Recent Development

Labor Law—SUCCESSORSHIP—Successor employer held to have no duty to arbitrate its obligations to seller's former employees when no substantial continuity in work force exists.—*Howard Johnson Co. v. Detroit Local Joint Executive Board,* 94 S. Ct. 2236 (1974).

In a recent decision, *Howard Johnson Co. v. Detroit Local Joint Executive Board,*[1] the United States Supreme Court was again faced with the problem of defining the legal obligations of a "successor" employer to the employees of his predecessor. The Court held that, where there was no substantial continuity of identity in the work force hired by the buyer with that of the seller and where there was no express or implied assumption of the agreement to arbitrate, the buyer was not obligated to arbitrate the extent of its obligations to the seller's employees.[2]

In *Howard Johnson,* the Grissom family, who were owners of a motel and adjacent restaurant, entered into collective bargaining agreements with the two unions representing their employees. Both agreements contained arbitration provisions and provided that the agreements would be binding on the employer's successors, purchasers, or lessees.[3] The Grissoms then sold the personal property used in their business to Howard Johnson but retained ownership of the real property, which was leased to the purchaser. Prior to consummation of the sale, Howard Johnson explicitly refused to assume any obligations from the labor agreements between the seller and the unions.[4] To begin its operations, the buyer hired forty-five employees, nine of whom had been employed by the Grissoms.[5]

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[1]94 S. Ct. 2236 (1974).

[2]*Id.* at 2244.

[3]*Id.* at 2238.

[4]Howard Johnson sent the Grissoms a letter, which they later acknowledged, stating in part that "[i]t was understood and agreed that the Purchaser . . . would not recognize and assume any labor agreements between the Sellers . . . and any labor organizations," and that it was agreed that "the Purchaser does not assume any obligations or liabilities of the Sellers resulting from any labor agreements." *Id.*

[5]The Grissoms had a total of fifty-three employees. Howard Johnson started operations with thirty-three restaurant employees and twelve motor lodge employees. Of these only nine of the restaurant employees had previously been employed by the Grissoms. *Id.*

The union filed an action in a Michigan state court. The action, based on section 301 of the Labor Management Relations Act[6] (L.M.R.A.) which in subdivision (a) authorizes suits for violation of collective bargaining contracts,[7] was subsequently removed to the United States District Court for the Eastern District of Michigan. The union sought an order compelling both the seller and the purchaser to arbitrate the extent of their obligations to the seller's employees under the bargaining agreements.[8] The district court so ordered[9] and the Sixth Circuit Court of Appeals affirmed.[10] On certiorari, the United States Supreme Court reversed.[11] Justice Marshall delivered the eight to one opinion of the Court and Justice Douglas filed a dissenting opinion.[12] The Court held that since Howard Johnson's work force bore no substantial continuity of identity with that of the Grissoms and since Howard Johnson had not expressly or impliedly assumed the agreement to arbitrate, Howard Johnson was not compelled to arbitrate the extent of its obligations to the former Grissom employees.[13]

In an earlier successorship case, *John Wiley & Sons, Inc. v. Livingston*,[14] the Supreme Court found that a duty to arbitrate continued when there was both relevant similarity and continuity of operation bridging the change of ownership. These factors were evidenced by the wholesale transfer of all employees of the disappearing corporation to the plant of the surviving corporation.[15] The Court held that all of the rights covered by the collective bargaining agreement of the employees of the disappear-

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[6]29 U.S.C. § 185(a) (1970).

[7]94 S. Ct. at 2238-39.

[8]The sellers admitted their obligation to arbitrate under the terms of the collective bargaining agreements. *Id.* at 2239.

[9]The district court denied the union's motion for a preliminary injunction which would require Howard Johnson to hire all of the former Grissom employees, however, and granted a stay of its arbitration order pending appeal. Civil No. 38,654 (E.D. Mich., August 22, 1972).

[10]Detroit Local Joint Executive Bd. v. Howard Johnson Co., 482 F.2d 489 (6th Cir. 1973).

[11]94 S. Ct. at 2239.

[12]*Id.* at 2244.

[13]*Id.*

[14]376 U.S. 543 (1964).

[15]*Id.* at 551. The Court took note of the fact that the union made its position known to Wiley well before the merger. The union did not assert any bargaining rights independent of the Interscience agreement. The union sought to arbitrate claims based on that agreement, not to negotiate a new agreement.

ing corporation were not automatically terminated by the fact of the corporate merger.[16]

In its more recent decision in *NLRB v. Burns International Security Services, Inc.*,[17] the Court held that a successor employer may be required to recognize and bargain with the union when a majority of the employees hired by the successor were previously represented by a recently certified union.[18] However, the Court also held that the new employer, who had not agreed to assume the substantive terms of the collective bargaining agreement negotiated by its predecessor, was not bound by those terms.[19] In *Howard Johnson*, the Court neither reconciled nor overturned *Wiley* and *Burns* but, instead, relied on both of them in reaching its decision.

Since the lower courts distinguished *Wiley* from *Burns*, it is necessary to consider the fundamentals of each of these cases in order to understand the holding of the Supreme Court in *Howard Johnson*. *Wiley* was an action to compel arbitration brought by the union against the successor employer under section 301 of the L.M.R.A.[20] Interscience Publishers, Inc., which had a collective bargaining contract containing no successorship clause, merged with John Wiley & Sons, Inc., and Interscience ceased to exist as a separate entity.[21] The merger was subject to a state law which provided that claims against a corporation were not extinguished by a consolidation.[22] Wiley retained all of the predecessor's employees.[23] The union claimed it continued to represent those Interscience employees taken over by Wiley and, therefore, Wiley was obligated to recognize certain employee rights which had "vested" under the Interscience collective bargaining contract.[24] Wiley's

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[16]*Id.* at 548.

[17]406 U.S. 272 (1972).

[18]*Id.* at 281.

[19]*Id.* at 284.

[20]29 U.S.C. § 185 (1970). This section authorizes suit for violation of labor contracts. Section 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[21]376 U.S. at 544-45.

[22]*Id.* at 547-48.

[23]*Id.* at 545. Of the eighty Interscience employees at the time of the merger, forty were represented by the union.

[24]The union contract expired on January 31, 1962. Interscience and Wiley merged on October 2, 1961. The issues which the union sought to arbitrate were:

position was that it should not be compelled to arbitrate since it was not a signatory to the bargaining agreement upon which the union's claim to arbitration depended.[25]

The Supreme Court ordered Wiley to arbitrate with the union.[26] In its reasoning, the Court emphasized the central role of arbitration in national labor policy[27] and the need to afford some protection to employees during the transition from one employer to another.[28] Negotiations leading to a change in corporate ownership do not usually concern the well-being of the employees, and the Court felt that the transition from one corporation to another would be eased if employee claims were resolved by arbitration rather than by "the relative strength . . . of the contending forces."[29] The Court stated that an ordinary contract, which would not bind an unconsenting successor, differed from a collective bargaining agreement, which is a "generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate."[30] A collective bargaining contract is not the simple product of a

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(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962.

(b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962.

(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect.

(d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract.

(e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract.

Id. at 544-45, 552.

[25]*Id.* at 548.

[26]The Court held:

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

Id.

[27]United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

[28]376 U.S. at 549.

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

[30]376 U.S. at 550, *quoting from* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79 (1960).

consensual relationship. Since Wiley's predecessor, Interscience, was a party to the collective bargaining contract and there was found to be a substantial continuity of identity in the business enterprise after the change in ownership, the duty to arbitrate was not something imposed from without, but rather was to be found in the particular bargaining agreement and in the acts of the parties.[31]

Burns was an unfair labor practice action. Upon acceptance of its contract bid, Burns replaced the Wackenhut Corporation, which had provided plant protection services at the Lockheed Aircraft Service Company.[32] Wackenhut had a bargaining agreement with the United Plant Guard Workers of America (UPG), which had been recently certified by the NLRB as the exclusive bargaining representative of Wackenhut's employees.[33] Before it replaced Wackenhut, Burns knew that Wackenhut's guards had a collective bargaining contract with the UPG, but Burns did not agree to be bound by the contract.[34] When Burns took over, it hired forty-two guards, twenty-seven of whom had been employed by Wackenhut. Burns subsequently refused to bargain with the UPG.[35]

The UPG then filed unfair labor practice charges, claiming that Burns had violated sections 8(a)(2) and 8(a)(1)[36] by unlawfully recognizing the American Federation of Guards, a rival of the UPG, and that Burns had violated sections 8(a)(1) and 8(a)(5)[37] by failing to recognize and bargain with the UPG and by refusing to honor the collective bargaining agreement negotiated by Wackenhut and the UPG.[38] Burns did not challenge the unlawful assistance finding but did challenge the appropriateness

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[31]376 U.S. at 550-51.

[32]Burns did not acquire any of Wackenhut's assets. Burns competed with Wackenhut for the contract to provide plant guards for Lockheed. 406 U.S. at 275.

[33]*Id.* at 274.

[34]*Id.* at 275.

[35]*Id.* Burns issued cards for the American Federation of Guards to the twenty-seven guards hired from Wackenhut.

[36]29 U.S.C. § 158(a) (1970) provides in pertinent part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . .

[37]29 U.S.C. § 158(a)(5) (1970) provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees."

[38]406 U.S. at 276.

of the bargaining unit and denied the obligations to bargain and to observe the collective bargaining agreement.[39] Burns claimed that the single Lockheed facility was not an appropriate bargaining unit.[40] The trial examiner found that the Lockheed bargaining unit was appropriate[41] and the Supreme Court refused to review this determination.[42]

The Supreme Court held that when a bargaining unit remained the same and a majority of the employees hired by the new employer were represented by a recently certified bargaining agent, the new employer could be ordered to bargain with the union.[43] In reaching its decision, the Court considered the fact that Burns knew of the recent certification of the UPG and of the existence of the collective bargaining contract.[44] Since Burns hired a majority of its predecessor's employees, who were already represented by a union certified as their bargaining agent, Burns was bound to bargain with the union under section 8(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."[45]

However, the Court relied on *H.K. Porter Co. v. NLRB*[46] in holding that the new employer was not bound by the substantive provisions of a collective bargaining contract negotiated by its predecessor but not agreed to or assumed by it.[47] In *Porter*, the Court said that

> allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure

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[39] *Id.*

[40] *Id.* at 298. Burns made a practice of transferring employees from one jobsite to another. For administrative purposes Wackenhut treated each location as a separate unit, but Burns treated large numbers of them together.

[41] William J. Burns Int'l Detective Agency, Inc., 182 NLRB 348 (1970). This point was affirmed by William J. Burns Int'l Detective Agency, Inc. v. NLRB, 441 F.2d 911 (2d Cir. 1971).

[42] 406 U.S. at 277-78.

[43] *Id.* at 281.

[44] *Id.* at 278. For a general discussion of the reasoning in *Burns*, see 86 HARV. L. REV. 247 (1972).

[45] 406 U.S. at 277-78, *citing* 29 U.S.C. § 158(a)(5) (1970).

[46] 397 U.S. 99 (1970).

[47] 406 U.S. at 284. The Court also held that Burns did not commit an unfair labor practice by unilaterally changing existing terms and conditions of employment, because Burns had no previous relationship to the unit and, therefore, had no outstanding terms and conditions of employment. *Id.* at 294.

> alone, without any official compulsion over the actual terms of the contract.[48]

Serious inequities might result if either the union or the new employer were held to the substantive terms of the old bargaining agreement. Each side should be able to negotiate freely in light of current economic realities for terms it considers appropriate.[49]

In *Howard Johnson,* the courts below found *Wiley* controlling on the basis that *Wiley* and *Howard Johnson* both involved a section 301 suit to compel arbitration, whereas *Burns* involved an unfair labor practice action.[50] One of the most significant points the Supreme Court made in *Howard Johnson* was that the basic policies controlling in an unfair labor practice context may not be disregarded in a section 301 arbitration context.[51] In so holding, the Court emphasized its decision in *Textile Workers Union v. Lincoln Mills,*[52] which directed the federal courts to develop a federal common law "fashion[ed] from the policy of our national labor laws."[53] The union in *Howard Johnson* had tried to circumvent the policy of the NLRB holding in *Burns* by bringing a section 301 arbitration suit in federal court. The Supreme Court in *Howard Johnson* emphasized that the rights of the parties in a successorship context should not depend on the forum in which the suit is heard.[54]

The Court, in *Howard Johnson,* emphasized the necessity of using a case-by-case approach in developing the federal common law under section 301, since there are many different factual circumstances and legal contexts in which the successorship problem can arise. The Supreme Court held that the lower court decisions were an unwarranted extension of *Wiley.* The Supreme Court stressed several facts in reaching its decision in *Howard Johnson.* In *Wiley,* the former employer disappeared by merger and the only remedy available to the union was against Wiley, the successor.[55] In *Howard Johnson,* the initial employer survived as a legal entity, and, therefore, the union had a realistic remedy

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[48] 397 U.S. at 108.

[49] 406 U.S. at 287.

[50] 94 S. Ct. at 2240.

[51] *Id.*

[52] 353 U.S. 448 (1957).

[53] 94 S. Ct. at 2240, *quoting from* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957).

[54] 94 S. Ct. at 2240.

[55] *Id.* at 2241. *See also* Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973), which held that there is usually no need for distinguishing among mergers, consolidations, or purchases of assets in analyzing successorship problems.

against the former employer.[56] Wiley hired all of its predecessor's employees whereas Howard Johnson hired an independent work force.[57] Furthermore, the union in *Wiley* sought to protect the benefits that employees were to receive in connection with their employment.[58] The union in *Howard Johnson* sought arbitration on behalf of the employees *not* hired by Howard Johnson in order to force Howard Johnson to hire all of its predecessor's employees.[59] The Court found that what the union sought in *Howard Johnson* was in conflict with the basic principles of *Burns*.[60] Nothing in the federal labor laws requires a successor employer to hire all of the employees of his predecessor.[61] A successor employer should be free to make changes in the composition of the labor force.[62] *Burns* established that Howard Johnson was not compelled to hire any of Grissom's employees if it so chose.[63]

Because of its emphasis on examining the facts in a case-by-case approach, the Court did not set forth a comprehensive test for successorship. However, the Court did establish what appears to be at least one of the essential ingredients in a test for successorship. In *Wiley*, the Court held that arbitration could not be compelled unless there was "substantial continuity of identity in the business enterprise" before and after a change in ownership, because otherwise the duty to arbitrate would be "something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved."[64] In *Howard Johnson*, the Court found that "[t]his continuity of identity in the business enterprise necessarily includes, we think, a *substantial continuity in the identity of the work force* across the change in ownership."[65] In similar suits the lower courts have also emphasized whether or not a successor

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[56]94 S. Ct. at 2241. The Court pointed out that the Grissom corporations were viable entities with substantial assets from which a judgment could be satisfied.

[57]*Id.* See note 7 *supra* for a discussion of the Howard Johnson employee breakdown.

[58]See note 28 *supra*.

[59]94 S. Ct. at 2242.

[60]*Id.* at 2243, *citing* NLRB v. Burns Int'l Security Serv., Inc. 406 U.S. 272, 280 n.5 (1972).

[61]NLRB v. Burns Int'l Security Serv., Inc. 406 U.S. 272, 280 n.5 (1972). *See also* Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 n.6 (1973).

[62]406 U.S. at 287-88.

[63]94 S. Ct. at 2243. However, discriminatory hiring could be a violation of section 8(a)(3). See notes 74 and 75 *infra* & accompanying text.

[64]94 S. Ct. at 2244, *quoting from* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964).

[65]94 S. Ct. at 2244 (emphasis added).

hires a majority of the predecessor's employees in determining the obligations of the successor in section 301 arbitration suits.[66]

In his dissenting opinion, Justice Douglas confronted the problem of what the test for successorship is now. He indicated his belief that the majority of the Court has made "the number of prior employees retained by the successor the sole determinative factor" in ascertaining the existence of successorship.[67] While the majority opinion utilized the concept of "a substantial continuity in the identity of the work force across the change in ownership"[68] in deciding whether successorship exists, the number of retained employees is clearly not the only factor considered. The Court also considered the method by which Howard Johnson took over the business, the continued existence of the previous employer, Grissom, whether there was "substantial continuity of identity in the business enterprise,"[69] whether the new employer expressly or impliedly assumed the predecessor's collective bargaining contract, and the purpose for which the union sought arbitration.[70] Justice Douglas apparently felt that the Court would use the number of previous employees hired by the new employer as the "sole determinative factor"[71] in future successorship cases.

Justice Douglas also expressed concern that using the number of retained employees as the test for successorship will leave unprotected the rights of employees of the prior employer.[72] However, refusal to hire the former employer's employees to avoid successorship would amount to a discriminatory refusal to hire those persons because of their membership in a labor organization,[73] which is a violation of section 8(a)(3) of the L.M.R.A.[74]

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[66]*See* Printing Specialties Union v. Pride Papers Aaronson Bros. Paper Corp., 445 F.2d 361 (2d Cir. 1971); International Ass'n of Machinists v. NLRB, 414 F.2d 1135 (D.C. Cir. 1969); Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964); Boeing Corp. v. International Ass'n of Machinists, 351 F. Supp. 813 (M.D. Fla. 1972); Owens Illinois, Inc. v. District 65 Retail, Wholesale, & Department Store Union, 276 F. Supp. 740 (S.D.N.Y. 1967); Local Joint Executive Bd. v. Joden, Inc., 276 F. Supp. 390 (D. Mass. 1966).

[67]94 S. Ct. at 2246 (Douglas, J., dissenting).

[68]*Id.* at 2244.

[69]*Id.* at 2241-42.

[70]*Id.* at 2239-44.

[71]*Id.* at 2246 (Douglas, J., dissenting).

[72]*Id.*

[73]Brief for Appellant at 61, Howard Johnson Co. v. Detroit Local Joint Executive Bd., 94 S. Ct. 2236 (1974).

[74]29 U.S.C. § 158(a) (1970) provides in pertinent part: "It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Hence, any employees so discriminated against have a remedy under the provisions of the Labor Management Relations Act.[75]

In its reasoning in *Howard Johnson,* the Court relied on both *Wiley* and *Burns* but refused to resolve whether there was any irreconcilable conflict between *Wiley* and *Burns.*[76] *Wiley* emphasized the protection needed by employees against sudden changes in terms and conditions of employment in a successorship situation.[77] *Burns* recognized the new employer's right to hire its own labor force to operate the business, and its right not to be held to the substantive terms of the old bargaining agreement even if it did hire a majority of the predecessor's employees.[78] However, in *Howard Johnson,* the Court said it was attempting to balance *Wiley* and *Burns* when it held that when there was no substantial continuity of identity in the work force and no express or implied assumption of the agreement to arbitrate, Howard Johnson was not compelled to arbitrate the extent of its obligations to the former Grissom employees.[79]

One important question which the *Howard Johnson* Court did not explore was what policy is to control in a situation in which the successor employer takes over a business when there *is* a substantial continuity of identity in the work force hired by the new employer with that of the previous employer. In *Howard Johnson,* the Court *distinguished Wiley* but did not overrule it.[80] If *Wiley* controls our hypothetical situation, the successor might be required to arbitrate the extent of its obligations to the predecessor's employees. If *Burns* controls, the new employer might be required to bargain with the union but would not be held to the substantive terms of the collective bargaining contract. There appears to be a substantial conflict between *Burns* and *Wiley* which does need to be reconciled.

Another problem which needs to be explored is that of the meaning of the successorship clause in a collective bargaining agreement. The collective bargaining agreements which the unions had with the Grissoms provided that the agreements would be binding upon the employer's "successors, assigns, purchasers, lessees or transferees."[81] In spite of this provision, the Court found that Howard Johnson was not bound under the bargain-

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[75]An order of reinstatement, substantial back pay liability, and an order to bargain could result.

[76]94 S. Ct. at 2240.

[77]376 U.S. at 549.

[78]406 U.S. at 280-81.

[79]94 S. Ct. at 2244.

[80]*Id.* at 2237.

[81]*Id.* at 2238.

ing agreement.[82] Grissom agreed to arbitrate the extent of its liability to its former employees. The Court suggested that this arbitration would presumably explore whether Grissom had breached the successorship provisions of the contract, and, if so, what the remedy for that breach might be.[83]

Howard Johnson demonstrates the Court's cautious case-by-case approach to developing the common law of successorship and its reluctance to set forth a definitive test for successorship. It also illustrates the Court's determination to prevent forum shopping in a successorship suit by holding that basic policies controlling an unfair labor practice action before the NLRB may not be disregarded in a federal court suit to compel arbitration.

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[82] *Id.* at 2243.

[83] *Id. See id.* at 2241 n.3. The Court pointed out that the union might have had another remedy available to it prior to sale. The union might have moved to enjoin the Grissoms from completing the sale to Howard Johnson on the grounds that the sale would be a breach of the successorship clauses in the collective bargaining agreements.

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