Recent Decisions
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WARSAW CONVENTION—Jurisdiction—Article 28(1) of the Warsaw Convention Does Not Relate to Venue, But Rather to Jurisdiction in the International or “Treaty Sense.” Smith v. Canadian Pacific Airways, Ltd., 452 F. 2d 798 (2d Cir. 1971).

Edmund Smith, a United States citizen, purchased a ticket in Vancouver, British Columbia, for a Canadian Pacific Airways flight originating in Vancouver and destined for Tokyo. On route, the aircraft crashed. Smith instituted an action in the Southern District of New York against Canadian Pacific Airways, alleging that the district court had jurisdiction under article 28(1) of the Warsaw Convention. Defendant moved to dismiss the complaint for lack of subject matter jurisdiction or alternatively, for improper venue under article 28(1) of the Warsaw Convention. The motion was denied; the forum limitations imposed by article 28(1) relate only to venue and venue was proper because defendant had a place of business in New York City. Held, reversed: Article 28(1) does not relate to venue, but rather to jurisdiction in the international or “treaty sense.”

The Second Circuit further announced that in Warsaw Convention cases a two pronged jurisdictional test must be satisfied before a suit can be maintained. Plaintiff must establish: (i) treaty jurisdiction—the power of the nation as a whole to hear the case; and (ii) domestic jurisdiction—the power of the courts within the nation to hear the case. The plaintiff in Smith failed to establish treaty jurisdiction because none of the four contacts specified in article 28(1) were within the United States. Article 28(1) states:

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the [h]igh [c]ontracting [p]arties, either before the court of the domicile of the carrier or of his

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principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

Since Smith failed to establish treaty jurisdiction in the United States, it was unnecessary for the Second Circuit to consider the question of domestic jurisdiction under the federal question and diversity of citizenship statutes.\(^3\)

In 1929, the authors of the Warsaw Convention attempted to solve two major problems facing the then infant airline industry: first, the potential that adverse judgments from air disasters could completely dissipate air carriers' total capital investment and second, that air carriers in foreign jurisdictions might have "formidable difficulties" before the tribunals in "court systems" that were not well organized.\(^5\) To mitigate these anticipated problems the draftsman unified the law relating to international carriages, limited the airlines' liability for injury or death of passengers,\(^6\) and restricted the number of possible forums in which suit could be brought.


\(^4\) The Warsaw Convention was the result of two international conferences held in Paris in 1925 and Warsaw in 1929, and the work done by the interim Comité International Technique d'Experts Aériens (CITEJA) created by the Paris conference. Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498 (1967).

\(^5\) Article 28 does not completely eliminate the possibility of suit in remote places, but it is clear that the drafters intended the article to limit jurisdiction as much as possible. *II Conference International de Droit Privé Aérien, 4-12 Octobre 1929, Varsovie*, ICAO Doc. 7838, pp. 77-79; translated in Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. Air L. & Com. 217, 229-30 (1959).

\(^6\) Warsaw Convention, Article 1(1) shall apply "to all international transportation . . . performed by aircraft for hire." Article 1(2) defines "international" transportation as transportation between two countries.

\(^7\) Articles 17 and 22 of the Warsaw Convention limited liability to 125,000 Poincare francs or approximately 8,300 United States dollars. Improved air safety and the growth of the airline and insurance industry obviated the low liability limits that the Convention created. See Kreindler, *Denunciation of the Warsaw Convention*, 31 J. Air L. & Com. 291 (1965); Stephen, *The Adequate Award in International Aviation Accidents*, 531 Ins. L.J. 197 (1967). At the insistence of the United States, the limits of liability were raised to $16,000—nearly twice the Warsaw limit at the 1955 conference to amend the Convention held at the Hague. ICAO International Conference on Private Air Law September 1955. See 1, Minutes, ICAO, International Conference on Private Air Law XV-XVII (1955). The Hague Protocol, however, was never ratified by the United States, which felt the limits were still too low. The United States delegation had sought an increase to $25,000. See Calkins, *Hiking the Limits of Liability at the Hague*, 120 (Proceedings of the Am. Soc'y of Int'l L.) (1962); Kreindler, *The Denunciation of the War-
might be brought."

The Second Circuit in Smith was dealing with the major area of the Warsaw Convention that has perplexed the courts since the Convention's inception. Article 28(1) sets forth four forums in which suit may be maintained, but the article does not refer to either "jurisdiction" or "venue." As a result of this omission, American courts have been faced with the question of whether article 28(1) affects the subject matter jurisdiction or is merely a venue requirement.

The determination of whether article 28(1) is jurisdictional or only a venue provision is crucial in deciding where a suit can be brought. This decision is of utmost importance to American plaintiffs who wish to adjudicate their claims in the United States courts that traditionally give recoveries in excess of those given by courts in other countries. Thus, the stakes are higher when applying the article in the United States judicial system. In addition to treaty jurisdiction, United States courts must deal with the unique problems of federal jurisdiction and venue.

saw Convention, 31 J. Air L. & Com. 291 (1965). Accordingly, the International Civil Aviation Organization and the International Air Traffic Association made a concerted effort to secure an agreement by the principal international airlines to voluntarily waive liability up to $75,000 under terms of absolute liability to avoid the announced intention by the United States to denounce the Convention. See Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967). After the attempts to reach agreement failed, the Civil Aeronautics Board issued an order imposing strict liability on the airlines for death or personal injury of passengers up to $75,000 for international flights originating, stopping or terminating in the United States. CAB Docket No. 17,325; CAB Order No. E-23680; CAB Agreement No. 18900 (May 13, 1966).

8 Warsaw Convention, Article 28(1).

9 The jurisdiction versus venue argument raised by article 28(1) has been further complicated in the United States as the result of controversy whether the article is national in scope or refers to national sub-divisions. See, e.g., Dunning v. Pan American World Airways, Inc., 4 Av. Cas. 17,394 (D.D.C. 1954); Mertens v. Flying Tiger Line, Inc., 341 F.2d 831 (2d Cir.), cert. denied, 382 U.S. 916 (1965).

10 Article 25 takes away the airline's limited liability if the injury was caused by the airline's "willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct."

Since the United States has the highest standard of living of any country in the world, quite naturally damage recoveries will be greater than in less affluent countries once a finding of willful misconduct is established. See Cox v. Northwest Airlines, Inc., 379 F.2d 893 (7th Cir. 1967). There is no question that awards and settlements have risen throughout the world, but statistics comparing settlements in the United States with those of other countries are unavailable.
Varying results will occur depending upon the article 28(1) interpretation a court chooses. If article 28(1) is jurisdictional and none of the four contacts are present, the court is without power to hear the suit. If the article is construed to be a venue provision, the court may have the power to hear the case, but may be an improper forum. Moreover, there are major procedural differences: if noncompliance with article 28(1) amounts to a defect in venue, the defect may be waived; but if it constitutes a lack of subject matter jurisdiction, it cannot be waived and the court must dismiss. The Second Circuit, recognizing this confusion and the need for a uniform interpretation, sought to remedy this procedural problem by treating article 28(1) as requiring three separate judicial determinations: two of which involve the power of the court to hear the case and the third involves the convenience of the court.

I. Treaty Jurisdiction

In Smith the Second Circuit held that article 28(1) "must be considered as absolute and mandatory, on the national level, in the jurisdictional sense, and be given [its] proper status as a treaty obligation of our nation without equivocation." This means that if none of the four contact points specified in the article could be found within this country, then the suit could not be tried in any of the courts of the United States regardless whether there might otherwise be jurisdiction.

Smith relied on the "place of business through which the contract has been made" to establish treaty jurisdiction. Since it was clear that the other three provisions of article 28(1) did not apply, this was the only provision asserted on appeal.

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13 452 F.2d at 801.
14 The conclusion that article 28(1) is mandatory in nature and jurisdictional in the larger or treaty sense was reached by reading article 28(2) in conjunction with article 32. Article 28(2) provides that "questions of procedure shall be governed by the law of the court to which the case is submitted." Article 32 prohibits alteration of the rules as to "jurisdiction." 452 F.2d at 801.
15 452 F.2d at 802. For purposes of article 28(1), the domicile of the carrier is its place of incorporation. See McHenry, Judicial Jurisdiction Under the Warsaw Convention, 29 J. Air L. & Com. 205, 208-09 (1963). In Smith, the domicile of Canadian Pacific Airways (Canada) was not in question. Further, Canadian Pacific Airways principal place of business had previously been established as
Smith relied on the decision in *Eck v. United Arab Airlines, Inc.* 16 in asserting treaty jurisdiction under the third forum of article 28(1)—“the place of business where the contract was made.” In *Eck* a round-trip ticket from Zurich to the Mid East was purchased in California. The ticket for the portion of the trip furnished by United Arab Airlines was purchased through Scandinavian Airlines System although United Arab Airlines maintained a New York ticket office. The Second Circuit held the suit could be maintained in New York since defendant had a place of business that regularly issued tickets in the United States, and even though the ticket had not been bought or confirmed through that place of business the ticket had been bought in the United States. *Eck* was based on the concept of agency first applied to this provision of article 28(1) in *Berner v. United Airlines.* 17 In *Berner* plaintiff purchased a round-trip ticket from New York City to Sydney, Australia. Although the ticket had been purchased from British Overseas Commonwealth Airways, transportation was furnished by British Commonwealth Airways. Following the BCA aircraft’s crash, suit was commenced in a New York state court, which held that the Warsaw Convention applied and article 28(1) jurisdiction was established since the “place of business through which the contract has been made” was within the United States and BOAC had acted as BCA’s agent when the ticket was sold. *Smith* is distinguishable from *Eck* and *Berner.* In *Smith,* plaintiff purchased his ticket outside the United States, and neither defendant’s New York office nor any other American agency was involved with the pur-

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3. Under article 28(1) foreign corporations can have only one principal place of business, i.e., where the executive and main administrative functions are located and where most of its business is transacted. See *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 809 (2d Cir. 1966); *Nudo v. Societe Anonyme Belge D'Exploitation De La Navigation Aerienne Sabena Belgium World Airways*, 207 F. Supp. 191 (E.D.N.Y. 1957); McHenry, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. Air L. & Com. 205 (1957). The other forum for maintaining suit specified by article 28(1) is “before the court at the place of destination.” The location of this contact is determined by the destination shown on the contract of carriage. In *Smith,* Tokyo, Japan, was the place of destination.
4. 16360 F.2d 804 (2d Cir. 1966).
chase. Neither Eck or Berner had held that merely maintaining place of business was sufficient to establish jurisdiction.

II. DOMESTIC JURISDICTION

The Second Circuit in Smith, after stating the mandatory nature of article 28(1) on the treaty jurisdiction level, interpreted article 28(2) to mean that beyond the question of treaty jurisdiction, domestic law could not be affected. This interpretation is not novel. In Mertens v. Flying Tiger Line, Inc. plaintiff brought an action for wrongful death caused by an aircraft accident in Japan. Suit was commenced in the Southern District of New York, and the court denied defendant's motion to dismiss for lack of subject matter jurisdiction. The Second Circuit affirmed, holding that article 28(1) dictates the country in which an action must be brought and not a particular court within a country. Although Mertens did not speak in terms of treaty jurisdiction, treaty jurisdiction was within the United States since defendant's principal place of business was in California, the contract was made in California, and the carrier's place of incorporation was in Delaware. Treaty jurisdiction thus existing, domestic jurisdiction would not be disturbed by article 28(1). The same conclusion was reached in Martino v. Trans World Airlines, Inc. In that case after finding treaty jurisdiction, the court found that domestic jurisdiction could not be established in Illinois. Since domestic jurisdiction is not affected by treaty jurisdiction, there is no inconsistency between Smith and a number of previous decisions construing this article. Smith, however, was more explicit in explaining the approach employed.

III. VENUE

The Second Circuit in Smith further concluded that once treaty and domestic jurisdiction are found to exist, then venue questions

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18 452 F.2d at 800, 801. See also note 14 supra.
19 341 F.2d 851 (2d Cir. 1965), cert. denied, 382 U.S. 816 (1965).
21 341 F.2d at 855.
23 Transworld Airlines' place of incorporation was Delaware and its principal place of business was in Missouri. Id. at 652.
should be settled in accordance with the United States Judicial Code.\textsuperscript{44} Again, the Smith court's treatment of venue question arising under article 28(1) does not represent a departure from the manner in which previous court decisions have handled this question. In Dunning v. Pan American World Airways, Inc,\textsuperscript{45} the district court treated the article as a venue requirement and transferred the action from the District of Columbia to the Southern District of New York because Pan American's domicile and principal place of business were in New York even though Pan American had many facilities in the District of Columbia. Eck v. United Arab Airlines\textsuperscript{46} is in accord. Although Eck speaks in terms of venue, and the court did not specifically address this issue, it is clear that both treaty jurisdiction and domestic jurisdiction did exist. This is the only justification for the result reached. The Eck decision offers a good illustration of the reasons for the confusion surrounding the interpretation of article 28(1). The Smith pragmatic approach, therefore, does not pronounce any new standard of judicial interpretation, but rather clarifies the approach implicitly utilized in previous decisions.

\textbf{IV. Conclusion}

Amid all the confusion stemming from the application of the terms of article 28(1), the Smith decision is important for its attempted analytical approach to the uncertainties of the article. "Much of the case law on the subject is confused and not well reasoned . . . [because] the term ‘jurisdiction’ has been loosely used in many cases and there appears to be no consistent or logical pattern of decisional law."\textsuperscript{47} The concept of jurisdiction being on two levels and the introduction of the concept of “treaty jurisdiction” in dealing with the Convention is a significant step towards dispelling this confusion. Further confusion could be eliminated if other courts adopted the approach used in Smith. Despite the gains made by Smith, the case illustrates the need for reforming the Warsaw Convention and article 28(1) by adding another forum in

\textsuperscript{45} 54 Av. Cas. 17,394 (D.D.C. 1954).
\textsuperscript{46} 360 F.2d 804 (1966).
which actions can be brought. Indeed, this reform has in fact be-
gun. In recognition of the changed conditions in the industry since
the date of the Convention’s adoption, the Guatemala City Protocol
to Amend the Warsaw Convention\textsuperscript{28} has abandoned the protective
spirit of the original Convention. The Guatemala City Protocol
broadens article 28(1) by adding a fifth forum:

in the territory of one of the [h]igh [c]ontracting [p]arties, before
the [c]ourt within the jurisdiction of which the carrier has an estab-
ishment if the passenger has his domicile or permanent residence
in the territory of the same [h]igh [c]ontracting [p]arty.\textsuperscript{29}

This forum would alleviate many of the inequitable results reached
under the present article 28(1) by allowing the carrier to be sub-
ject to suit in any country in which the carrier has an establishment. Adoption of this fifth forum would mean that the strained inter-
pretations of cases like Eck would no longer be necessary. It would
also allow plaintiffs the opportunity to bring suit in the country in
which he resides and in which the court system is more familiar
and possibly more friendly to him. For these reasons immediate
ratification of the Guatemala City Protocol is strongly urged.\textsuperscript{30}
Although the Second Circuit reached the correct result under the
present article 28(1), the detailed approach necessary to reach that
result would no longer be required if the Guatemala Protocol
applied.

\textit{Burton Cohen}


\textsuperscript{29} Id., Chapter I, Art. 12, at 9.

\textsuperscript{30} The United States has signed the Guatemala City Protocol, but it has not been given to the Senate for ratification. The Protocol will enter into force on the nineteenth day after deposit of the thirtieth instrument of ratification. Id., Chapter III, Art. 20.

Wackenhut, a unionized company, provided plant protection services for the Lockheed Corporation. Both Wackenhut and Burns International Security Services submitted bids solicited by Lockheed for a new service contract. At a pre-bid conference, Burns was put on notice that Wackenhut's employees were represented by a union and that a collective-bargaining contract had recently been signed. Burns was awarded the service contract and proceeded to hire a majority of Wackenhut's employees, all of whom were represented by a recently certified union. The union demanded recognition as the bargaining representative of Burns' employees and also demanded that Burns honor the unexpired, pre-existing collective-bargaining contract with Wackenhut. When Burns refused, the union filed unfair labor practice charges with the National Labor Relations Board. The Board found that Burns was a "successor-employer," obligated to bargain with the union and to honor the pre-existing contract. The Second Circuit agreed that the bargaining duty should be imposed, but refused to impose the contractual obligation. Held, affirmed: A successor-employer must bargain with his predecessor's certified bargaining representative, but is not bound by a pre-existing collective-bargaining contract. NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272 (1972).

Since the passage of the National Labor Relations Act, the National Labor Relations Board has often had to determine whether either a bargaining or a contractual obligation could be imposed on the acquirer of an existing business when the predecessor employer had been so obligated. While the bargaining obligation generally remains extant, and the Board cannot force parties to

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2. William J. Burns Int'l Detective Agency v. NLRB, 441 F.2d 911 (2d Cir. 1971).
5. 397 U.S. 99, 103 (1970). The company violated the Act by a bad-faith re-
agree to substantive provisions in a contract, the issue of whether the Act requires a successor employer to honor a pre-existing contract after a change in ownership was unsettled prior to *Burns*.

I. THE DUTY TO BARGAIN

A. Survival of the Duty

Section 8(a)(5) of the Act imposes a duty on an employer to bargain in good faith with the chosen representatives of his employees. For this duty to survive a change of ownership, it must be shown that the 'employing industry' remained essentially the same despite the change.

Assuming the change in ownership does not disturb the 'employing industry', a union's certification as the exclusive bargaining representative of the predecessor's employees will survive. The new employer is considered a "successor" and the obligation to bargain will remain.


Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees..." Section 8(d) defines "to bargain collectively" as "the performance of the mutual obligations of the employer and the representative of the employees to meet at reasonable times, and confer in good faith..." Section 9(a) states that the representative must be selected by a majority of the employees in a unit appropriate for these purposes.


The Board's remedial powers, the Court noted that the Board is without power to compel an agreement between the parties.

See *NLRB v. McFarland*, 306 F.2d 219, 220 (10th Cir. 1962); *NLRB v. Alamo White Truck Serv.*, 273 F.2d 238, 239 (5th Cir. 1959); *NLRB v. Lunder Shoe Corp.*, 211 F.2d 284, 286 (1st Cir. 1954); *NLRB v. Hoppes Mfg. Co.*, 170 F.2d 962, 964 (6th Cir. 1948).

There had been a change in ownership and in determining whether the duty to bargain remained, the court noted: "[I]t is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace." 105 F.2d at 183.

B. Successor Defined

The determination whether the 'employing industry' remains undisturbed following a change in ownership can be made only after close scrutiny. The question generally arises after a sale of assets, merger, consolidation, transfer or other agreement between the old and new employer; the analysis should be made in terms of the succession of employment, with the employer-employee relationship being the most important element, rather than the succession of employees. The National Labor Relations Board has developed certain criteria revolving around the determination of whether there is a substantial continuity of business operations. The essential requirement for a finding that the 'employing industry' remained undisturbed is that this finding be reasonable.

C. Imposing the Duty on Burns

In Burns the successor doctrine was applied to a change in ownership resulting from competitive bidding between employers rather than through the usual successor situation when there is an agreement between them. This situation was not novel to the Board and the duty to bargain has been held to remain because:

If however, the employer can assert a good-faith doubt whether the union continues in a majority status, he can refuse to bargain. Mitchell Standard Corp., 140 N.L.R.B. 496, 500, 52 L.R.R.M. 1049 (1963). This is allowable because it would be in violation of the Act if an employer bargained with a representative that is not the representative of the majority of his employees. International Ladies' Garment Workers' Union, AFL-CIO v. NLRB (The Bernhard-Altman Case), 366 U.S. 731, 737 (1961).

11 Makela Welding, Inc. v. NLRB, 387 F.2d 40, 46 (6th Cir. 1967); NLRB v. Auto Ventshade, Inc., 276 F.2d 303, 305 (5th Cir. 1960).


13 NLRB v. Alamo White Truck Serv., 273 F.2d 238, 242 (5th Cir. 1959).

14 NLRB v. McFarland, 306 F.2d 219, 220 (10th Cir. 1962).

15 Fanning, Labor-Relations Obligations of a Purchaser, 1967 Labor Relations Yearbook 284, 286. The criteria include: (i) use of the same plant; (ii) the same or substantially the same work force; (iii) the same jobs exist under the same working conditions; (iv) employment of the same supervisors; (v) use of the same machinery, equipment and methods of production; (vi) manufacture of the same product or offer of the same services.

16 Tom-A-Hawk Transit, Inc. v. NLRB, 419 F.2d 1025, 1027 (7th Cir. 1969); Hackney Iron & Steel Co. v. NLRB, 395 F.2d 639, 640 (D.C. Cir. 1968).


It would be virtually impossible for employees to achieve collective bargaining rights in an employing industry which is periodically subject to a possible change of employers if with every change the employees must again resort to the Board's processes in order to demonstrate anew their desire to be represented by their formerly certified bargaining representative.  

This reasoning, which is consistent with the objectives of the Act, balances the rights of owners to make managerial decisions with the need to protect employees against a sudden change in the employment relationship.  

The Board, in applying the successor doctrine to Burns, adopted the trial examiner's findings concerning the continuity of the 'employing industry' and emphasized the Act's policy of stabilizing industrial relations. The Second Circuit, affirming the Board's determination that Burns was a successor, stressed that Burns commenced performance of its contract with a work force consisting of a majority of former Wackenhut employees.  

The Supreme Court affirmed the Board and the Second Circuit holding that Burns must recognize and bargain with its predecessor's certified bargaining representative. While the Court adopted the trial examiner's findings concerning the continuity of the 'em-

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18 ABC Food Service, Inc., 176 N.L.R.B. 426, 428, 73 L.R.R.M. 1052 (1969). Based on a competitive bidding procedure, ABC Food Service was awarded a contract. Although it was known that the predecessor had negotiated a collective-bargaining contract with a certified union, ABC hired sixty-four of his predecessor's eighty-four employees. Other factors remained the same and the union requested ABC to bargain with it. Based on these facts, the Board found ABC to be a successor and obligated to bargain with and honor the certification of the union.  


23 William J. Burns Int'l Detective Agency v. NLRB, 441 F.2d 911, 915 (2d Cir. 1971).  

24 NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272, 279 (1972). The Court stated: "a mere change of employers or of ownership in the employing industry is not such a 'unusual circumstance' as to effect the force of the Board's certification within the normal operative period." The "normal operative period" is established by the Act to be twelve months. Labor Management Relations Act (Taft-Hartley Act), § 9(c)(3), 29 U.S.C. § 159(c)(3) (1970).
ploying industry," the carryover of personnel was emphasized. Consequently, the Court concluded that Burns' bargaining duty did not arise until after it became obvious that the total work force would be comprised of a majority of the predecessor's employees.

Thus, the Court isolated Burns from a typical successor situation. Burns, therefore, stands for the proposition that when the change in ownership is not effectuated by an agreement, a successor does not have an immediate duty to bargain. When there is no agreement, express or implied, continued majority union representation becomes the determining factor.

In the "no-agreement" successor situation, Burns reasoning controls if and when the duty to bargain arises. While the duty to bargain generally is imposed on a successor immediately, when competitors are involved as in Burns, the bargaining duty is not automatic. It arose in Burns only because a majority of the employees were already represented by a certified union. This was determinable only at the completion of all hiring. Thus, when there is no agreement between employers, an immediate duty to bargain is not imposed and a Burns-type successor will not violate section 8(a)(5) by refusing to bargain when setting the initial terms of employment.

This is not the only benefit accruing to the "no agreement" type of successor. The Burns-type successor's hiring practices will be scrutinized less than the typical successor's will be. Prior to Burns, in a successor situation the new employer could not avoid the bargaining obligation by refusing to hire his predecessor's employees. The Board traditionally reasoned:

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28 406 U.S. at 278.
29 406 U.S. at 281.
30 406 U.S. at 295. Until the employer was certain that the predecessor's bargaining representative would retain a majority, he could not bargain with it. Southern Conference of Teamsters v. Red Ball Motor Freight, Inc., 374 F.2d 932, 937 (5th Cir. 1967).
32 406 U.S. at 295.
33 406 U.S. at 294. Subsequent to the decision in Burns, the Sixth Circuit has interpreted this to hold that any successor is free to unilaterally set the initial terms and conditions of employment. See NLRB v. Wayne Convalescent Center, Inc., 69 CCH Lab. Cas. § 12,977 (1972). In view of the Supreme Court's distinction between types of successors, it is difficult to understand why the courts will allow the usual successor to do this.
... the individuals employed by the seller of the enterprise must be regarded as 'employees' of the purchaser as that term is used in the Act. Such individuals possess a substantial interest in the continuation of the existing employee status, and by virtue of this interest bear a much closer economic relationship to the employing enterprise than, for example, the mere applicant for employment ... 

When, as in Burns there is no agreement, the former employees do not possess this "closer economic relationship;" therefore, a "no-agreement" successor can avoid the bargaining obligation by limiting his work force to employees not represented by a certified union.

II. THE CONTRACTUAL DUTY

It was Congress' intent in passing the National Labor Relations Act to promote industrial peace through collective bargaining. Management and labor were to be brought to the bargaining table in an effort to have them reach their own agreement. Section 8(d) of the Act, which was enacted to prevent the Board from interfering with the bargaining process, has been interpreted to prescribe the Board from compelling parties to agree on a substantive contractual term.

Prior to the Board's decision in Burns, the obligation to honor a pre-existing collective-bargaining contract had never been imposed on a successor. Burns, however, raised the question:

Whether the national labor policy embodied in the Act requires the successor-employer to take over and honor a collective-bargaining agreement negotiated on behalf of the employing enterprise by the predecessor?

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52 151 N.L.R.B. at 1078 (emphasis added).
56 Cruse Motors, 105 N.L.R.B. 244, 245, 32 L.R.R.M. 1285 (1953).
The union in Burns urged that the rationale of John Wiley & Sons v. Livingston\(^{41}\) controlled, and that the obligation to honor the pre-existing contract should be imposed on Burns.

**A. John Wiley & Sons**

In Wiley\(^{42}\) a unionized company merged with a considerably larger non-union company. The union contended that it continued to represent the merged employees and that the employer was obligated to recognize certain rights that had “vested” under the prior contract.\(^{43}\) Failing to reach an accord, the union commenced a section 301 action\(^{44}\) to compel arbitration. The Supreme Court was called upon to decide whether an arbitration clause in a collective-bargaining contract survives a merger.\(^{45}\) The Supreme Court recognized that arbitration plays an integral part in effectuating national labor policy;\(^{46}\) it is “part and parcel of the collective bargaining process itself.”\(^{47}\) The Court noted:

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor . . . a collective-bargaining agreement is not an ordinary contract.\(^{48}\)

Although the question of whether the entire contract survives a change in ownership was not reached, the Court did rule that all employee rights under the prior agreement are not automatically terminated.\(^{49}\) Enforcement of these rights was to be effectuated by requiring the successor employer to arbitrate questions that his

\(^{41}\) 376 U.S. 543 (1964).

\(^{42}\) Id.

\(^{43}\) 376 U.S. at 545.


\(^{46}\) Id. at 549. This policy was developed by the Steelworkers Trilogy: United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).


\(^{49}\) 376 U.S. at 548.
predecessor would have been bound to arbitrate.66 Dicta in subsequent circuit cases has expanded the Wiley rationale to allow enforcement of all of the terms of pre-existing contracts.67

B. Honoring the Contract

In Burns the Board, faced with the decisions of Wiley and "Wiley's progeny," concluded that because a collective-bargaining agreement "covers the whole employment relationship" and "calls into being . . . the common law of a particular industry,"68 a successor-employer must honor a pre-existing contract.69 The Board extended the Wiley doctrine by finding that a collective-bargaining contract is not the simple product of a consensual relationship but like arbitration an extension of the Act.70 Reasoning that since a contract already existed, the Board determined that Burns was not being required to agree to a proposal or concession in violation of section 8(d).71 Accordingly, in holding a successor bound to the terms of a pre-existing contract, the Congressional intent manifested in section 8(d) was furthered by promoting industrial peace

66 376 U.S. at 554.
67 United Steelworkers of America v. Reliance Universal, Inc., 335 F.2d 891, 895 (3d Cir. 1964); Wackenhut Corp. v. International Union, United Plant Guard Workers, 332 F.2d 954, 958 (9th Cir. 1964). These cases indicate that all contract rights survive a change in ownership. The duty to arbitrate, however, is all that was actually imposed upon the successor in these cases.
69 182 N.L.R.B. at 350.
70 182 N.L.R.B. at 349. Initially, the bargaining obligation of a successor was found to be "a matter of interpretation of the Act and not of contract." Cruse Motors, 105 N.L.R.B. 244, 248, 32 L.R.R.M. 1285 (1953). Wiley extended this by stating that a collective bargaining agreement is not "the simple product of a consensual relationship." John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550 (1964).

if . . . the Board shall be of the opinion that any person . . . has . . . or is engaging in any . . . unfair labor practice, then the Board shall . . . issue . . . an order requiring such person to cease and desist . . . and to take such affirmative action . . . as will effectuate the policies of the Act . . .

The Court in Porter determined that this power did not include the power to compel agreement to a substantive term of the contract. Although lacking the remedial power to compel agreement, the Board determined that the Act required the imposition of the contractual obligation in Burns.
through requiring adherence to existing agreements.\textsuperscript{56}

The Second Circuit\textsuperscript{57} and the Supreme Court\textsuperscript{58} disagreed with this rationale. Noting that section 8(d) was enacted to prevent the Board from imposing its settlement of the terms of a collective-bargaining contract, the Supreme Court emphasized that "the Act does not compel any agreement whatever."\textsuperscript{59} The Court rejected the logical extension of the Wiley doctrine and distinguished Wiley from Burns:

The present case [Burns] does not involve a section 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.\textsuperscript{60}

Nevertheless, the Court noted that under certain circumstances,\textsuperscript{61} "the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract."\textsuperscript{62} This assumption would be founded on an agreement, express or implied. Because in Burns the employers were competitive bidders, the circumstances necessary for an implied assumption can never be present.

C. Wiley Revisited

In deciding the contractual questions raised by Burns, the Court was faced with two alternatives: (i) H. K. Porter's interpretation of section 8(d) rendering the Board powerless to compel either party to agree to any substantive contractual provision of a col-

\textsuperscript{57} William J. Burns Int'l Detective Agency, Inc. v. NLRB, 441 F.2d 911 (2d Cir. 1971).
\textsuperscript{60} 406 U.S. at 286.
\textsuperscript{61} E.g., Perma Vinyl Corp., 164 N.L.R.B. 968, 65 L.R.R.M. 1168 (1967) (a finding of subterfuge). Subterfuge occurs when the new employer is a disguised continuance of the old employer or when the business is transferred as a means of evading liability under the Act.
\textsuperscript{62} NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272, 291 (1972). The Court indicated this was possible in situations involving a merger, stock acquisition, reorganization or purchase of assets; all involve the typical successor situations.
collective-bargaining agreement; or (ii) *John Wiley & Sons'* finding that all rights of employees under a prior contract are not automatically terminated by a change in ownership and that these rights could be enforced through the arbitration clause in the pre-existing contract. Neither of these decisions controlled the contractual issue in *Burns*, but the logical extension of either would be decisive.

The Court followed the *Porter* rationale and limited *Wiley* to hold that the arbitration clause of a collective-bargaining contract is all that survives a change in ownership. Collective bargaining is the essential ingredient of this policy and *Porter*'s interpretation of section 8(d) fosters this process. If *Wiley* were extended to its logical conclusion, the Board would have the power to interfere with the collective bargaining process in successor situations. Since *Wiley* recognized that arbitration was, "part and parcel of the collective bargaining process," a limitation of the case to this procedure allows the Court to square *Burns* with the rationale behind the Act.

The Court, in distinguishing *Wiley* by stating that *Burns* did not involve a section 301 action or the duty to arbitrate, was indicating that arbitration remained as a viable means of enforcing certain vested rights against a successor. The burden of protecting employees against a sudden change in ownership is now on the union bargaining representative, rather than the employer or the Board. Therefore, union bargaining representatives will have to negotiate for liberal arbitration clauses in their contracts during the collective bargaining process.

**III. CONCLUSION**

In imposing the bargaining obligation upon *Burns*, the Supreme Court gave recognition to the successor doctrine as it had been applied by the Board, but distinguished the *Burns* successor situa-

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tion from one involving an agreement between employers. This
distinction determines if and when the duty to bargain arises. In the
usual successor situation, the duty is imposed immediately, but the
imposition is not automatic in a "no agreement" situation. The
duty arose only when Burns hired as a majority of his work force
employees already represented by a certified union. This time lag
allows a Burns-type employer to set initial terms of employment,
differing from those of his predecessor. The distinction also indi-
cates that a Burns-type employer can completely avoid a successor's
bargaining obligation simply by refusing to hire his predecessor's
employees.

In addition, the Court determined that the Act does not require
a successor to honor a pre-existing collective-bargaining contract.
Although a contrary result was possible under the Wiley doctrine,
the decision in Burns fosters the policy of the National Labor Re-
lations Act by promoting the collective bargaining process rather
than by requiring an agreement. Although Burns severely limits the
scope of Wiley, employees can still enforce vested rights previously
arbitrable under a prior contract by instituting a section 301 action
to compel arbitration of these rights against the successor.

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