Kraft Food Co., 76 N.L.R.B. No. 77, at 492, 21 L.R.R.M. 1214, 1214 (1948).

25 Labor Management Relations Act § 9(c)(3), 29 U.S.C. § 159 (1947).

26 The contract bar is a rule established by the Board to prevent elections within the bargaining unit for the duration of the contract. 1970 GUIDEBOOK TO LABOR RELATIONS 90 (10th ed. Commerce Clearing House Pub. 1970).

27 Decertification is an action by which the Board conducts an election in the bargaining unit to establish that the recognized union is no longer the chosen bargaining representative of a majority of the employees in the unit. *Id.* at 106.

binds the successor, the union should be free from challenge under the protection of the contract bar.

The Duty to Honor the Collective Bargaining Agreement

While the Second Circuit held that Burns must bargain with the union selected by his predecessor's employees, it did not impose upon Burns the duty to honor the existing collective bargaining agreement.[28] This appears to be an unreasonable limitation upon the rights of the employees.

Not only does successorship require a successor-employer to recognize the union as his employees' bargaining agent, but it also supports the conclusion that the new employer is obligated to honor his predecessor's collective bargaining agreement. The factors[29] the Board considers in determining successorship may indicate that the business conducted by the old company has not changed. This conclusion is essential if the Board's rule in *Burns* is to be fairly applied to the successor. The predecessor's contract was keyed to the particular needs of his business. The type of work, the working conditions, the rates of pay, and hours of work were related to his business and the work his employees performed. Unless the new company takes over the predecessor's business and is conducting it in substantially the same fashion, the existing bargaining agreement will have no relation to the work the new company performs. Hence, the contract would be an unreasonable burden on the new employer. For example, suppose that Company X engages in the business of commercial printing. In order to expand, X decides to purchase Company Y which operates a warehouse. Company X decides to keep one half of Company Y's work force and retain them. Company Y had a collective bargaining agreement with the Warehousemen's Union. Under X none of Y's job classifications are retained. The work is no longer the same, hence working conditions will have changed. The wages and hours under the predecessor's collective bargaining agreement bear no relation to the work that will be performed for X. Where successorship is not found, the labor contract bears no reasonable relation to the new employer and should not bind him.[30]

However, when the new company is operating the same business as the predecessor-employer, the existing contract will relate directly to the new employer. Where nothing has been changed by the suc-

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[28] 441 F.2d at 916.

[29] *See* text accompanying note 12, *supra.*

[30] *Cf.* N.L.R.B. v. Alamo White Truck Service, Inc., 273 F.2d 238, 240, 242 (5th Cir. 1959).

cessor but the ownership, the contract covers the same items under both predecessor and successor-employers. In *Burns*, the trial examiner[31] found that Burns was a successor-employer from these facts: sixty-four percent of Wackenhut's employees continued to work for Burns; practically the same facilities were used; the working conditions were the same; and the services provided were the same. He also noted that both Wackenhut and Burns were large national firms with an annual gross volume of business in excess of $500,000.[32] Thus, it may be inferred that the interests of both companies are likely to be similar. Their labor policies would be those of large corporations not those of small companies. Because they are both large firms with numerous contracts to provide guard services throughout the nation, imposing the labor contract on Burns would not likely drive it out of business.

Thus, Wackenhut's collective bargaining agreement covered the same working conditions as Burns's. There is no hardship for Burns to take over Wackenhut's obligations under the contract because Burns, having been found to be a successor, stands in the same position as Wackenhut.[33] The agreement which covered Wackenhut's employees is their protection against unilateral changes by their employer. This protection should not be removed because the owner of the business has changed while the men and the business conducted which the contract covered has not.

The Second Circuit held that Burns should not be bound by the existing collective bargaining agreement.[34] This decision fails to take into account the similarity of the factual situations when a successor takes over a business from his predecessor. The conclusion that the contract should bind the successor follows from this similarity.

Imposition of the Contract Upon a Party Who Has Not Bargained

When an employer and a union have not reached a collective bargaining agreement, the Board cannot impose contract provisions

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31 "N.L.R.B. trial examiners are the 'trial judges' in unfair practice cases under the National Labor Relations Act. In the ordinary 'complaint' proceeding, the trial examiner presides at the hearing, controls the admission or exclusion of evidence, makes preliminary findings of fact and conclusions of law, . . ." 1970 Guidebook to Labor Relations 316 (10th ed. Commerce Clearing House Pub. 1970).

32 182 N.L.R.B. No. 50, at 2 (trial examiner's decision).

33 It is not necessary that the successor have assumed the contract. The normal principles of contract law which require assent on the part of the party who is sought to be bound by the contract, do not apply to collective bargaining agreements. John Wiley and Sons v. Livingston, 376 U.S. 543, 550 (1964); *see* notes 50-60 and accompanying text, *infra*.

34 441 F.2d at 916.

on either party.[35] The Second Circuit reasoned that since a successor-employer has not contracted with the incumbent union, it is beyond the Board's power to impose the contract upon either party.[36] In reaching its determination that binding an unwilling successor to its predecessor's bargaining agreement is inimical to national labor policy, the court relied on *H. K. Porter Co. v. N.L.R.B.*[37] However, the Second Circuit misapplied the holding of *H. K. Porter* on this point.

In order to correctly examine the holding of *H. K. Porter*, it is necessary to establish in what factual context the case arose. The United Steelworkers Union was certified as the bargaining agent at Porter's Danville plant in 1961. The union began negotiating a contract and as part of its demands requested a check-off clause.[38] The company refused to grant this demand because it did not want to aid the union in its collection of dues. The Board found that the company's reason for refusing to bargain over this issue violated its duty to bargain in good faith. Therefore, the Board ordered Porter to bargain in good faith over the check-off clause. When the company continued to refuse to bargain with regard to the check-off clause, the U.S. Court of Appeals for the District of Columbia said that the Board could remedy this unfair labor practice by compelling the company to grant the check-off clause.[39] The United States Supreme Court found that the Board lacked the power to compel a company or union to agree to any substantive provision of a contract.[40] The Court in referring to section 8(d) of the Labor Management Relations Act[41] said it was intended that employers and employees should reach agreements without government interference. The policy embodied in federal labor law is that the passions and struggles of prior years should be resolved in bargaining. Hence, imposition of contract terms by the Board would violate established labor policy.[42] The Second Circuit reasoned that the principles embodied in *H. K. Porter* bound them to hold that imposing a contract upon a successor violated national labor policy.[43]

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[35] H. K. Porter Co. v. N.L.R.B., 397 U.S. 99, 102 (1970).

[36] William J. Burns Int'l Detective Agency v. N.L.R.B., 441 F.2d 911, 915 (2d Cir. 1971).

[37] 397 U.S. 99 (1970).

[38] A check-off clause is a device by which the employer makes a deduction of the employee's union dues from his paycheck and forwards that amount deducted to the union. J. WILLIAMS, LABOR RELATIONS AND THE LAW 635 (3d ed. 1965).

[39] H. K. Porter Co. v. N.L.R.B., 414 F.2d 1123, 1125 (D.C. Cir. 1969), *rev'd*, 397 U.S. 99 (1970).

[40] 397 U.S. at 102.

[41] 29 U.S.C. § 158 (1947).

[42] 397 U.S. at 103.

[43] William J. Burns Int'l Detective Agency v. N.L.R.B., 441 F.2d 911, 915 (2d Cir. 1971).

While in the appropriate context[44] the holding of the Supreme Court should be applied, that context is not present in *Burns*. In *H. K. Porter* the parties had not arrived at a bargaining agreement. The method of arriving at agreements through collective bargaining was established so that employers and employees could resolve their conflicts in a peaceful manner. For an outside party to impose contract terms would likely result in a mutually unsatisfactory agreement, thus threatening labor peace.[45]

In *Burns* there was a collective bargaining agreement. Wackenhut bargained with the union and arrived at a contract which was keyed to the same conditions of employment which now exist under Burns. While Burns has not bargained with the union, Wackenhut, whose interests were similar to Burns, has done so. Once a contract has been established the Supreme Court acknowledges that industrial peace is best accommodated by its enforcement.[46] The Court has said, "It [section 301 Labor Management Reporting and Disclosure Act] expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."[47] Since Burns has voluntarily "stepped into the shoes" of Wackenhut, the policy of *H. K. Porter* should not apply.

Moreover, section 8(d) of the Labor Management Relations Act of 1947[48] establishes a congressional policy that collective bargaining agreements should continue in effect until their termination date. Section 8(d) requires that, "[W]here there is in effect a collective bargaining contract . . . no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification serves written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, . . ." Therefore, where a contract is still in effect it should be applied to the successor.

The United States Supreme Court has established that an *H. K. Porter* situation does not apply to circumstances where a contract exists.[49] In enforcing an arbitration clause against a successor employer, the Court distinguished the situation where no

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44 *See* notes 37-41 and accompanying text, *supra*.

45 *See* H. K. Porter Co. v. N.L.R.B., 397 U.S. 99 (1970). *See generally* Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962); United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); Textile Worker's Union v. Lincoln Mills, 353 U.S. 448 (1957).

46 Textile Worker's Union v. Lincoln Mills, 353 U.S. 448, 455 (1957).

47 *Id.*

48 29 U.S.C. § 158 (1947).

49 John Wiley and Sons v. Livingston, 376 U.S. 543, 550 (1964).

contract has been established: "This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated."[50] Thus, it may be that the Second Circuit has failed to distinguish *Burns* from the situation where there is no contract. To remove the bargaining agreement, the instrument of industrial stability, and replace it with the often hostile, disruptive environment of collective bargaining is hardly the mandate of *H. K. Porter.*

LIMITATION OF SUCCESSOR'S OBLIGATION TO ARBITRATION

The Board, in reaching its determination that Burns should be bound by Wackenhut's contract, relied heavily on a United States Supreme Court case, *John Wiley and Sons v. Livingston*,[51] which held that a successor-employer is bound by certain provisions of his predecessor's bargaining agreement. In *Wiley* the union had negotiated a contract with Interscience Publishers, Inc., which was to terminate in 1962. In 1961 Interscience merged with John Wiley and Sons, Inc. The union demanded that Wiley recognize certain provisions of the Interscience contract.[52] The union brought suit under section 301 of the Labor Management Reporting and Disclosure Act[53] to compel Wiley to honor an arbitration clause in the contract. The Supreme Court found that Wiley was required to arbitrate even though the contract had terminated.[54] However, because the case was limited to the issue of arbitration, the Court did not indicate whether the entire contract was enforceable. The Board concluded that this case altered the perspective in which a successor-employer's duty to honor his predecessor's contract must be viewed.[55]

The Second Circuit has taken a narrower view of *Wiley.* The court reasoned that the holding of the Supreme Court should be construed only to impose arbitration upon a successor-employer.[56]

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[50] *Id.* at 550.

[51] 376 U.S. 543 (1964).

[52] The issues which the union sought to arbitrate were: (1) whether the seniority rights of the predecessor's employees must be continued; (2) whether Wiley (the successor) had to continue to make payments to the union's security and pension plans; (3) whether the job security and grievance provisions of the contract continued in effect; (4) whether Wiley was liable for severance pay under the contract; and (5) whether Wiley was liable for vacation pay under the contract. *Id.* at 552.

[53] 29 U.S.C. § 401 (1959).

[54] 376 U.S. at 550.

[55] William J. Burns Int'l Detective Agency, 182 N.L.R.B. No. 50, at 5, 74 L.R.R.M. 1098, 1099 (1970).

[56] William J. Burns Int'l Detective Agency v. N.L.R.B., 441 F.2d 911, 916 (2d Cir. 1971).

The Second Circuit said that, "[T]he policy behind the decision in Wiley was founded upon the Court's recognition of 'the central role of arbitration in effectuating national labor policy.' The Court's determination is only that 'the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.' "[57]

It is possible that the Second Circuit overlooked some very important language in the Supreme Court's decision. The measuring standard by which arbitration is imposed may be more than its central role in national labor policy. The Supreme Court said in *Wiley* that the sale or takeover of a business does not take into account the interests of the employees. The employees stand to lose greatly in a change of employers. Their seniority rights, pension plans, rates of pay, hours of employment, and jobs themselves may be changed or terminated by a transfer of ownership. The interests of employers in the free alienation of assets and employees must be balanced by some protection to the employees.[58] In *Wiley* arbitration was the protection granted to insure that the workers' rights accrued under the contract with Interscience would be preserved.

To hold that *Wiley* is limited to arbitration misses the impact of the Supreme Court's reasoning. If the Court is using a balancing test to protect employees' rights, then the collective agreement is the factor which should be weighed most heavily in favor of the employee. Arbitration was a heavily weighted interest because it could preserve national labor tranquility while it gave some degree of protection to the employees' rights. But preservation of the employees' contractual rights, clearly established by a collective bargaining agreement, is perhaps of greater importance because all the employees' rights, including arbitration, are either grounded in the agreement or are nonexistent.

The importance of the contract in preserving national labor peace has been emphasized by the Supreme Court in *Heinz Co. v. N.L.R.B.*,[59] where the Court said that a labor contract stabilizes

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[57] *Id.* The Second Circuit is quoting the Supreme Court in Wiley. 376 U.S. at 549-550.

[58] The Supreme Court said, "Employees, and the union which represents them, ordinarily do not take part in the negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. *The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.* 376 U.S. at 549 (emphasis added).

[59] 311 U.S. 514 (1941).

labor relations.[60] There must be some strong interest in favor of the new employer in order to overcome the enforcement of the contract. The fact that the new employer has not been able to bargain from his various strengths and weaknesses would be such a factor if his predecessor, who had similar interests and was in a similar position, had not already bargained. The Board pointed out in *Burns* that it found no inequity in requiring a successor to take over his predecessor's contract. The Board recognized that the successor in the usual case stands in the same position as the predecessor. The employer can compensate for the obligation of the contract in the negotiations for sale or in computing his bid. However, the employees cannot make a similar adjustment.[61] If the collective bargaining agreement terminates with the sale, the employee must bargain anew for all of his rights. This is an unfair burden upon the employee, hence the contract should be enforced upon the successor.

HARDSHIP

The Second Circuit contends that the Board's rule in *Burns* could result in serious inequities to the union because there would be no choice but to be bound by the contract. The court cites the example of a union which makes concessions to a failing company in order to keep it in business only to have the successor turn out to be a financially viable organization.[62] The court says that in such a case the union would be unfairly burdened by the contract.[63] The Board was also troubled by this dilemma, and attempted to solve the problem in *Emerald Maintenance, Inc.*,[64] wherein the Board refused to bind the successor-employer to the predecessor's contract.

The Board's Hardship Exception

In *Emerald*, servicing of housing and maintenance of roads at Laredo Air Force Base were provided by independent contractors. On a yearly basis the Defense Department requested bids and awarded the contract to the lowest bidder. The Public Service, Production and Maintenance Employees, Local Union No. 1057, was certified by the Board as the bargaining agent for the employees

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[60] The Supreme Court said, "[T]he signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing through collective bargaining, strikes and industrial strife." *Id.* at 524.

[61] 182 N.L.R.B. No. 50, at 8, 74 L.R.R.M. at 1101 (1970).

[62] William J. Burns Int'l Detective Agency v. N.L.R.B., 441 F.2d 911, 916 (2d Cir. 1971).

[63] *Id.*

[64] 188 N.L.R.B. No. 139, 76 L.R.R.M. 1437 (1971).

who performed these services. The union signed a contract with the Bartlett Company and the Rice Cleaning Service, the predecessor companies, who were awarded the service contracts on April 1, 1969. The contracts included wage increases which were to take effect six months after their service contract with the Defense Department expired. In January of 1970, the Government asked for bids for the work being performed by Rice and Bartlett. In computing their bids for the work, prospective bidders were told by the Comptroller General to use prevailing wage rates *then* in effect. Emerald Maintenance, the successor, was the low bidder, but in computing its bid Emerald did not include the wage increase the union had negotiated with Rice and Bartlett. The Board found that Emerald was a successor, but it refused to enforce the predecessor's collective bargaining contract. The Board said that a mechanistic application of its rule in *Burns* under the circumstances here would retard rather than advance the goal of providing continuity of employment.[65] If the contract were enforced it could cause Emerald to go out of business. Emerald jusifiably relied upon the order of the Comptroller General to use the wage scale currently being paid rather than the increase called for in the contract.

It appears, therefore, that the Board allows for a case by case analysis to determine if there is some legitimate hardship which will relieve a successor from his obligation to honor his predecessor's collective bargaining agreement. This rule should apply not only to a successor-employer but also to the incumbent union for both successor and union are bound by the existing contract. The Second Circuit's example could be classified by the Board as a case involving hardship upon the union. Hence, the union might be relieved of its duty to honor the contract. This exception allows for flexibility in applying the Board's rule in *Burns* to the myriad of fact situations arising under it.

The Second Circuit Rejects Emerald Maintenance, Inc.[66]

The Second Circuit rejected the Board's approach to cases of hardship because the rule in *Emerald*, "[M]erely arrogates to the Board the additional power to pick and choose among the contractural provisions it will impose on non-contracting parties."[67] The court is restating its misconceived idea that *H. K. Porter Co. v. N.L.R.B.*[68] prohibits the Board from imposing the bargaining

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[65] *Id.* at 6, 76 L.R.R.M. at 1438.

[66] 188 N.L.R.B. No. 139, 76 L.R.R.M. 1437 (1971).

[67] William J. Burns Int'l Detective Agency v. N.L.R.B., 441 F.2d 911, 916 (2d Cir. 1971).

[68] 397 U.S. 99 (1970).

agreement upon a successor-employer or a union because they have not contracted between themselves. *H. K. Porter* is applicable where there is no contract. But where there is an existing labor contract, *John Wiley and Sons v. Livingston*[69] has established that a successor and the union do not have to stand in the relationship of contracting parties.[70] In binding Wiley to the arbitration provision of its predecessor's contract, the Supreme Court said, "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 not in any real sense the simple product of a consensual relationship."[71] Thus, the Board's power to bind or refuse to bind a successor-employer who has not agreed to accept his predecessor's contract is well established, and the Board's rule in *Emerald Maintenance, Inc.*[72] appears valid.

CONCLUSION

The United States Court of Appeals for the Second Circuit took a much too narrow view of the principles of federal labor policy in reaching its conclusion in *William J. Burns Int'l Detective Agency v. N.L.R.B.*[73] The United States Supreme Court in agreeing to hear this case has an excellent opportunity to enunciate the duties of a successor-employer based upon his predecessor's contract. The decision of the Second Circuit endangers labor peace by requiring labor and management to bargain anew. This redundant action threatens to bring about economic sanctions in the form of strikes and lockouts at a time in our economic history when industrial stability is a goal much to be desired. In order to safeguard the established rights of employees, the Supreme Court should overrule the Second Circuit's decision in *Burns* and establish that it is a successor's duty to recognize the collective bargaining agreement his predecessor has negotiated.

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[69] 376 U.S. 543 (1964).

[70] *See* notes 50-60 and accompanying text, *supra.*

[71] 376 U.S. at 550.

[72] 188 N.L.R.B. No. 139, 76 L.R.R.M. 1437 (1971).

[73] 441 F.2d 911 (2d Cir. 1971).

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