

issue will presumably be delayed until a taxpayer seeks capital gains treatment on the disposition of an exclusive contract right such as that in *Billy Rose*. Meanwhile, the *Billy Rose* decision reveals a firm intention on the part of the Second Circuit to examine the form of transactions which give rise to taxpayers' claims for preferred income tax treatment.

JOHN J. GOGER

Labor Law—Successor Employers—Duty to Honor Predecessor's Collective Bargaining Agreement—*NLRB v. Burns Int'l Security Services*.¹—For five years (1962-67) guard services at the Lockheed Aircraft Service Company at the Ontario International Airport in California were provided by the Wackenhut Corporation. In 1967, United Plant Guard Workers of America (UPG) won a representation election and was certified by the NLRB as exclusive bargaining representative of the Wackenhut employees at the Lockheed plant. Wackenhut and the Union entered into a three-year collective bargaining contract on April 29, 1967. Because Wackenhut's service contract with Lockheed was due to expire on June 30, Lockheed called for bids from various suppliers of guard services; the contract was awarded to Burns International Security Services, Inc. Burns, slated to take over on July 1, had learned at a pre-bid conference on May 15 of the Union's certification and subsequent contract with Wackenhut.

Burns retained twenty-seven of the Wackenhut guards and added fifteen Burns guards, brought in from other locations. Burns informed the former Wackenhut employees that they would have to join the American Federation of Guards (AFG), a union with which Burns had contracts at other locations, inasmuch as Burns "could not live with" the Wackenhut contract.² On June 29, Burns recognized the AFG as bargaining representative of the plant guards at the Lockheed unit. On July 12, UPG demanded that Burns not only recognize it as bargaining representative, but also honor the terms of the existing contract with Wackenhut. These demands were refused, whereupon UPG filed unfair labor practice charges.³

The NLRB found a violation of Sections 8(a)(1) and (2)⁴ of the National Labor Relations Act (NLRA or Act) in Burns' recognition and assistance of the AFG, and a violation of Sections 8(a)(1) and (5)⁵ in Burns' failure to recognize and bargain with UPG and refusal

¹ 406 U.S. 272 (1972).

² *Id.* at 275.

³ *Id.* at 276.

⁴ 29 U.S.C. §§ 158(a)(1),(2) (1970).

⁵ Section 8(a)(5) provides that

It shall be an unfair labor practice for an employer— . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(a)(5) (1970).

to honor the contract entered into between UPG and Wackenhut.⁶ Consequently, the Board ordered Burns to recognize UPG, honor that union's contract with Wackenhut, and make whole the employees for any losses suffered. In so doing, the Board adopted the view of the collective bargaining agreement taken in the 1964 Supreme Court case of *John Wiley & Sons, Inc. v. Livingston*:⁷ that it is a unique kind of contract, requiring other than conventional contract treatment.

The United States Court of Appeals for the Second Circuit enforced the Board's orders regarding unfair recognition and assistance of a rival union and refusal to bargain, but held that the Board was without power to order Burns to honor a contract to which it had not been a party.⁸

On certiorari, affirming the Second Circuit, the Supreme Court HELD: that a successor employer, although required to bargain with the representative of its predecessor's employees, is not required to honor the terms of the predecessor's contract with the union.⁹ In so holding, it will be submitted, the Court manifested an intention to extend one goal of the national labor policy—freedom of contract as effectuated in *H.K. Porter Co. v. NLRB*¹⁰—at the expense of the national policy of fostering industrial peace through providing stability for collective bargaining agreements as effectuated in *John Wiley & Sons, Inc. v. Livingston*.¹¹

This casenote will examine the *Wiley* case as the basis for the Board's *Burns* decision, and the Court's reason for choosing not to rely upon the policy of maintaining the integrity of the collective bargaining contract effectuated in *Wiley*. It will then consider the Court's reliance, in *Burns*, on the competing policy of freedom of contract as given effect in the *Porter* case, and will examine the two policies and Section 8(d) of the NLRA in order to argue that the *Burns* Court made a pure policy decision, grounded neither in a clearly ruling case nor in a clear legislative mandate. It will go on to note the Court's consideration of a policy emerging from neither *Wiley* nor *Porter*—that of greater latitude for the employer through freedom of contract—as the policy most conducive to industrial peace. Finally, it will discuss recent Board and court cases dealing with the issue of contract survival and the ways in which, in light of these cases, the Court's *Burns* decision may be regarded. It will be submitted that, in relying on *Porter* when the fact situations of the two cases are quite disparate, while at the same time attenuating its holding to a set of facts which deviates from the usual

⁶ William J. Burns Int'l Detective Agency, Inc., 182 N.L.R.B. 348, 349, 74 L.R.R.M. 1098, 1099 (1970).

⁷ 376 U.S. 543 (1964).

⁸ William J. Burns Int'l Detective Agency, Inc. v. NLRB, 441 F.2d 911, 916 (2d Cir. 1971).

⁹ 406 U.S. at 291.

¹⁰ 397 U.S. 99 (1970).

¹¹ 376 U.S. 543 (1964).

successorship pattern,¹² the Court's new *Burns* decision, albeit the proper decision as regards the *Burns* case, may be too easily distinguishable from future successorship cases to have the effect of answering decisively the question of whether or not a successor employer will be bound by a predecessor's collective bargaining agreement.

The NLRB, in holding *Burns* bound by its predecessor's collective bargaining agreement, relied heavily on *Wiley*. The *Wiley* case has generated a number of different interpretations, each of which, with its own particular emphases, extrapolations and inferences, is arguably a "correct" interpretation in the eyes of its proponents, or a "blatant misreading" as seen by its adversaries. This casenote adheres to the view—hotly debated and very much at the center of the entire contract survival controversy—that *Wiley* gave rise to the inference that a successor might be ordered to honor the terms of his predecessor's collective bargaining agreement, and that the case thus lends itself to citation in defense of the policy of maintaining the integrity of the collective bargaining agreement. This view of *Wiley* will be maintained throughout the paper, but never without full awareness of the fact that it is but one reading of the case.

Wiley was a section 301¹³ suit to compel arbitration, brought by a union against a successor employer which took over a company by a merger four months before the union's collective bargaining agreement was due to expire. The Supreme Court held in *Wiley* that the arbitration clause of the collective bargaining agreement between the predecessor employer and the union was binding upon the successor employer despite both the expiration of the contract and the disappearance of the predecessor through merger. In reaching its holding, the *Wiley* Court admitted that under traditional notions of contract law, an unconsenting successor would not be bound by his predecessor's contract; however, it observed that

a collective bargaining agreement is not an ordinary contract. ". . . [I]t is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It

¹² The *Burns* Court noted that:

Here 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 Burns purchased nothing from Wackenhut and became liable for none of its financial obligations. Burns merely hired enough of Wackenhut's employees to require it to bargain with the union as commanded by § 8(a)(5) and § 9(a). But this consideration is a wholly insufficient basis for implying either in fact or in law that Burns had agreed or must be held to have agreed to honor Wackenhut's collective bargaining contract.

406 U.S. at 286. The dissent would go further and find this situation so unconventional as to render Burns not a successor to Wackenhut at all. *Id.* at 307 (dissenting opinion).

¹³ Section 301(a) of the Labor Management Relations Act of 1947 (Taft-Hartley Act) grants the federal courts jurisdiction to hear suits for violation of collective bargaining contracts. 29 U.S.C. § 185(a) (1970).

calls into being a new common law—the common law of a particular industry or of a particular plant.”¹⁴

Viewing *Wiley* as dispositive of the *Burns* case, the Board in *Burns* emphasized not so much the *Wiley* holding as what it deemed the “spirit” of *Wiley*: the revolutionary notion that the time-honored concept of privity of contract might be put aside in order to better achieve the goal of industrial peace so central to the national labor policy.¹⁵

The Board stated that the integrity of existing collective bargaining agreements is necessary to the stabilization of labor relations and to the prevention of strikes and industrial strife. It further observed that this had been recognized by Congress in 1947 when it enacted Section 8(d) of the Act, whose proviso defines the duty to bargain as including the duty not to terminate or modify an existing collective bargaining agreement. The Board concluded: “Section 8(d) thus clearly demonstrates Congress’ recognition of the paramount role in maintaining industrial peace played by parties’ adherence to existing collective-bargaining agreements.”¹⁶

The Supreme Court disagreed with the Board’s application of *Wiley* to the *Burns* facts. The Court in *Burns* distinguished *Wiley* on the basis that it arose in the context of a section 301 suit to compel arbitration, while *Burns* was an unfair labor practice action. Further, the Court rejected the Board’s application of the “spirit of *Wiley*” to the *Burns* fact situation:

Wiley’s limited accommodation between the legislative endorsement of freedom of contract and the judicial preference for peaceful arbitral settlement of labor disputes does not warrant the Board’s holding that the employer commits an unfair labor practice unless he honors the substantive terms of the preexisting contract. The present case does not involve a § 301 suit; nor does it involve the duty to arbitrate. Rather, the claim is that *Burns* must be held bound by the contract executed by Wackenhut, whether *Burns* has agreed to it or not and even though *Burns* made it perfectly clear that it had no intention of assuming that contract. *Wiley* suggests no such open-ended obligation.¹⁷

The *Burns* Court, then, apparently saw *Wiley* as applicable only in the context of a suit to compel arbitration and attributed that case’s holding to the judicially expressed preference for arbitration as a method of settling disputes.¹⁸

¹⁴ 376 U.S. at 550 (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960)).

¹⁵ 182 N.L.R.B. at 349, 74 L.R.R.M. at 1100.

¹⁶ *Id.* at 350, 74 L.R.R.M. at 1101.

¹⁷ 406 U.S. at 286.

¹⁸ The “spirit of *Wiley*” interpretation favored by the Board has not been unacknowledged. “Although the successor was not charged with being guilty of an unfair

Having found inapplicable *Wiley* and its emphasis on industrial peace through insuring the integrity of collective bargaining agreements, the Court saw as decisive of the question posed in *Burns*—that of the extent of a successor's responsibility to honor his predecessor's union contract—the concept of freedom of contract as expressly mandated in Section 8(d) of the Act and as effectuated in *H.K. Porter & Co. v. NLRB*.¹⁹ Section 8(d) provides that the obligation to bargain “does not compel either party to agree to a proposal or require the making of

labor practice, the *Wiley* decision is nonetheless on point insofar as our problem of successor employers under the NLRA is concerned.” Stern, Binding the Successor Employer to Its Predecessor's Collective Agreement Under the NLRA, 45 Temp. L.Q. 1, 6 (1971). See also Comment, 21 Syr. L. Rev. 875, 881 (1970): “By relying on policy rather than legal principle for its rationale, the Court [in *Wiley*] provided the basis for binding the successor in a corporate sale as well as in a merger Every court decision since *Wiley* has used this policy-based rationale to compel arbitration of a successor who obtained corporate assets through purchase rather than merger.” Nor has the interpretation lacked support. See *United States Gypsum Co. v. United Steelworkers*, 384 F.2d 38, 42 (5th Cir. 1967), cert. denied, 389 U.S. 1042 (1968); *Wackenhut Corp. v. United Plant Guard Workers*, 332 F.2d 954, 958 (9th Cir. 1964).

The Ninth Circuit, basing its holding in *Wackenhut Corp. v. United Plant Guard Workers on Wiley*, stated that:

Reading the opinion as a whole . . . we are convinced that the Supreme Court . . . [decided *Wiley*] upon a broader view dictated by the policy of the national labor laws Having in view the objectives of national labor policy reflected in established principles of federal law, the court held the described interest of the employees outweighs that of the employer, and must prevail.

Id. at 958. It should be noted that this case, albeit involving the *Wackenhut Corporation*, is not related to the *Burns* litigation.

One author, contending that “it was the Supreme Court [in *Wiley*] which not only paved the road for the Board's *Burns* decision, but escorted the Board most of the way down it,” stated that “even more important than the precise holding of *Wiley* is the principle for which it stands” Doppelt, Successor Companies: The NLRB Limits the Options—and Raises Some Problems, 20 DePaul L. Rev. 176, 184 (1971). The restriction of *Wiley* to its narrow holding, on the other hand, is hardly unprecedented. The Court in *Wiley* itself emphasized repeatedly the importance of arbitration. 376 U.S. at 549-51. The Third Circuit, in *United Steelworkers v. Reliance Universal, Inc.*, 335 F.2d 891, 895 (3d Cir. 1964) referred to “the guarded language of the *Wiley* opinion,” in contending that the Supreme Court consciously restricted its holding to the question of arbitration, and declined to venture into the area of total contract survival. A number of writers adhered to the narrow view of *Wiley*. “The Court in *Wiley* seemed deliberate in confining its ruling to the narrow inquiry of whether a duty to arbitrate which had been established previously under a predecessor's collective bargaining agreement would survive a change in ownership.” Note, 73 W. Va. L. Rev. 53, 54 (1970-71). “*Wiley* and *Overnite* seem to provide the employees with sufficient protection against abrupt changes upon transfer Neither legal analysis nor policy balancing seem to justify a rule requiring the successor to maintain its predecessor's entire labor contract.” Comment, 36 Geo. Wash. L. Rev. 215, 223 (1967); See also Sangerman, The Labor Obligations of the Successor to a Unionized Business, 19 Lab. L.J. 160 (1968). Appalled at what he perceived as a flagrant misreading in *Wackenhut* of the “quite limited” holding in *Wiley*, one commentator wrote: “The sole redeeming aspect of the decision is that the court was possibly engaging in dictum with respect to the binding nature of the entire contract, since the union had sued only to compel arbitration.” Comment, 21 Syr. L. Rev. 875, 882, 883-84 (1970).

¹⁹ 397 U.S. 99 (1970).

a concession."²⁰ In *Porter* an employer—not a successor employer—refused to bargain with the union concerning a dues check-off provision in a proposed collective bargaining agreement. The Board ordered the employer to grant the check-off provision.²¹ Despite the employer's patent bad faith, the Court held that the Board had erred in so ordering.²² The Court's rationale for its decision in *Porter* was rooted largely in the history of the Act,²³ which the Court interpreted to show that its purpose never was to allow substantive terms of an employer-union contract to be dictated by the Board. The opinion concluded by noting that "it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process."²⁴ The *Burns* Court, then, applied the *Porter* interpretation of section 8(d)—and that section's underlying policy of freedom of contract—to the successor employer situation. The Court gave recognition to the Board's policy rationale for its decision, but held that policy to be outweighed by the express legislative prohibition of section 8(d). The Court observed that "[p]reventing industrial strife is an important aim of federal labor legislation, but Congress has not chosen to make the bargaining freedom of employers and unions totally subordinate to this goal."²⁵

In applying the *Porter* holding to *Burns*, the Court made little mention of the factual differences between those two cases. It is submitted, however, that *Porter* is no less distinguishable from the facts of *Burns* than is *Wiley*. As the *Burns* Court observed, *Wiley* was a section 301 action to compel arbitration, while *Burns* was an unfair labor practice action. While it is true that *Porter* and *Burns* bear that similarity which *Wiley* and *Burns* lack—they were both unfair labor practice actions—there is a crucial difference: *Porter* did not involve a successor employer. Rather, it concerned the more typical refusal-to-bargain situation in which the employer simply refuses to deal in good faith with the representative of his employees. In *Porter*, the contract had not yet been agreed to. In *Burns*, the collective bargaining agreement at issue was not in the proposal stage, but had already been agreed to by Wackenhut and UPG. It is submitted that there is a significant difference between the Board's enforcement in *Burns* of a substantive term originally agreed upon by the predecessor employer and a union and, as in *Porter*, the original determination of terms by the Board and the Board's subsequent enforcement of such terms. In the former situation, a successor is ordered to assume the terms of an agreement at which its predecessor and the union arrived through good-faith bargaining, while in the latter situation the employer and union have neither negotiated nor agreed.

²⁰ 29 U.S.C. § 158(d) (1970).

²¹ H.K. Porter Co., 172 N.L.R.B. No. 72, 68 L.R.R.M. 1337 (1968).

²² 397 U.S. at 102, 107.

²³ *Id.* at 102-08.

²⁴ *Id.* at 109.

²⁵ 406 U.S. at 287.

Since these factual distinctions do not allow either *Porter* or *Wiley* clearly to control the Court's ruling in *Burns*, it is submitted that the *Burns* holding was dictated either by a clear statutory mandate or by application of the NLRA through a process of weighing that statute's competing policy considerations of freedom of contract on the one hand and prevention of industrial strife through preservation of the collective bargaining agreement on the other.

The *Burns* Court found a statutory mandate for its decision in Section 8(d) of the Act, which provides that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession. . . ."²⁶ The Court saw this language as a clear limitation on the Board's power to order *Burns* to honor the collective bargaining agreement made by its predecessor and the UPG. It is submitted, however, that it is by no means clear that section 8(d) was meant to apply to the successor employer situation in which a collective bargaining agreement between the predecessor and the union is in existence. In the first place, it is obvious from a reading of section 8(d) that it contains no reference to successor employers. Since the legislative history of this section sheds no light on Congress' intent regarding the successor employer, and also in view of the fact that the legislation was passed in 1947, before the burgeoning of franchises, conglomerates and corporate takeovers made successorship a vital problem, there is a great likelihood that successorship simply was not considered by the authors of section 8(d).

It is further submitted that the opinions in *Wiley* and *Porter* give rise to the inference that in those cases the Supreme Court saw no relationship between section 8(d) and successorship cases. In *Wiley*, the Supreme Court reached its holding without reference to section 8(d) or the policy of freedom of contract embodied therein. The successor in *Wiley* was ordered to honor at least one term—the arbitration clause—of its predecessor's collective bargaining agreement. Indeed, it is arguable that the result of the *Wiley* holding could have been, in effect, an indirect order to honor the substantive terms of the contract.²⁷ Unless the Supreme Court in *Wiley* is to be seen as having wholly ignored a specific mandate of the national labor policy, embodied in Section 8(d) and the legislative history of the Act, the inference to be drawn from the Court's failure to deal with Section 8(d), it is submitted, is that it felt that 8(d) had no bearing on successorship cases.

Porter, read with the awareness that *Wiley* preceded it, also supports the inference that the Supreme Court saw no clear relationship be-

²⁶ 29 U.S.C. § 158(d) (1970).

²⁷ The *Wiley* Court stated that: "This Union does not assert that it has any bargaining rights independent of the . . . [predecessor's] agreement; it seeks to arbitrate claims based on that agreement, now expired, not to negotiate a new agreement." 376 U.S. at 551 (emphasis added). It is apparent from this statement that the arbitrator's frame of reference in resolving disputes was intended by the Court to be the contract between the predecessor and the union. It follows that the arbitrator had the power to compel the successor employer to honor the substantive terms of that contract.

tween section 8(d) and successorship cases. This is so because the *Porter* opinion, relying wholly on section 8(d), fails to mention *Wiley* or the cases that followed it. If it is considered that successorship is a unique phenomenon, not to be equated with an original employer-union situation for 8(d) purposes, this omission is wholly logical; there is no reason that the *Porter* Court should take into account a line of cases that fall into a category requiring different treatment from that required by the *Porter* fact situation. However, it is submitted that had the *Porter* Court felt that successorship cases required similar treatment, it should have felt compelled to deal—at least for purposes of distinguishing—with the *Wiley* line of cases. *Porter* held that an employer cannot be compelled to agree to a term of a collective bargaining agreement. *Wiley* ordered the successor employer to honor a contractual term to which it had not agreed. Had the *Porter* Court seen no basis for different treatment in the fact that the latter case dealt with a successor, it should have felt compelled to deal with the *Wiley* precedent in justifying its *Porter* holding.

In light of the lack of legislative language clearly applying section 8(d) to successorship cases, and the failure of the Supreme Court to recognize such applicability in *Wiley* and *Porter*, it is submitted that no clear legislative mandate for the *Burns* holding exists. In view of the fact that no such mandate is evident, this case note takes the position that an elucidation of the underlying policy considerations of the NLRA is necessary to justify why the *Burns* Court held as it did.

One of the main purposes of the National Labor Relations Act was clearly to put an end to, or at very least ameliorate, rampant strife in labor relations which was adversely affecting interstate commerce.²⁸ The 'collective bargaining process, under which the employer would have to face his employees' chosen representative and attempt to come to terms acceptable to both, was settled upon—and, so experience proved, with great justification²⁹—as the central means through which such industrial peace might best be furthered.³⁰ The hoped-for end of the collective bargaining process would be the collective bargaining contract, mandatorily

²⁸ See, e.g., Congressman Truax's statement on the floor of the House:

To those unfamiliar with the strife that has been engendered by . . . unfair labor practices . . . it might be well to recall that the dire need for this bill, ever-growing industrial unrest, is caused first by the denial of the right of employees to organize and by the refusal of employers to accept the procedure of collective bargaining

²⁹ Cong. Rec. 9715 (1935). Dissenting in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 297 (1956), Justice Frankfurter noted:

[T]he important considerations in promoting peaceful industrial relations which might well have determined the action of Congress [in formulating the Act.] In the first place, the Congress may have set a very high value on peaceful adjustments, i.e., the absence of strikes. One may take judicial notice of the fact that this consideration was at the very forefront of the thinking and feeling of the Eightieth Congress.

³⁰ *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 1218, 28 L.R.R.M. 1266 (1964).

³⁰ *Id.*

observed once signed, but composed of terms voluntarily arrived at. No sooner did this contract become part of the Act's goal than it appeared that the Act's authors had unwittingly imported a conflict into their legislation. The policy of freedom of contract was not a stated end of the NLRA; it was more than that, an overarching principle of common law, a given, long settled beyond questioning. This policy and the Act's central policy of curbing industrial strife through maintaining the integrity of the collective bargaining process which would find its ultimate embodiment in a new kind of contract were bound to clash—and so they have. Congress' effort to adjust the conflict by making it clear in the 1947 amendment, section 8(d), that the Act was not intended to contravene freedom of contract transferred the Act from the proverbial frying pan to fire, for thereafter the Act could be interpreted—perhaps *must* be interpreted—as embodying two often irreconcilable policies: freedom of contract and the achievement of industrial peace through stabilization of collective bargaining agreements.

It appears that section 8(d) itself—at least insofar as it applies to successorship cases—is the repository of the two conflicting policies. On one hand it expressly states that the obligation to bargain “does not compel either party to agree to a proposal or require the making of a concession. . . .”³¹ Within the same paragraph, however, it provides, with certain stated exceptions, that, “where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract”³² The first of these phrases is clearly an embodiment of the policy of freedom of contract; the latter embodies the policy of maintaining stability through insuring the preservation of the collective bargaining agreement. While the freedom of contract policy is grounded in the common law tradition, the latter policy is derived from the conviction that once the collective bargaining agreement becomes viable it serves effectively to prevent strife and thereby to encourage industrial stability. Institution of unilateral changes during the effective term of a collective bargaining contract has been made an unfair labor practice under section 8(a)(5).³³

It is possible to trace the history of the National Labor Relations Act so as to show that the Act was conceived as an embodiment of freedom of contract,³⁴ clearly understood by Congress³⁵ and the Su-

³¹ 29 U.S.C. § 158(d) (1970).

³² *Id.*

³³ *Winn-Dixie Stores, Inc.*, 147 N.L.R.B. 788, 56 L.R.R.M. 1266 (1964).

³⁴ “The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions.” *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970).

³⁵ The *Porter* Court evaluated the legislative intention as follows: “This fundamental limitation was made abundantly clear in the legislative reports accompanying the 1935 Act. The Senate Committee on Education and Labor stated:

preme Court³⁶ to be so, and later amended in such a way as to guard against possible erosion of that freedom.³⁷

In *Porter*, the Supreme Court expressly recognized that freedom of contract is a "fundamental" policy of the Act.³⁸ The policy of freedom of contract relied upon by the *Porter* Court is evidenced both in the legislative history of the labor laws and their judicial interpretation. In congressional debate concerning the Act, the Act was interpreted as follows:

... [T]his bill, which is evidently very much misunderstood ... seeks to make effective the right of employees to organize and engage in collective bargaining It does not require an employer to sign any contract, to make any agreement, to reach any understanding with any employee or group of employees. The board created in the bill is not empowered to settle labor disputes; nothing in the bill allows the Federal Government or any agency to fix wages, regulate rates of pay, limit hours of work, or to effect or govern any working conditions in any establishment. . . . This bill is designed to put into force and effect the principle of collective bargaining."³⁹

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

[S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935)], The discussions on the floor of Congress consistently reflected this same understanding." *Id.* at 104 (footnote omitted).

³⁶ "In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), this Court . . . held that Congress was within the limits of its constitutional powers in passing the Act. In the course of that decision the Court said:

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."

397 U.S. at 105 (citation omitted).

³⁷ *Id.* at 105-06, discussing the Taft-Hartley Amendments.

³⁸ *Id.* at 107-08.

³⁹ 79 Cong. Rec. 9711 (1935) (Remarks of Congressman Welch). See also Senator Walsh's interpretation of the Act:

Let me emphasize again: when the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it. It anticipates that the employer will deal reasonably with the employees, that he will be patient, but he is obliged to sign no agreement.

Id. at 7660. The point was also stressed by Congressman Griswold, who stated:

The whole object of the bill, the only object, and the object we should not lose sight of is that in this concentrated business of collective bargaining on the part of business we should also have collective bargaining on the part of the

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In *NLRB v. Jones & Laughlin Steel Corp.*,⁴⁰ the constitutionality of the Act's requirement that an employer be compelled to bargain with his employees' union was challenged, and the Act was held to be constitutional. The Supreme Court, referring to the underlying purpose of the Act, stated:

The Act does not compel agreements between employers and employees. It does not compel any agreement whatever The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act itself does not attempt to compel.⁴¹

When the Act was amended in 1947, a House committee report noted that "the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make" and expressed concern lest, without guidelines provided by Congress, the Board "carry this process still further and seek to control more and more the terms of collective-bargaining agreements."⁴² This report, in itself a reaffirmation of the legislative intent that the Act provide only the framework for collective bargaining and in no way allow the substantive terms of an employee-employer contact to be dictated, led to the inclusion in Section 8(d) of language which definitively set out that the employer and the union representative must meet

. . . and confer in good faith with respect to wages, hours, and other terms or 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, *but such obligation does not compel either party to agree to a proposal or require the making of a concession*⁴³

As much as the Act embodies the policy of freedom of contract, however, so does it embody that of preservation of industrial peace through maintaining the integrity of the collective bargaining agreement. The Act grew out of Congress' conviction that interstate commerce was being adversely affected by strife in labor relations;⁴⁴ the collective

employee This bill does not adjust labor disputes; it puts both sides in a position where they can adjust them.

Id. at 9682.

⁴⁰ 301 U.S. 1 (1937).

⁴¹ Id. at 45.

⁴² H.R. Rep. No. 245, 80th Cong., 1st Sess. 19-20 (1947).

⁴³ 29 U.S.C. § 158(d) (1970).

⁴⁴ See note 28 supra.

bargaining machinery was set up as a means by which employers and employees could discuss and hopefully agree upon a solution to their differences. Industrial peace was a goal of the Act; collective bargaining, the chosen means by which this goal was to be achieved.⁴⁵ Section 1 of the Act includes language which sets forth the centrality of the collective bargaining process:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.⁴⁶

And in his dissent in *United Mine Workers v. Pennington*,⁴⁷ a case dealing with the application to labor of the antitrust laws, Justice Goldberg alluded a number of times to the legislature's intent that industrial peace through collective bargaining be established in the Act as a goal of the national labor policy: "The history of labor relations in this country shows, as Congress has recognized, that progress and stability for both employers and employees can be achieved only through collective bargaining agreements involving mutual rights and responsibilities."⁴⁸

Further support of this view is evidenced by the protection of the sanctity of the collective bargaining contract through the unfair labor practice machinery of the Act. The institution of unilateral changes during the term of a collective bargaining contract is a violation of section 8(a)(5), with the usual range of remedies available to the injured employee or employer.⁴⁹ In a notable 8(a)(5) case, *Fibreboard Paper Products Corp. v. NLRB*,⁵⁰ the Supreme Court held that the employer's contracting out, when consisting of replacement of employees in an existing bargaining unit with those of an independent contractor to do identical work under like conditions of employment, was a statutory subject of collective bargaining under section 8(d) and that unilateral contracting out of this sort was an unfair labor practice under section 8(a)(5).⁵¹ It is reasonable to infer that by so deciding the Court recog-

⁴⁵ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

⁴⁶ 29 U.S.C. § 151 (1970).

⁴⁷ 381 U.S. 657 (1965).

⁴⁸ *Id.* at 722 (dissenting opinion). Justice Goldberg also stated that: "The National Labor Relations Act also declares it to be the policy of the United States to promote the establishment of wages, hours, and other terms and conditions of employment by free collective bargaining between employers and unions." *Id.* at 711 (dissenting opinion).

⁴⁹ The remedies available are set forth in 29 U.S.C. § 160(c) (1970).

⁵⁰ 379 U.S. 203 (1964).

⁵¹ *Id.* at 215.

nized, at least by implication, the importance of maintaining the integrity of the collective bargaining contract. The contract is the embodiment of an agreement at which the employer and the representative of the employees have arrived. A unilateral change by either party is tantamount to a statement that the contract is only to be abided by when it is convenient to abide by it—in other words, that it is altogether meaningless, or at least potentially so. To allow the contract, which is the hoped-for culmination of the whole collective bargaining process, to be thus rendered nugatory, would make a mockery of collective bargaining. Protection against such an eventuality, which is offered by making unilateral changes during the term of a collective bargaining agreement into a section 8(a)(5) unfair labor practice, demonstrates the Court's recognition that just as collective bargaining is central to the purpose of the Act,⁵² so is maintenance of the collective bargaining agreement crucial to the meaningful operation of the process as a whole.

The Board's position as summarized by the Supreme Court in *H. J. Heinz Co. v. NLRB*,⁵³ was that the collective bargaining contract had a seminal position in the Act's general plan of reducing industrial strife:

[T]he history of the collective bargaining process . . . [demonstrates] that its objective has long been an agreement between employer and employees as to wages, hours and working conditions evidenced by a signed contract or statement in writing, which serves both as recognition of the union with which the agreement has been reached and as a permanent memorial of its terms [T]he signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife.⁵⁴

It can be inferred, then, that Congress saw stability of collective bargaining agreements as essential to attainment of the goal of industrial peace. And it is clear that the importance of collective bargaining, along with freedom of contract, was central to the Act.

It has been submitted that no clear legislative mandate for the Court's *Burns* decision exists and that both *Porter* and *Wiley* are distinguishable from *Burns* on their facts. On those grounds it would seem that the only adequate justification for the decision is that the Court determined that the policy of freedom of contract outweighs the policy of preserving industrial peace through maintaining the integrity of the collective bargaining agreement: "Preventing industrial strife is an important aim of federal labor legislation, but Congress has not chosen to make the bargaining freedom of employers and unions totally subordi-

⁵² *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

⁵³ 311 U.S. 514 (1941).

⁵⁴ *Id.* at 523-24 (emphasis added) (citations omitted).

nate to this goal."⁵⁵ Influencing this decision on the Court's part was another policy issue, in this instance arising not out of the Act, but out of the realities of the business community: that of possible unfairness to the employer inherent in a successor's being made to assume his predecessor's collective bargaining contract, and the resultant negative effect upon industrial peace: "We also agree with the Court of Appeals that holding either the union or the new employer bound to the substantive terms of an old collective bargaining contract may result in inequities."⁵⁶

The majority found the potential for unfairness to both sides inherent in the fact that a successor employer, regardless of how convincingly it be argued that he "stands in the shoes"⁵⁷ of his predecessor vis-à-vis collective bargaining with the union, is nevertheless *not* that predecessor, but a new and unique employer with new and unique characteristics:

A potential employer may be willing to take over a moribund business only if he can make changes in corporate structures, composition of the labor force, work location, task assignment, and nature of supervision On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm.⁵⁸

A rule requiring a successor to honor the substantive terms of his predecessor's bargaining contract, therefore, might well be self-defeating in that the crippling restraints placed upon employer and union alike will serve to retard industrial peace more surely than the stability inherent in contract survival will tend to promote it.⁵⁹ Nor will the ripples created stop with the employer and the union: to any extent to which takeover and subsequent bolstering of failing companies is discouraged, company stockholders and eventually the general public also join the roster of those negatively affected.⁶⁰ The truth of this contention is difficult to dispute. The attempt can be made, however—and in reaction to the Second Circuit's decision in *Burns*, has been made⁶¹—to outweigh it with another truth: the overwhelming imbalance of security in favor

⁵⁵ 406 U.S. at 287.

⁵⁶ *Id.*

⁵⁷ William J. Burns Int'l Detective Agency, Inc., 182 N.L.R.B. 348, 350, 74 L.R.R.M. 1098, 1101 (1970).

⁵⁸ 406 U.S. at 287-88.

⁵⁹ "A requirement of concession on [substantive terms] will dampen the desire to trade and thus chill the bargaining process. Therefore, while employer concession as to some minor issues may be necessary to demonstrate good faith, total concession is not only unnecessary, but also undesirable." Comment, 1968-1969 Annual Survey of Labor Relations Law, 10 B.C. Ind. & Com. L. Rev. 785, 852 (1969).

⁶⁰ Comment, 36 Geo. Wash. L. Rev., *supra* note 18, at 223.

⁶¹ Doppelt, *supra* note 18, at 185; Comment, 25 Okla. L. Rev. 132, 138 (1972). But see Comment, 21 Syr. L. Rev., *supra* note 18, at 894.

of the employer if the union cannot depend upon a collective bargaining agreement to survive a change of employers.⁶²

Had Wackenhut remained the employer and hired several new guards, these guards would have been bound by the terms of the Wackenhut-UPG contract.⁶³ Why, then, should the former Wackenhut guards who went to work for Burns when Burns took over—employees whose very action in remaining to work for the successor evinces their conception of themselves neither as “Wackenhut employees” nor as “Burns employees,” but as “security guards at Lockheed”—have to settle for any lesser degree of security?⁶⁴ The knowledge that the agreement in which their basic security resides⁶⁵ is tantamount to an agreement between them and a particular employer, rather than to an agreement between them and an ongoing employing entity—and the subsequent knowledge that the agreement’s continued existence is to be governed by an individual’s decisions rather than by the comparatively stable fortune of an employing industry—could foster in the workers a sense of insecurity which might well militate against labor-management harmony. What ought to be a shield for employees could therefore turn into a Sword of Damocles.

The prospective impact of the Supreme Court’s *Burns* decision is unclear. That the emphasis in deciding *Burns* might have fallen upon the preservation of industrial peace rather than the preservation of freedom of contract is attested to not only by the Board’s *Burns* decision, in which the former policy was given ruling effect,⁶⁶ but also by the reaction of a number of legal scholars after the Court of Appeals’ reversal of the Board.⁶⁷ The furthering of either policy may, in many situations, automatically imply a relative flouting of the other. In any such event, the weighing and balancing of interests that must take place in order to decide which of the goals to effectuate—and, concomitantly, which to temporarily relegate to a lesser importance—requires that the precise

⁶² 182 N.L.R.B. at 350, 74 L.R.R.M. at 1101.

⁶³ Cf. Statement of M. Gottesman to N.Y.U. 18th Annual Conference on Labor, April 1965, reported at 58 L.R.R.M. 43, 44 (1965).

⁶⁴ *Id.*

⁶⁵ 182 N.L.R.B. at 350, 74 L.R.R.M. at 1101.

⁶⁶ William J. Burns Int’l Detective Agency, Inc., 182 N.L.R.B. 348, 74 L.R.R.M. 1098 (1970).

⁶⁷ See, e.g., Comment, 25 Okla. L. Rev. 132, *supra* note 61, where the author concludes that “[t]he lack of any significant interference with the substantive results of private collective bargaining coupled with the strong national labor policy in favor of industrial peace in labor relations . . . argue for the validity of the Board’s decision in *Burns*.” *Id.* at 136.

See also Doppelt, *supra* note 18, at 185, who argues in support of the Board’s *Burns* decision:

The *Burns* rule . . . can further the basic labor policy of avoiding “industrial strife.” With *Burns*, all parties know where they stand from the outset of their relationship. They are aware of their mutual rights and obligations. This ordinarily reduces confrontations and disputes, necessarily adding to labor stability.

But see, Patrick, Implications of the John Wiley Case for Business Transfers, Collective Agreements, and Arbitration, 18 So. Car. L. Rev. 413, 430 (1966).

facts at hand be carefully considered. Slight differences in facts could easily and justifiably tip the balance one way or the other. This is not to say that the facts in *Burns* might not necessitate a decision identical to that in *Porter*, but merely that, because of the difference in fact situations, the extrapolation is not an automatic one. The Court leaves its *Burns* holding—at least, insofar as it is based on *Porter*—dangerously vulnerable by omitting both an acknowledgement of the differences between the two cases and an explication of any reasons they may have for seeing such a difference as, for the purposes of the *Burns* decision, irrelevant. This dual omission leaves room for critics of the opinion to speculate that no such reasons exist.

Viewed in the light of recent Court and Board cases dealing with the issue of contract survival, the Board's *Burns* rule was not the epitome of heresy, but a logical and anticipated developmental step in a new orthodoxy. *Wiley*, with its break with traditional concepts of privity of contract through recognition of the collective bargaining agreement as being in a unique class of contracts not susceptible of conventional contract-law treatment,⁶⁸ was not left to stand alone, a judicial aberration to be distinguished and ultimately overruled. The Ninth Circuit, in *Wackenhut Corp. v. United Plant Guard Workers*⁶⁹ held that a successor employer which had purchased the assets of a limited partnership and hired substantially all of the partnership's employees was bound by the predecessor's collective bargaining agreement. The *Wackenhut* court gave *Wiley* a broad interpretation, viewing its rule as applicable to a sale as well as to a merger, and further seeing it as requiring total contract survival. The Third Circuit, in *United Steelworkers of America v. Reliance Universal, Inc.*,⁷⁰ retreated somewhat from *Wackenhut* in that it limited its holding to the successor's duty to arbitrate; however, the possibility of full contract survival was left an open-ended question under *Reliance*, which gave the collective bargaining agreement a special status as "an embodiment of the law of the shop . . . the basic charter of labor relations at the . . . plant after the change of ownership,"⁷¹ and left to the arbitrator's discretion the extent to which this charter should bind the successor employer. The Fifth Circuit, in *United States Gypsum Co. v. United Steelworkers of America*,⁷² held a successor bound by the substantive provisions of his predecessor's collective bargaining contract despite the union's loss of majority status and decertification. Relying upon *Wiley*, the Board ruled in *Overnight Transportation Co.*⁷³ that a successor's effecting of unilateral changes before bargaining with the predecessor's union constituted an unfair labor practice, thus effectively if not explicitly man-

⁶⁸ *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964).

⁶⁹ 332 F.2d 954, 958 (9th Cir. 1954).

⁷⁰ 335 F.2d 891, 894 (3d Cir. 1964).

⁷¹ *Id.* at 895.

⁷² 384 F.2d 38 (5th Cir. 1967).

⁷³ 157 N.L.R.B. 1185, 61 L.R.R.M. 1520 (1966), enforced, 372 F.2d 765 (4th Cir.), cert. denied, 389 U.S. 838 (1967).

dating survival of the substantive terms of the contract.⁷⁴ And in *Perma Vinyl Corp.*,⁷⁵ the Board ordered a successor to remedy unfair labor practices perpetrated by its predecessor. Seen in the light of this line of cases, the Board's *Burns* decision was not a new rule, but a codification of a practice already in existence.⁷⁶ From this point of view, the Supreme Court's *Burns* decision may be seen as a step backwards, a rejection of the most viable means of balancing two major policies underlying the National Labor Relations Act: freedom of contract, and industrial peace through collective bargaining.

From another point of view, however, the Supreme Court's decision in *Burns* is a return to the status quo⁷⁷ from a deviation—consisting of *Wiley* and its progeny—which was at best ambiguous and at worst catastrophic.⁷⁸ From this vantage point, *Wiley* is seen as a heretical decision which exposed labor relations in general to a state of upheaval and uncertainty by making an assault against the previously unassailable bulwark of freedom of contract. The Board's *Burns* decision is concomitantly seen as an overt statement of a doctrine that could have been

⁷⁴ "Although this case [*Overnite*] does not stand for the proposition that under Board law a successor employer must adopt the terms of its predecessor's contract, the result of the decision is practically the same." Sangerman, *The Labor Obligations of a Successor to a Unionized Business*, 19 Lab. L.J. 160, 175 (1968). Since the Supreme Court's decision in *Burns*, a Board order similar to that in *Overnite* has been denied enforcement insofar as it required the successor to refrain from making unilateral changes in the terms of its predecessor's bargaining agreement. *NLRB v. Wayne Convalescent Center, Inc.*, — F.2d —, 81 L.R.R.M. 2129 (6th Cir. 1972). In *Wayne* a successor employer, although cognizant of an agreement between his predecessor and a union, nevertheless instituted new regulations concerning paid vacations, wage rates, and sick leave benefits. The Board, deciding prior to the *Burns* decision, ruled that the successor violated its duty to bargain by making unilateral changes. The Sixth Circuit, deciding after *Burns* and concentrating particularly on the language in the *Burns* opinion discussing the severe impediment that a requirement of total contract survival could prove to potential successors to moribund businesses, held that the changes made were the employer's initial terms of employment, about which no negotiation with the union was necessary. In light of *Burns*, the Board, too, has adopted a position similar to that of the Sixth Circuit. In *Hecker Mach., Inc.*, 198 N.L.R.B. No. 161, 1972 CCH Lab. Cases ¶ 24,555, the Board held that a successor was not obliged to uphold the substantive terms of its predecessor's collective bargaining agreement.

⁷⁵ 164 N.L.R.B. 968, 65 L.R.R.M. 1168 (1967), enforced sub. nom. *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

⁷⁶ Doppelt, *Successor Companies: The N.L.R.B. Limits the Options—And Raises Some Problems*, 20 DePaul L. Rev. 176, 184 (1971); Bernstein, *Labor Problems on Acquisitions and Sale of Assets*, in *Proceedings of N.Y.U. Twenty-second Annual Conference on Labor* 103 (T.G. Christenson ed. 1970). But see Comment, 21 *Syr. L. Rev.* 875, 882-88 (1970) for a treatment of these cases as misinterpretations of *Wiley*, and not the components of a new rule. This commentator viewed these cases as possible precursors of a dangerous new rule about to be formulated (which fear was realized in the Board's *Burns* decision).

⁷⁷ The majority in *Burns* points out that "the Board's prior decisions . . . until now have consistently held that, although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them." 406 U.S. at 284.

⁷⁸ Comment, *supra* note 76, at 876.

distinguished away as a mere implication in *Wiley*, and as a misreading of *Wiley* in such cases as followed and/or expanded upon it. Adherents of this view will welcome the new Supreme Court ruling as a boon to employers and employees alike, at once both a laying to rest of the ambiguities set in motion by *Wiley*—e.g., is a successor obliged to honor all the substantive terms of his predecessor's union contract, or merely those mandating arbitration?—and an evasion of the equally ambiguous possibilities⁷⁹ inherent in the Board's *Burns* rule—for instance: to what extent will a successor have to follow his predecessor's precise hiring and firing standards, pension plan, and seniority determinations?

The two lines of opinion regarding total contract survival—that which argues in favor of it with employees' security and prevention of industrial strife in mind, and that which argues against it armed with observations concerning the evils of shackling employers, each seeing the greater well-being of the industrial community as hinging upon the factors which it emphasizes—have long been recognized.⁸⁰ Out of the first of these camps emerges the Board's *Burns* decision; out of the second, the Supreme Court's. The split of opinion, both judicial and academic, and the acknowledgement of the advantages and drawbacks implicit in either position, bespeak a frustratingly balanced issue. It is submitted that the new *Burns* decision runs the risk of being treated—both as a result of the language employed by the Court and because of the large number of proponents and detractors alike of both sides of the

⁷⁹ Doppelt, *supra* note 76, at 186-90.

⁸⁰ In 1967, Board Member J. H. Fanning recognized the relatively balanced merits of the two lines of opinion that have formed around the issue of survival of the substantive terms of a collective bargaining contract:

There is one body of responsible opinion that argues for the strict application of the contract where it can be established that despite a change in ownership there is a continuity of employer identity based on operational criteria and the contract stays within the reasonable duration set by the Board. The advocates of this position look upon the collective bargaining agreement as a kind of quasi-public regulatory code which governs the industrial community and which acts as a shield for employees against sudden changes in their employment status wrought by entrepreneurial rearrangements. A kind of immutability is attached to this code based upon the fact that the establishment of industrial government in the industrial community is not imposed for its own sake alone, but for the broader purpose that the still greater interest of the national community, of which the industrial community is but a part, is entitled to protection as well.

An equally responsible body of opinion maintains that the humanitarian-motivated solicitude for employees affected by a change of employers tends to be too impractical and unrealistic under the highly competitive demands of today's business world. It will be only the most unusual employer, argue the advocates of this position, who will walk into the mare's nest that "being bound by the contract" entails. Thus, say the proponents, if a successor is to be the rescuer of a moribund or even uneconomical enterprise, he must not be shackled by an impediment which may prevent him from making those changes which in his business judgment are in the best interests of the . . . employees themselves by improving their job security.

Address by John H. Fanning at the Annual Convention of the State Bar of Texas, July 7, 1967, reprinted in 1967 Labor Relations Yearbook 284, 292.

contract survival issues—as not having been decisive of the issue at all. *Burns* does not overrule *Wiley*, but merely distinguishes it on its facts; the Court's rejection of the "spirit" interpretation of *Wiley* can likewise be viewed by the Board and courts in future decisions as being applicable only to the precise fact situation in *Burns*. Since *Burns* does not present the usual successorship situation,⁸¹ it will not take very sophisticated manipulation to distinguish this case from the fact situations in future successorship cases.

A court wishing to find a duty of a successor to continue his predecessor's contract would merely have to find that succession to the business had occurred through a sale of assets in order to hold that the fact situation is sufficiently different so that the *Burns* rule need not be applied, much as the *Burns* Court distinguished *Wiley* partly on the basis of its having arisen in the context of a merger. Such court would then be in the following quandary: on one hand, it would have *Wiley*, not overruled by *Burns* and arguably applicable; on the other hand it would have the *Burns* rule, the Supreme Court's last word—but arguably confined to one discrete type of successorship case. At best, this hypothetical court is free to choose between *Wiley* and *Burns*; at worst, squarely facing the fact that neither *Wiley* nor *Burns* directly and clearly applies to the sale of a business, it might choose to formulate an altogether new rule. On the other hand, judicial bodies that so desire will be able to find in the *Burns* holding a basis for refusing to bind a successor to the substantive terms of its predecessor's labor contract, even in a fact situation differing from that of *Burns*.

By specifying that "[r]esolution turns to a great extent on the precise facts involved here,"⁸² and yet in relying for that resolution largely upon *Porter*, the facts of which are quite different from the facts in *Burns*, the Court left itself open to precisely the kind of interpretation that it rejected when applied to *Wiley*. Future decisions, wholly contradictory of each other, may well find equal reason for reliance upon *Burns*, depending on whether they have chosen to interpret it as applying only in cases presenting similar facts or as implying an extrapolation to all successorship cases.

The answer seems clear: if *Burns* has failed to settle the upheaval initiated by *Wiley*, if neither Court nor Board seems able to formulate an unambiguous, comprehensible rule that will have application to any given variant of the successorship situation, the reason well may be that

⁸¹ In a usual successorship situation, a sale of the predecessor's assets, or a substantial portion thereof, occurs. The traditional standards for successorship have been articulated as follows: "[I]n applying the standard of substantial continuity of the business enterprise, the courts have tended to focus on whether: (1) the new employer has acquired substantial assets of the employer originally under contract with the union; (2) the new employer has continued its predecessor's business in the same or similar manner; and (3) the new employer has hired a substantial proportion of its predecessor's employees." Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw. U. L. Rev. 735, 750-51 (1969).

⁸² 406 U.S. at 274.

no such rule is capable of judicial formulation. If the Board and the Court examine and reexamine, interpret and reinterpret the NLRA with results that add less to the fund of knowledge than to the morass of confusion that surrounds the successorship question, it well may be because they are searching for something that simply isn't there. The Board has tried; the Supreme Court has tried. It is time for the legislature to take on the ever-expanding area of successorship.

NELL MARGOLIS

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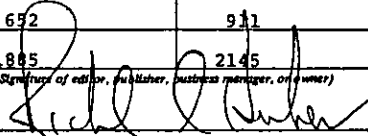
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