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Obligations of the Purchasing Employer on a Pre-Existing Labor Contract Notes

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OBLIGATIONS OF THE PURCHASING EMPLOYER ON A PRE-EXISTING LABOR CONTRACT

An entity that purchases a business in which a labor union has been certified or which is bound by a collective bargaining agreement, faces three basic problems: (1) Must it bargain with the union? (2) Is it in any way bound by the pre-existing agreement between the seller and the union? (3) Is it bound to remedy unfair labor practices of the seller? This article examines the nature of these problems and the current state of the law as established by decisions of the courts and the National Labor Relations Board.

Bargain with the Union?

The NLRB grants a certification to a union if a majority of the employees to be represented vote for the union. The United States Supreme Court has held that the certification requires the employer to bargain with the union for at least one year.[1] Subsequent decisions have enforced the one-year requirement absent unusual circumstances.[2] Will a change in employers by virtue of a sale of the business be considered an unusual circumstance so that the purchasing employer may avoid the bargaining requirement? It has been held that unusual circumstances may exist where there is a substantial change in business operations or personnel but that a change in employers alone does not permit the new employer to avoid the bargaining requirement.[3] Even after the initial certification year, there is a rebuttable presumption that a majority of the employees still want the union representation and that therefore, the employer, including a purchasing employer, must recognize and bargain with the union.[4] In rebutting the presumption, a purchaser must exhibit good faith where he contends that the employees no longer wish union representation.[5] In one case, where the certification was 18 years old, factors which were held sufficient to rebut the pre-

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[1] Brooks v. NLRB, 348 U.S. 96 (1955).

[2] Johnson Ready Mix Co., 142 N.L.R.B. 437 (1963); Colony Materials, Inc., 130 N.L.R.B. 105 (1960); Firchau Loggin Co., 126 N.L.R.B. 1215 (1960).

[3] *See* NLRB v. Alamo White Truck Service, Inc., 273 F.2d 238 (5th Cir. 1959), where the court refused to enforce an order by the Board compelling the purchaser to bargain with the union certified to represent the seller's employees, even though it was within the certification year. The basis for the decision was that there had been a substantial change in the nature of the employing enterprise.

[4] Richard W. Kaase Co., 141 N.L.R.B. 245 (1963); Downtown Bakery Corp., 139 N.L.R.B. 1352 (1962).

[5] Diamond National Corp., 133 N.L.R.B. 268 (1961).

sumption were the change in ownership, management, operations, a marked reduction in number of employees, and the fact that the purchasing employer was willing to bargain.[6] Similarly, substantial indications of employee dissatisfaction with union representation in combination with an apparent lack of union animosity by the purchasing employer has also been found sufficient to rebut the presumption.[7] Therefore, if there is substantial doubt as to the union's status, the result is a requirement for a reshowing of that status, by vote of the employees, before the purchasing employer is obligated to recognize and bargain with the union.

Bound by Pre-existing Contract?

Until 1964, the general rule was that the purchasing employer was not bound by the labor contract provisions of the selling employer, absent an express assumption of the contract.[8] In 1964, the United States Supreme Court changed this rule.[9] Interscience Publishers, Inc., which had a labor contract running until January 31, 1962, merged with Wiley on October 2, 1961, and ceased to do business as a separate entity. Most of the Interscience employees were absorbed by Wiley. The contract had no provision making it binding on successors. Wiley expressly disclaimed any obligation under the contract and, in fact, claimed that the merger terminated the union's status as bargaining agent for all purposes. The union asserted that it continued to have bargaining rights for the former Interscience employees. It demanded that Wiley submit certain disputes to arbitration in accordance with the arbitration provisions of the agreement the union had with Interscience. Arbitration was ordered[10] and Wiley appealed.

The Supreme Court, after expressing the principle that the national labor policy favored arbitration of disputes, held that:

> . . . [T]he disappearance by merger of a corporate employer which has entered into a collective bargaining agreement . . . does not automatically terminate all rights of the employees covered by the agreement, and . . . in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.[11]

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[6] *Id.* at 270.

[7] Mitchell Standard Corp., 140 N.L.R.B. 496 (1963).

[8] Empire Workers v. Empire Co., 63 N.Y.S.2d 35 (1946); Herman Loewenstein, Inc., 75 N.L.R.B. 47 (1947); Jolly Giant Lumber Co., 114 N.L.R.B. 413 (1955); General Extrusion Company, Inc., 121 N.L.R.B. 1165 (1958); American Concrete Pipe of Hawaii, Inc., 128 N.L.R.B. 720 (1960); Rohlik Inc., 55 L.R.R.M. 1130 (1964). In some of these cases, the purchasing employer was considered to be the successor to the seller and in all of them there was a substantial continuity of operations.

[9] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).

[10] John Wiley & Sons, Inc. v. Livingston, 313 F.2d 52 (2d Cir. 1963).

[11] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 548 (1964).

It explained that although the principles of law governing ordinary contracts would not bind a nonconsenting successor, ". . . a collective bargaining agreement is not an ordinary contract."[12] The holding did state that the duty to arbitrate would not bind all purchasing employers and gave as a possible basis for an exemption:

> . . . [T]he lack of any substantial continuity of identity in the business enterprise before and after a change [which] would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved.[13]

Prior to the decision in *Wiley*, the ninth circuit in *Wackenhut v. Plant Guards*,[14] held that a purchaser was not bound to honor the arbitration provision of a contract between the seller and union where (1) there had been no agreement to assume the contract, (2) there was no merger, (3) the purchaser was not the mere alter ego of the seller, and (4) the sale was not to avoid the contract. After the Supreme Court's decision, *Wackenhut* was reheard[15] and the court ordered the purchaser to arbitrate because there was a substantial similarity of operation and a continuity of identity of the enterprise after the sale, which, it said, *Wiley* made the basis for requiring arbitration. The court held *Wiley* controlling even though it was not able to classify the purchaser as an alter ego or as a "successor," or to classify the transaction as a merger.

The third circuit, relying on *Wiley*, ruled in *Steelworkers v. Reliance Universal*[16] that the purchaser must submit to the arbitration provision of the seller's labor contract. It seemed to extend *Wiley* in holding that the pre-existing contract remained "the basic charter of labor relations"[17] between the union and purchaser, a point on which the Supreme Court had declined to comment. The court also said that the ". . . arbitrators may properly give weight to any change of circumstances created by the transfer of ownership which may make adherence to any term or terms of that agreement inequitable."[18]

It now seems clear that even though the purchaser expressly disclaims assumption of the labor contract, and even though the pre-existing contract does not by its terms bind successors, the purchaser will be held at least to its arbitration provisions if there is substantial continuity of identity in the enterprise after the sale. Thus,

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[12] *Id.* at 550.
[13] *Id.* at 551.
[14] Wackenhut v. Plant Guards, 332 F.2d 954 (9th Cir. 1964).
[15] Wackenhut v. Plant Guards, 332 F.2d 954 (9th Cir. 1964), rehearing.
[16] 335 F.2d 891 (3d Cir. 1964).
[17] *Id.* at 895.
[18] *Ibid.*

whether or not the purchaser is a legal successor, *i.e.*, a purchaser of assets and liabilities, is not a criterion. Further, even though the *Wiley* case involved a merger, that fact alone was not the basis for the liability of the purchaser. The controlling factor was the continuity of the enterprise. The *Wackenhut* and *Reliance* cases forcefully clarify these points since neither involved a merger and neither purchaser was a legal successor. Furthermore, *Reliance* indicates that courts may be willing to allow the purchaser to be bound by provisions of the contract beyond the arbitration clause with its holding that the entire pre-existing contract would remain "the basic charter of labor relations."

Remedy Unfair Labor Practices?

When employers are found guilty of committing an unfair labor practice, the NLRB issues an order stating the remedial action to be taken. Will the order be automatically enforceable against a successor? The United States Supreme Court held in *Regal Knitwear Co. v. NLRB*[19] that an enforcement order may not be "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law."[20] The Courts said it was the actual relationship which existed between the employer covered by the order and the "successor," not the term itself, which governed. Thus, if the successor was an aider or abettor in the commission of the practice, or was "merely a disguised continuance of the old employer,"[21] it would be bound.

Despite the Supreme Court holding, the NLRB ruled in *Alexander Milburn Co.*[22] that a purchaser who had taken over the entire business, and who had knowledge of the commission of an unfair labor practice, was bound to remedy the practice under an order issued to the seller. The decision was based on the continuity of employment and operations, not on alter ego or participation in the unfair labor practice.

Continuity of operations and personnel continued as the Board doctrine until the tenth circuit in *NLRB v. Birdsall-Stockdale*

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[19] 324 U.S. 9 (1944).

[20] *Id.* at 13. It was pointed out that Rule 65(d) of the Federal Rules of Civil Procedure provided that: "Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise," and that "the term 'successors' in an enforcement order may not enlarge its scope beyond that defined by the Rule."

[21] *Id.* at 14.

[22] Alexander Milburn Co., 78 N.L.R.B. 747 (1948).

Motor Co.[23] specifically applied the *Regal Knitwear Co.* criteria and held that a good-faith purchaser, although a successor in terms of continuity of operations and personnel, was not bound by an order issued to the seller. The decision was enough to compel the Board to overrule its *Milburn* doctrine.[24]

The fifth circuit has held an order was enforceable against a purchaser in a bona fide transaction where the business remained substantially the same.[25] No reference was made to Rule 65(d) of the Federal Rules of Civil Procedure, and the court did not go to the extent of labeling the purchaser the alter ego of the seller. Knowledge of the unfair labor practice was probably present, although the subject was not treated specifically in the decision.

In *C. T. Reynolds Box Co.*,[26] the Board upheld the trial examiner's finding that there was substantially the same ownership and a continuity of operations after the sale, so that the purchaser who knew of the unfair practice was bound: "Whether the term 'successor' or 'alter ego' is applied to the relationship, the corporation was not a bona fide successor insofar as unfair labor practices are involved."[27] There was substantial evidence that the seller was trying to evade its duty to bargain with the union by selling the business to a corporation which had the same ownership as itself. Although the Board did not cite *Birdsall-Stockdale*, its reference to the purchaser as not being in good faith suggests it had that decision in mind.

In the most recent reported case heard by the NLRB on this subject,[28] the purchaser was held not bound to remedy unfair labor practices, even though the owner of the selling business was a director, officer and substantial stockholder in the purchasing corporation. The specific basis for the ruling of non-liability was the purchaser's lack of knowledge of the unfair labor practice.

It is difficult to draw definite conclusions from the Board and Court rulings. It is clear that orders to remedy unfair practices are enforceable against the alter ego of the selling corporation. On the other hand, the Board will not hold liable the purchaser who had no knowledge of the unfair labor practice and is not in any way a collaborator with the seller. Not so clear is the status of the non-collaborating purchaser who may have knowledge of the unfair labor practice and who continues substantially the same operations.

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[23] 208 F.2d 234 (10th Cir. 1953).
[24] Symns Grocer Co., 109 N.L.R.B. 346 (1953).
[25] NLRB v. Tempest Shirt Mfg. Co., 285 F.2d 1 (5th Cir. 1960).
[26] 139 N.L.R.B. 519 (1962).
[27] *Id.* at 524.
[28] M. Yoseph Bag Company, 1962 CCH NLRB ¶ 11,805.