The Duty of a Successor-Employer to Arbitrate Grievances under a Predecessor's Collective Bargaining Agreement: The Evolution of Substantial Continuity of Identity in the Business Enterprise Since John Wiley & Sons, Inc. v. Livingston

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THE DUTY OF A SUCCESSOR-EMPLOYER TO ARBITRATE GRIEVANCES UNDER A PREDECESSOR'S COLLECTIVE BARGAINING AGREEMENT: THE EVOLUTION OF "SUBSTANTIAL CONTINUITY OF IDENTITY IN THE BUSINESS ENTERPRISE" SINCE JOHN WILEY & SONS, INC. v. LIVINGSTON

I. Introduction

Arbitration is the method employed in almost every industry for the resolution of deadlocks in the adjustment of grievances under collective bargaining agreements.[1] The duty to arbitrate is the contractual obligation to submit a disputed matter to some selected person or persons for resolution, thus avoiding the alternative delay and expense of ordinary litigation.[2] Indeed, arbitration serves as "the substitute for industrial strife [and is the] part and parcel of the collective bargaining process itself."[3]

Since arbitration is a consensual agreement, a party cannot be required to arbitrate any dispute over subject matter which is not arbitrable under the collective agreement. Moreover, the authority of the arbitrator is governed by the collective bargaining agreement itself.[4] In section 301 of the Labor-Management Relations Act,[5] Congress gave the courts the duty of ascertaining whether a particular dispute is one covered by the contract.[6] Further, the court may determine whether a party who refuses to arbitrate has breached this agreement.

1. Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1007 (1955).
2. Wauregan Mills, Inc. v. Textile Workers Union, 21 Conn. Supp. 134, 146 A.2d 592, 595 (1958).
3. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).
4. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).
5. 61 Stat. 136, 29 U.S.C. § 185 (1964). Sec. 301(a) provides:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, 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.

6. Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

The Supreme Court in *John Wiley & Sons, Inc. v. Livingston*[7] held that a successor-employer who was not a party to his predecessor's collective bargaining agreement is bound to arbitrate under that contract if there is substantial similarity of operation and continuity of identity of the predecessor's business enterprise after a change in ownership. *Wiley* established no definitive criteria for determining whether substantial continuity exists after a change in ownership and business structure, but left the development to subsequent case law.

This paper will explore the significant post-*Wiley* decisions in attempting to draw some definite conclusions as to when a successor-employer must arbitrate grievances under a predecessor's collective bargaining agreement. Consideration will be given to the nature of the transfers—mergers, sales of assets, and transfers in bankruptcy—and the various other factors, such as location and nature of business activity of the successor, used by the courts to determine whether or not "substantial continuity of identity" exists so that a successor must arbitrate grievances.

II. THE JOHN WILEY & SONS DECISION

On October 2, 1961, Interscience Publishers, Inc. merged with John Wiley & Sons, a much larger New York City publishing firm. Prior to the merger, Interscience had entered into a collective bargaining agreement which was to expire January 31, 1962. It contained no express provision making it binding upon successors of Interscience.[8] One week before the expiration of the Interscience collective bargaining agreement, the Union commenced an action to compel arbitration.[9]

At the time of the merger, Interscience operated a single plant in New York City with a gross annual income in excess of one million dollars, and employed about eighty persons, of whom forty were union members. By contrast, Wiley's total volume exceeded nine million dollars and it employed some three hundred employes, none of whom were represented by the Union.[10]

7. 376 U.S. 543 (1964). For an exhaustive study of the *John Wiley & Sons* decision *see* Patrick, *Implications of the John Wiley Case for Business Transfers, Collective Agreements, and Arbitration,* 18 S.C.L. REV. 413 (1966).
8. 376 U.S. at 544-45.
9. Livingston v. John Wiley & Sons, Inc., 203 F. Supp. 171 (S.D.N.Y. 1962).
10. 376 U.S. at 545.

The Union, relying on § 90 of the New York Stock Corporation Law which provides that no "claim or demand for any cause" against a constituent corporation shall be extinguished by a consolidation,[11] took the position that after the merger Wiley was obligated to recognize certain rights of the Interscience employees which had "vested." These rights concerned matters generally covered by collective bargaining agreements such as seniority, severance pay, and pension fund payments.[12]

Wiley asserted that the merger terminated the bargaining agreement for all purposes, and thus refused to recognize the Union as the bargaining agent of Interscience employees. The company further contended that since it was never a party to the collective bargaining agreement it was not bound by the contract, and that the Union lost its status as representative of the former Interscience employees when they were mingled in a larger Wiley unit of workers.[13]

Wiley, therefore, posed the question of whether or not a company which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration was based, was bound by its predecessor's arbitration provisions. The Supreme Court in a unanimous decision held that the disappearance of a corporate employer through a merger does not automatically terminate all rights of employees under a collective bargaining agreement, and that in appropriate circumstances the successor may be required to arbitrate with the Union.[14] The Court recognized that if a "change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate"[15] federal policy of settling disputes by arbitration would be thwarted. Nevertheless, a strict reading of the decision might limit its holding to a "merger" situation. As one court has indicated, the guarded language of *Wiley* makes

11. N.Y. STOCK CORP. LAW § 90 (McKinney 1954) provides in part:
The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by such consolidation; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities . . . .
12. 376 U.S. at 552.
13. *Id.* at 545.
14. *Id.* at 548.
15. *Id.* at 549.

it "unreasonable or inequitable to require labor or management to adhere to particular terms of a collective bargaining agreement previously negotiated"[16] in every instance.

With this background, it is possible to begin an examination of the factors utilized to determine substantial continuity of the business enterprise under the *Wiley* decision, and the types of transfers to which they apply.

III. TYPE OF CORPORATE TRANSFERS

A. Merger

Merger involves the transfer of property by one or more corporations to another corporation. The transferor corporations are swallowed up or "merged" into one corporation which remains in existence.[17] Quite naturally, since *Wiley* involved a merger, there has been much less significant case development in this area than in the other types of corporate transfers.

One decision, *Bath Iron Works Corp. v. Bath Marine Draftsmen's Ass'n*,[18] reveals an interesting application of the *Wiley* principles to a merger. *Bath* involved a merger of a wholly owned subsidiary, Hyde Windlass Company, with its parent. Both companies had similar agreements with the same union except for a few provisions in certain areas. The issue in the case was not whether arbitration was applicable, but which company's contract—Bath's or Hyde's—was to serve as the basis of arbitration.

Since the contract of the successor, Bath Iron Works, was more advantageous to the Hyde employees, the Union had the precarious position of arguing that the Hyde contract ought not survive under the *Wiley* doctrine. In holding that the successor's contract was to govern, the lower court readily distinguished *Wiley*. It pointed out that since both predecessor and successor were represented by the same union there was no danger of thwarting national labor policy favoring arbitration.

The court of appeals examined the pre- and post-merger employment situation with the purpose of balancing the equities

16. United Steelworkers v. Reliance Universal Inc., 335 F.2d 891, 895 (3d Cir. 1964).
17. Metropolitan Edison Co. v. Commissioner, 98 F.2d 807, 810-11 (3d Cir. 1938); Von Weise v. Commissioner, 69 F.2d 439, 442 (8th Cir. 1934); Fidanque v. American Maracaibo Co., 33 Del. Ch. 262, 92 A.2d 311, 315 (1952).
18. 393 F.2d 407 (1st Cir. 1968); *see* Comment, 29 U. PITT. L. REV. 273, 276 (1967).

of the two contracts. Upon consummation of the merger, the Hyde employees became part of a much larger company and their "work universe" had changed significantly. The Hyde contract furnished no effective vehicle for arbitration. Any changes in the Hyde contract designed to place the Hyde employees on an equal footing with Bath employees would in essence amount to a cancellation of the existing Hyde contract with its arbitration provision. The Bath contract thus provided the basis for the arbitration.

B. Sale of Assets

There are statements in the *Wiley* opinion which, if considered separately, might indicate that if a change of employees is accomplished by a sale and purchase of assets instead of by merger, the successor might not be bound to arbitrate under his predecessor's collective bargaining contract. Subsequent decisions have demonstrated, however, that the case was not limited to mergers. It was decided upon a broader ground dictated by the policy of the national labor laws.[19]

Before discussing those "sale of assets" decisions adhering the *Wiley* doctrine, it should be pointed out that not all courts have held that the successor-employer is bound to arbitrate under the seller's collective bargaining agreement following the sale or purchase of assets. For example, a successor-employer is under no duty to arbitrate under a predecessor's pre-sale collective bargaining agreement when the National Labor Relations Board has declared another union to be the bargaining representative for all of the successor-corporation's employees.[20] Also, where the successor purchases only one of many stores or plants owned by the seller, one decision recognizes that the successor-employer is under no duty to arbitrate.[21] Since the seller's business still operates, the employees would apparently have easy redress against their former employer for arbitration of their grievances.[22]

19. *See, e.g.,* United Steelworkers v. Reliance Universal Inc., 335 F.2d 891 (3d Cir. 1964); Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964); International Bhd. of Pulp, Sulphite & Paper Mill Workers v. Great Northwest Fibre Co., 263 F. Supp. 167 (E.D. Wash. 1965).
20. McGuire v. Humble Oil & Ref. Co., 355 F.2d 352 (2d Cir. 1966).
21. Retail Store Employees Union, Local 954 v. Lane's of Findlay, Inc., 260 F. Supp. 655 (N.D. Ohio 1966).
22. Comment, 29 U. PITT. L. REV. 273, 277 (1967).

The first significant decision applying the rationale of *Wiley* in requiring arbitration following the sale or purchase of assets was *Wackenhut Corp. v. United Plant Guard Workers.*[23] Wackenhut purchased the business and assets of General Plant Protection Company, but did not expressly assume the obligations of General Plant's labor agreement encompassing certain wage increases, a union shop and checkoff provision.

Three theories were advanced by the Union upon which Wackenhut would have been bound by the predecessor's collective bargaining agreement. *First*, it was suggested that the company had expressly agreed to be bound by the labor agreement. *Second*, the Union suggested that Wackenhut was estopped from denying that it was bound because of its course of conduct. *Third*, the Union contended that Wackenhut as a successor-employer was bound by the labor agreement of its predecessor under the rationale of *John Wiley & Son, Inc. v. Livingston.*

The lower court found that Wackenhut was bound to arbitrate under the predecessor's contract upon the first theory listed above. The court of appeals, however, rejected this finding, and instead held for the Union on the basis of the third theory; namely, that where there is substantial continuity of identity and operation of the business before and after a change in ownership, regardless of the form of the change,[24] a collective bargaining agreement is binding upon the successor-employer.

Several additional cases in this area are significant in demonstrating strict compliance with the *Wiley* decision. For instance, where a company is forced to sell its plant because of financial difficulties under a contract of sale requiring the seller to shut down its plant and mail employees a notice of final termination of their employment prior to the closing date of the sale, *Wiley* is applicable.[25] This is true despite an express provision in the contract of sale stating that the buyer assumes none of the seller's employment contracts, union contracts, or other labor agreements.

23. 332 F.2d 954 (9th Cir. 1964).

24. *Cf.* United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891, 895 n.3 (3d Cir. 1964). In *Reliance* the court recognized that *Wackenhut* viewed the *Wiley* decision as authority for making a pre-existing labor contract *unequalifiedly* binding upon a new proprietor, assuming of course, that there was substantial continuity of identity.

25. International Bhd. of Pulp, Sulphite, & Paper Mill Workers v. Great Northwest Fibre Co., 263 F. Supp. 167 (E.D. Wash. 1965); *cf.* K.B. & J. Young's Supermarkets, Inc. v. NLRB, 377 F.2d 463 (9th Cir. 1967).

Purchase of a plant under an ordered divestiture by the Federal Trade Commission will not relieve the successor company of an obligation to arbitrate issues covered by and arbitrable under a predecessor's labor contract.[26] Here the ruling court found little significance in the fact that the contract of sale contained a provision expressly relieving the buyer of any obligations under the collective bargaining agreement. This court admitted that there might be some circumstances in which it would be unreasonable to require an adherence to particular terms of a collective bargaining agreement previously negotiated by a predecessor.[27] Since this plant was sold as a going concern and since the original operation was to remain intact, the sale fell within the *Wiley* doctrine. Unfortunately, no specific guidelines were mentioned as to just when it might be unreasonable to require the successor to arbitrate.

Apparently the successor-employer is not relieved of his duty to arbitrate under the collective bargaining agreement of the predecessor-seller, even though the seller's collective bargaining contract expires prior to the take-over.[28] In *Overnite Transportation Co. v. NLRB*[29] certain operating franchises and physical assets of Rutherford Freight Lines, Inc. were purchased by Overnite. Overnite, acting unilaterally, immediately put into effect its own wage scale which was lower than that existing at Rutherford. Relying in part on the *Wiley* decision, the Court of Appeals for the Fourth Circuit recognized that the National Labor Relations Board could direct Overnite to restore to the former Rutherford employees the economic benefits that had been maintained by the seller and incorporated in its contract with the Union, despite the contract's having expired before the sale. Under the rationale of this decision one can logically argue that a successor would be bound to arbitrate grievances that were pending under a contract which expired prior to the take-over by the successor-employer.

With only minor exceptions, the decisions demonstrate that the *Wiley* decision is not limited to mergers. Having been decided upon broad national labor policy, *Wiley* has been extended to the sale and purchase of the assets of a business as

26. United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964).
27. *Id.* at 895.
28. *See* Overnite Transp. Co. v. NLRB, 372 F.2d 765 (4th Cir. 1967).
29. *Id.*

a going concern. This has been true despite the expiration of the predecessor's contract prior to the consummation of the purchase if the grievances have been pending.

C. Transfer by a Trustee in Bankruptcy

As previously discussed, mere sale of assets because of a company's financial difficulties will not relieve a successor of an obligation to arbitrate under the seller's collective bargaining agreement.[30] One court has held, however, that where the sale is by a receiver or trustee in bankruptcy and the receiver has discontinued business operations before the sale, the successor is not obligated to arbitrate under the bankrupt's collective bargaining agreement.[31]

In *Owens-Illinois, Inc. v. District 65, Retail, Wholesale & Department Store Union*,[32] Owens-Illinois purchased all the machinery and equipment, and all inventories of raw materials and work in process of Atlantic Container Corporation through a receiver in bankruptcy. The order of the referee in bankruptcy provided that the sale of the assets of Atlantic would be "free and clear of any and all rights, claims, liens, [and] encumbrances"[33] and there was no reference to Atlantic's collective bargaining agreement with the defendant in the agreement of sale.

The court found that there was no substantial continuity of identity here for several reasons. The Atlantic plant became integrated into the Owens-Illinois operations of manufacturing corrugated boxes, and only a small number of the production employees formerly worked for Atlantic. Certainly, the receiver's actions in terminating business operations prior to the sale interrupted the continuity of Atlantic. In addition, the Union at the successor employer's Newark, New Jersey plant had agreed to represent those employees at the old Atlantic plant.

Whether the receiver's actions in terminating the business operations were important in the court's finding of lack of substantial continuity is difficult to determine from the opinion

30. *See* note 25 *supra*.
31. Owens-Illinois, Inc. v. District 65, Retail, Wholesale & Department Store Union, 276 F. Supp. 740 (S.D.N.Y. 1967), *aff'd per curiam*, 393 F.2d 932 (2d Cir. 1968).
32. *Id.*
33. *Id.* at 741.

itself; particularly in light of the fact that the Union at the successor's plant agreed to represent the employees at the Atlantic plant. If a receiver continues to operate the plant as a going concern and then sells it, however, several authorities suggest that the successor will be bound to arbitrate under the predecessor's contract.[34]

IV. FACTORS UTILIZED TO DETERMINE "SUBSTANTIAL CONTINUITY OF THE BUSINESS ENTERPRISE."

A. Location of the Successor Enterprise

A study of the *Wiley* merger reveals a mere absorption by Wiley of Interscience Publishers. This change was accomplished when Interscience offered its employees in its only plant, jobs at the Wiley plant.[35] One court of appeal's decision found significance in the fact that an Interscience employee might have secured a job at Wiley merely by reporting for duty at the Wiley plant located in the same city the next day after the Interscience operations ceased.[36] Under the reasoning of *Piano & Musical Instrument Workers, Local 2549 v. W.W. Kimball Co.*,[37] a successor-employer, where there is a substantial difference in the location of his plant and his predecessor's, would apparently not be bound by the predecessor's contract because substantial continuity of the business enterprise would be lacking. For a worker to accept a position at a successor's plant located at a distant site, he would have to uproot his family and move to the new locale. In addition to a time loss for both the employer and the employee, only a limited number of workers would likely choose to make such a transition.

Kimball was reversed, however, by the Supreme Court;[38] and on remand the district court ordered arbitration of grievances.[39]

34. *Cf.* Johnson v. England, 356 F.2d 44, 49 (9th Cir. 1966) *and* NLRB v. Coal Creek Coal Co., 204 F.2d 579, 580 (10th Cir. 1953). In *Coal Creek* it was suggested that if a company continues to operate through a receiver it is responsible for unfair labor practices and such responsibility cannot be avoided by reorganizations and transfers. *See also* Comment, 29 U. PITT. L. REV. 273, 280 (1967).

35. *See* Piano & Musical Instrument Workers Union, Local 2549 v. W.W. Kimball Co., 333 F.2d 761 (7th Cir.), *rev'd per curiam*, 379 U.S. 357 (1964). While this case did not involve a successor-employer but a relocation of the employer's business, it is sufficiently analogous to the *Wiley* decision for purposes of determining substantial continuity of identity.

36. *Id.*

37. *Id.*

38. 379 U.S. 357 (1964).

39. Piano & Musical Instrument Workers Union, Local 2549 v. W.W. Kimball Co., 239 F. Supp. 523 (N.D. Ill. 1965).

From this, the conclusion is reached that location of the successor's business enterprise is not enough *alone* to constitute lack of substantial identity even though the two plants may be in different states. This is not to say, however, that the location of the successor's business may not be a factor in determining substantial continuity of the business enterprise.

In *Monroe Sander Corp. v. Livingston*,[40] Sander relocated its plant in Newark, New Jersey when its New York City plant became outmoded. The Second Circuit affirmed the district court decision in finding that there was substantial continuity of identity between the operations at the two plants. Among the factors considered by the circuit court was the fact that both plants were located in the New York metropolitan area.[41] While location itself may not establish lack of substantial identity, if the location is coupled with other factors, it may contribute to a finding of lack of substantial identity.

At the same time, the fact that the successor's business is located at the same site as his predecessor's will not *alone* mean that there is substantial continuity of identity in the business enterprise.[42]

B. Physical Features and Nature of Activities of the New Enterprise

A graphic illustration of what is meant by physical features and nature of activities of the new enterprise is that presented in *Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union v. Joden, Inc.*[43] Joden entered into an agreement with the representatives of Prince Spaghetti House, Inc. for the purchase of a restaurant. Prince continued operating the restaurant as the "Prince Spaghetti House" until the close of business, March 31, 1965. When the restaurant opened the next morning under Joden's ownership and management there had been no change in its physical appearance, its name, and its service to its patrons. Not only was the nature of the two businesses identical, but no evidence of any change in ownership was immediately given to the public. Joden waited

40. 377 F.2d 6 (2d Cir. 1967).
41. *Id.* at 12.
42. *See, e.g.,* Retail Store Employees Union, Local 954 v. Lane's of Findlay, Inc., 260 F. Supp. 655 (N.D. Ohio 1966).
43. 262 F. Supp. 390 (D. Mass. 1966).

ten days after taking over to change the name to "Vince Spaghetti House." Even after the name was changed to "Vince" the old Prince menu jackets were still being used. The name "Prince" remained embedded in the pavement at the main door of the establishment. Relying on the similarity of these physical features, as well as on the nature of the business activity, the court held that there was substantial continuity of identity in the restaurant enterprise before and after it was sold by Prince to Joden.

Another example of similarity in physical feature and nature of business activities of the successor is that furnished by *Wackenhut Corp. v. United Plant Guard Workers*.[44] Wackenhut, under a contract of sale, assumed substantially all of the monetary liabilities of General Plant Protection Co. It acquired General Plant's leaseholds in various properties, all of its contracts with customers and all customer lists. Wackenhut used the same office facilities and equipment. In addition, the predecessor's name remained on the door.

In contrast, where a chain store with several outlets in an area terminated its business at a particular location by selling certain of its furnishings, equipment, trade fixtures and merchandise to another chain store, substantial continuity was found lacking despite the fact that the chain stores were engaged in the same type business.[45] Here changes were made in the physical interior of the store and several weeks elapsed before the successor was able to operate fully at the new location.

Where the basic operation is identical, the inventory purchased is substantial, and little change is made in overall operation and appearance of the enterprise, substantial continuity is deemed to exist. As a general rule the courts have regarded minor changes to be insignificant in the determination of substantial continuity of identity.

C. Continuity of Employment

In an attempt to obviate the necessity of arbitrating under a predecessor's collective bargaining contract, the successor often reduces the number of workers previously employed by a predecessor or attempts to terminate the employment of all the

44. 332 F.2d 954 (9th Cir. 1964).
45. Retail Store Employees Union, Local 954 v. Lane's of Findlay, Inc., 260 F. Supp. 655 (N.D. Ohio 1966).

workers for a period of time before rehiring some or all of them. Thus, continuity of employment in this context refers to the number of workers employed by a successor who were previously employed by the seller, and to the length of time between the termination of the predecessor's operations and the commencement of the successor's business enterprise.

The decisions dealing with the number of employees retained by the successor involve complete retention,[46] almost complete retention,[47] and substantial rehiring.[48] In one decision the predecessor's employees were given preferential hiring status which indicated similarity in the two plants.[49] In another decision, despite the discharge of all employees by the seller at the direction of the successor, it was found that substantial continuity of identity existed and that the old employees had been wrongfully discharged and were entitled to reinstatement.[50]

Length of time between the sale and the beginning of working operations apparently is a factor to be considered. In *Retail Store Employees Union v. Lane's of Findley, Inc.*[51] the court pointed out that full operations at the store did not begin for approximately three weeks after the sale and after a substantial amount of remodeling. Here, none of the employees of the seller who were represented by the Union had been hired by Lane's. While there was lack of substantial continuity in this case, the element of time was a minor factor in the court's determination. In addition, when there is not a break in the operations of the enterprises, the courts tend to find substantial continuity.[52]

Thus, where there are at least a substantial number of employees retained by the successor, the courts uphold the continuity of identity and the duty to arbitrate. Additionally, the

46. United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964); Wackenhut Corporation v. United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964).
47. United States Gypsum Co. v. United Steelworkers, 384 F.2d 38 (5th Cir. 1967) (all except three former employees).
48. Hotel & Restaurant Employees & Bartenders Int'l Union v. Joden, Inc., 262 F. Supp. 390 (D. Mass. 1966) (where 12 out of 30 employees remained).
49. Monroe Sander Corp. v. Livingston, 262 F. Supp. 129, 136 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 6 (2d Cir. 1967).
50. K.B. & J. Young's Supermarkets, Inc. v. NLRB, 377 F.2d 463 (9th Cir. 1967).
51. 260 F. Supp. 655 (N.D. Ohio 1966).
52. *E.g.*, Overnite Transp. Co. v. NLRB, 372 F.2d 765 (4th Cir. 1967); United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964); Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964); Hotel & Restaurant Employees & Bartenders Int'l Union v. Joden, Inc., 262 F. Supp. 390 (D. Mass. 1966).

length of time between the sale and the successor's beginning operations is perhaps a minor factor considered by the courts.

D. Representative Union at the Successor's Plant

The Supreme Court pointed out in the *Wiley* decision that none of John Wiley's employees were represented by a union.[53] In *McGuire v. Humble Oil & Refining Co.*[54] the Court of Appeals for the Second Circuit had to decide whether a successor-employer was obligated to arbitrate grievances of the predecessor-employer when the successor's employees were represented by a union which such arbitration might undermine. The National Labor Relations Board had previously ruled that the employees of Weber & Quinn, the seller, were effectively merged into Humble's union. The court, however, found that Humble was not required to arbitrate under Weber & Quinn's collective bargaining agreement. To compel arbitration would lead to an obvious conflict between the interests of the Humble employees as a whole and the small number of the employees formerly employed by the seller. Where such a conflict is likely, the duty to arbitrate does not arise.

V. CONCLUSION

The *Wiley* decision has had a profound effect upon the field of labor relations law as evidenced by the many decisions that have interpreted, distinguished, and extended its doctrine. The duty of a successor to arbitrate under a predecessor's collective bargaining agreement includes not only mergers but also the sale and purchase of assets of a corporation. In determining whether or not a successor must arbitrate the courts look at the location of the successor enterprise, the nature of the business activities performed at the successor's plant, and the continuity of employment. Where there is a union at the new employer's business, the court should also consider whether or not arbitration would undermine the existing union at the successor's plant. Finally, since arbitration is the part and parcel of the collective bargaining process, most courts have recognized that insignificant changes in the business enterprise should not defeat the duty to arbitrate under the predecessor's contract.

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53. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).
54. 355 F.2d 352 (2d Cir. 1966).