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IMPLICATIONS OF THE JOHN WILEY CASE FOR BUSINESS TRANSFERS, COLLECTIVE AGREEMENTS, AND ARBITRATION

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I. INTRODUCTION

An increasingly important problem in labor-management relations is the extent to which rights and obligations created by a collective bargaining agreement survive a transfer of ownership in the business. Although particular situations vary a good deal, the general conflict which has arisen over this question results from a sharp clash between the entrepreneur's interest in freedom to reorganize business enterprise and labor's interest in job security.[1] Early in 1964, the Supreme Court in *John Wiley & Sons v. Livingston*,[2] established a basis for resolving disputes over the survival of collective agreements within the existing institutional structure of labor-management relations. Relying on the federal labor policy favoring the achievement of industrial stability through arbitration,[3] the Court directed that such disputes be submitted to arbitration[4] when the collective agreement contains a general arbitration provision.[5]

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1. *Compare* Brief for AFL-CIO as Amicus Curiae, pp. 4, 8-12, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964), *with* Brief for Appellee, pp. 19-26, United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964), *and* Farmer, *Bargaining Requirements in Connection with Sub-Contracting, Plant Removal, Sale of Business, Merger and Consolidation*, 14 LAB. L.J. 957 (1963). See also NLRB v. Darlington Mfg. Co., 380 U.S. 263 (1965); 17 S.C.L. REV. 577 (1965) (public interests in efficient economic system permits free withdrawal of capital from marginal enterprise).

2. 376 U.S. 543 (1964).

3. *Id.* at 548-49.

4. The Court declared that the "objective of national labor policy . . . requires that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." *Id.* at 549.

5. Today, grievance provisions are contained in 99% of all bargaining agreements. BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 51:1 (5th ed. 1961). As the ultimate step in the grievance procedure, one source estimates that 94% of all labor contracts provide for arbitration of grievances which arise under the agreement and are not settled by the parties. *Id.* at 51:7. A more recent survey indicates that of the estimated 50,000 col-

Although the *Wiley* doctrine is by no means a panacea, it will serve to forestall, at least temporarily, strikes over survival problems. More importantly, the doctrine has had and will continue to have a strong influence on the positions taken by the parties at the time of bargaining and at the time when transfer is contemplated. If the selling employer and the union fail to reach agreement during original bargaining on the consequences of a transfer, or if either employer is likewise unable to reach an accord with the union at the time of transfer, the parties will have almost certainly surrendered their complete control of the situation to the arbitrator.

This article will examine the *Wiley* decision and the cases applying it to impose arbitration upon a successor employer. It will also suggest some of the factors to be considered by arbitrators in determining whether substantive rights and duties have survived a transfer. A potential conflict between arbitrators and the National Labor Relations Board or the courts will be discussed in relation to the possible evolution of judicial review for *Wiley* doctrine arbitrations. Finally, the merits of pre-transfer bargaining as the best means of handling the survival problem will be discussed.

While this article is relevant primarily for corporate and labor practitioners, it should also be of interest to attorneys with a general interest in the process of common law development. The many problems which *Wiley* raises both for business transfers and for arbitration generally must be resolved largely through the evolving federal common law of labor.[6] If there is a genius in the common law, and if lawyers and courts are to fulfill their

lective bargaining agreements, 95% contain arbitration clauses. See Hays, *The Future of Labor Arbitration*, 74 YALE L.J. 1019 (1965). Of this number, less than 3% specify that a dispute may be submitted to arbitration only by mutual agreement. BUREAU OF NAT'L AFFAIRS, *supra* at 51:7.

Although general arbitration provisions are prevalent in bargaining agreements, about 60% place some explicit restrictions on the scope of arbitration or the power of the arbitrator. BUREAU OF NAT'L AFFAIRS, *supra* at 51:9 (5th ed. 1961). Of these, about 88% contain the general restriction that the arbitrator may not alter or add to the contract. *Ibid.*

Where the contract contains no arbitration provision, the courts will deal with the issue of survival by developing their own substantive law under § 301 of the Labor-Management Relations Act (Taft-Hartley Act), 61 Stat. 145 (1964), 29 U.S.C. § 185 (1958), the relevant portions of which are found in note 18 *infra*. *Cf.* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). The application, as controlling precedent, which this evolving case law may have on arbitration will be discussed in notes 109-114 and accompanying text *infra*.

6. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957). See notes 18-23 and accompanying text *infra*.

traditional roles in this system's development, recognition of these problems is essential to sound, pragmatic solutions.[7]

II. JOHN WILEY AND ITS PROGENY

A. The Decisional Background of Wiley

At common law, collective bargaining agreements were treated as ordinary contracts. Accordingly, the courts generally rejected attempts to impose obligations in a collective agreement on a subsequent employer, reasoning that one not a party to a contract was not bound by its terms.[9] It was recognized, however, that a subsequent employer could voluntarily assume his predecessor's labor obligations[10] either expressly or by implication,[11] agreeing to be bound by the entire agreement or any of its particular terms.[12] Moreover, courts occasionally imposed contractual obligations on a subsequent employer as a matter of law, relying on his relationship to the prior employer rather than on his actual

7. See Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't,* 63 COLUM. L. REV. 787, 789 (1963); Jones & Smith, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law,* 63 MICH. L. REV. 751, 808 (1965). *But see* the dissent of Mr. Justice Frankfurter in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 465 (1957) where he expressed doubt that the judiciary could cope with the manifold problems of developing a federal common law of labor under § 301. He concluded that "there are severe limits on 'judicial inventiveness' even for the most imaginative judge." *Ibid.*

8. See GREGORY, LABOR AND THE LAW 445-57 (2d rev. ed. 1961). See generally Cox, *The Legal Nature of Collective Bargaining Agreements,* 57 MICH. L. REV. 1 (1958); Shulman, *Reason, Contract, and Law in Labor Relations,* 68 HARV. L. REV. 999 (1955).

9. See, *e.g.,* Office Employees v. Ward-Garcia Corp., 190 F. Supp. 448 (S.D.N.Y. 1961). Bona fide purchasers of a going business have generally not been bound by their predecessor's labor agreement. See International Longshoremen's Union v. Juneau Spruce Corp., 189 F.2d 177 (9th Cir. 1951), *aff'd on other grounds,* 342 U.S. 237 (1952); Gold v. Gibbons, 178 Cal. App.2d 517 (Dist. Ct. App. 1960); Tarr v. Amalgamated Ass'n of Street Employees, 73 Idaho 223, 250 P.2d 904 (1952); Carouso v. Empire Case Goods Co., 271 App. Div. 149; 63 N.Y.S.2d 35 (1946), *aff'd,* 297 N.Y. 514, 74 N.E.2d 462 (1947); International Ass'n of Machinists v. Falstaff Brewing Corp., 328 S.W.2d 778 (Tex. Civ. App. 1959). See cases cited 113 U. PA. L. REV. 914, 917 n.115 (1965).

10. See Gold v. Gibbons, 178 Cal. App.2d 517 (Dist. Ct. App. 1960); International Ass'n of Machinists v. Falstaff Brewing Corp., 328 S.W.2d 778 (Tex. Civ. App. 1959).

11. See Argo Steel Constr. Co., 122 N.L.R.B. 1077, 1079 (1959); Application of Swift & Co., 76 N.Y.S.2d 881 (Sup. Ct. 1947). However, courts have been reluctant to impose contractual obligations by implication in the absence of a strong element of estoppel or reasonable union reliance. See, *e.g.,* International Longshoreman's Union v. Juneau Spruce Corp., 189 F.2d 177 (9th Cir. 1951), *aff'd on other grounds,* 342 U.S. 237 (1952); Application of Swift & Co., 76 N.Y.S.2d 881 (Sup. Ct. 1947).

12. See generally Annot., 14 A.L.R.2d 846 (1950) on the severability of provisions in collective bargaining agreements.

acts or intent.[13] Unions contended that a similar result should be reached when the agreement contained a "survivor" or "successor clause," *i.e.*, a provision which stated the agreement was binding upon the union or its successor and an employer or its successor.[14] Most courts, however, were unwilling to give effect to such clauses.[15]

Even where courts at common law did enforce outstanding bargaining agreements following a transfer, they virtually never ordered specific performance of the agreements' provisions to submit labor disputes to arbitration.[16] These courts based their decisions on the principle that an agreement to arbitrate a future dispute was revocable by either party prior to an award.[17] Following the enactment in 1947 of section 301 of the Taft-

13. *E.g.*, United Shoe Workers v. Brooks Shoe Mfg. Co., 183 F. Supp. 568 (E.D. Pa. 1960); Minkoff v. H. & L. Dress Corp., 10 Misc. 2d 828, 171 N.Y.S.2d 900 (Sup. Ct. 1958); *cf.* Herman Loewenstein, 75 N.L.R.B. 377, 379 (1947). This most often occurred where the successor employer was merely the alter ego of his predecessor and the transfer was part of an attempt to avoid labor obligations under an existing bargaining agreement. See, *e.g.*, United Shoe Workers v. Brooks Shoe Mfg. Co., *supra; cf.* NLRB v. O'Keefe & Merritt Mfg. Co., 178 F.2d 445 (9d Cir. 1949); C. & D. Coal Co., 93 N.L.R.B. 799 (1951). See also Journeyman Barbers Union v. Ector, 32 Ohio Op.2d 497 203 N.E.2d 370 (1964).

At times, courts were able to justify survival under principles of corporate law. See 15 FLECHER, CYCLOPEDIA CORPORATIONS §§ 7086, 7109-10 (rev. vol. 1961). Such an argument was made by the union in *Wiley*, and was based upon N.Y. STOCK BUS. LAW § 90 which deals with survival of the rights of creditors of consolidated corporations. 376 U.S. at 547-48. However, this contention was rejected by the Court's determination that federal labor law, not state corporation law, was controlling. *Id.* at 548.

14. See, *e.g.*, Brief for Appellee, p. 18 n.2, United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964).

Successor clauses are commonly found in collective bargaining agreements. See, *e.g.*, Parker v. Borock, 5 N.Y.2d 156, 161, 756 N.E.2d 297, 299 (1959); Matter of Acme Backing Corp., 2 N.Y.2d 963, 142 N.E.2d 427 (1957).

15. See, *e.g.*, International Machinists v. Shawnee Indus., Inc., 224 F. Supp. 347, 350-51 (W.D. Okla. 1963); Tarr v. Amalgamated Ass'n of Street Employees, 73 Idaho 223, 250 P.2d 904 (1952). *But see* Polaner v. Gold Medal Grill, Inc., 52 Ohio Op. 282, 117 N.E.2d 62 (1951) (court gave effect to clause purporting to bind successors). In the few cases where the courts have looked to successor clauses to impose contract obligations on a subsequent employer, the facts have evidenced a substantial continuity of the vendor's proprietary or financial interest in the business. *Ibid.* See cases cited note 13 *supra.*

16. RESTATEMENT, CONTRACTS § 550 (1932); 6 WILLISTON, CONTRACTS § 1919 (rev. ed. 1938). See generally Hayes, *Specific Performance of Contracts for Arbitration or Valuation,* 1 CORNELL L.Q. 225 (1916); 12 S.C.L.Q. 345-46 & n.3 (1960).

17. Vynior's Case, 8 Co. Rep. 81b, 82a, 77 Eng. Rep. 597, 598-99 (1609). See generally 47 VA. L. REV. 1182 (1961).

Hartley Act,[18] however, the courts,[19] pursuant to the Supreme Court's directive in *Lincoln Mills*,[20] undertook to fashion a federal common law of industrial relations from the policies of national labor laws.[21] This approach resulted in at least two alterations in the general common law concerning bargaining agreements, and laid a foundation for the *Wiley* decision. First, in the *Steelworkers Trilogy*,[22] the Supreme Court asserted that a collective bargaining agreement is not essentially a contract, but rather a generalized code created "to govern a myriad of cases which the draftsmen cannot wholly anticipate...."[23] Thus, although a collective agreement does represent an exchange of promises, its primary function is to establish the rules governing the employer-employee relationship. These rules bind the parties not by virtue of the principles of contract law, but by virtue of the federal labor policy of promoting industrial peace.

Secondly, beginning in 1961 with the *Trilogy*, the Supreme Court has fashioned a body of substantive federal common law delineating the respective roles of the arbitrator and the courts in the grievance process. Although there are still many gaps in this developing body of law, the *Trilogy* and subsequent cases

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18. Labor-Management Relations Act (Taft-Hartley Act) § 301 (a), 61 Stat. 145 (1947), 29 U.S.C. § 185(a) (1964) which provides in part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . 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.

19. State courts have concurrent jurisdiction with the federal courts to enforce collective bargaining agreement under § 301(a). *E.g.*, Humphrey v. Moore, 375 U.S. 335 (1964). State courts must, however, apply federal law in these actions. *E.g.*, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962), 14 S.C.L.Q. 560 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), 14 S.C.L.Q. 560 (1962).

20. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957). Here, the court said that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Ibid.*

21. See generally Elson, *The Supreme Court and the Private World of Arbitration*, 18 ARB. J. 65 (1963).

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

23. 363 U.S. at 578-80.

have greatly expanded the scope of an arbitrator's powers,[24] provided greater sanctity for his final determination on the merits,[25] and correspondingly limited the role of the courts.[26]

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24. See Mayer, *Judicial "Bulls" in the Delicate China Shop of Labor Arbitration,* 2 LAB. L.J. 502-03 (1951), where the author noted that, at that time, "the court insists that the obligation to arbitrate [a contract] must be 'perfectly expressed' to the extent that even judges cannot find it possible to uncross a 't' or undot an 'i' with respect to the language used by the contracting parties."

The Supreme Court distinguished the labor situation, however, noting that arbitration under a collective bargaining agreement is a substitute for a strike, whereas in a commercial arbitration it replaces litigation. Thus, the traditional judicial reluctance toward compelling parties to arbitrate is not applicable to labor arbitration. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578 (1960); see Marshall, *Contract Enforcement and the Courts,* 15 LAB. L.J. 577, 578 (1964).

25. See, *e.g.,* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (Court refused to review merits of arbitrator's award despite ambiguity); Jones & Smith, *Management and Labor Appraisals and Criticisms: A Report with Comments,* 62 MICH. L. REV. 1115, 1119-20 (1964) which summarizes the impact of the *Trilogy,* noting:

> These decisions have been interpreted, correctly we think, as having sharply reduced the opportunity to make effective use of the courts in either an attempt to intercept the submission of the issues to arbitration or to upset the awards which result.

See generally Wellington, *Judicial Review of the Promise To Arbitrate,* 37 N.Y.U.L. REV. 471 (1962).

26. *E.g.,* United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

See Smith, *Arbitrability—The Arbitrator, the Courts, and the Parties,* 17 ARB. J. 3, 8-11 (1962) and Note, 47 VA. L. REV. 1182-83 (1961). These articles note that the meaning of "arbitrability" may vary greatly depending on the stage of the proceeding at which the issue arises, *i.e.,* in a suit to compel arbitration; during the arbitration; or in a suit to avoid or enforce an award.

The issue of arbitrability may be more specifically subdivided into issues of "substantive arbitrability" and "procedural arbitrability". As the term "arbitrable" is most often used, it refers to "substantive arbitrability," that is, the authority of the arbitrator to *hear* the issues of a dispute. While the arbitrator usually rules on his authority to hear a matter, this is usually a provisional determination, and either party may seek an ultimate determination of the issue by a court. Of course, the parties can provide in the agreement that any dispute as to whether a particular claim is within the arbitration clause, is itself for the arbitrator to decide. See United Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 583 n.7 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 571 (1960) (Brennan, J., concurring).

Several commentators have noted that the issue of substantive arbitrability, which encompasses the *authority to hear a dispute,* should be distinguished from the issue in a subsequent action to question the arbitrator's *authority to make his award.* See Smith, *supra* at 11-15; Wellington, *Judicial Review of the Promise to Arbitrate,* 37 N.Y.U.L. REV. 471, 483-84 (1962). They point out that an arbitrator will at times hear frivolous claims because of the "therapeutic values" of arbitration. See 363 U.S. at 568. Thus, while he will have authority to hear the dispute, he would have no authority under the agreement to make the requested award. *E.g.,* Carey v. General Elec. Co., 315 F.2d 499 (2d Cir. 1963), *cert. denied,* 377 U.S. 908 (1964); New Bedford Defense Products Div. v. Local 1113, UAW, 258 F.2d 522 (1st Cir. 1958); see, *e.g.,* Hays, *The Future of Labor Arbitration,* 74 YALE L.J. 1019, 1020-22 (1965). In *Carey,* the court held that limiting language in the bargaining agreement went not to the arbitrator's jurisdiction, but to his "authority" to

For example, where a collective agreement contains a general arbitration provision, the Court held that unless an issue is *expressly excluded* from consideration, it will be presumed that arbitration was intended.[27]

Relying on the developing federal labor policy favoring arbitration, which in effect superceded common law contract rules,[28] unions began to allege that while perhaps all contractual obligations do not survive a business transfer, at least the duty to arbitrate a grievance survives.[29] Lower federal courts consistently denied such efforts, however, some stating that legislation would be necessary to abrogate the requirement that the consent of a successor employer was required to bind him to a prior collective agreement.[30] Others continued to deny arbitration on contractual grounds, relying on language in the *Trilogy* to the

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make an award. In *New Bedford,* the court noted that the matter was arbitrable, but the dispute could be correctly decided only one way.

The issue of "procedural arbitrability" raises questions of compliance by the party seeking arbitration with the steps required to initiate the proceeding. In *Wiley,* the court held that this issue was for the arbitrator's determination since it was so intertwined with the merits of the dispute. 376 U.S. at 555-59.

This vagueness of terms is partially due to a terrible penchant of both the judiciary and commentators to confuse the issue of jurisdiction to arbitrate with the merits of a dispute. See, *e.g.,* Gould, *The Supreme Court and Labor Law—An Analysis of Recent Trends,* 16 W. RES. L. REV. 819, 822 (1965). This confusion is due in part to the fact that the issue of the merits and jurisdiction are almost always intertwined to a degree.

Not only has the jurisdiction of the arbitrator grown at the expense of the courts, but there has been a concurrent expansion of arbitration into the once exclusive jurisdiction of the NLRB. See, *e.g.,* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964); Smith v. Evening News Ass'n, 371 U.S. 195 (1962). See notes 83-88 *infra* and accompanying text.

27. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581 (1960). Thus, it is obvious that the Court has abandoned the strict rule of contract interpretation which required arbitration of an issue only if expressly provided for in the language of the agreement.

28. *E.g.,* John Wiley & Sons v. Livingston, 376 U.S. 543, 548 (1963). "State law may be utilized so far as it is of aid in the developing of correct principles or their application in a particular case, but the law which ultimately results is federal." *Ibid.*

29. See, *e.g.,* Wackenhut Corp. v. International Plant Guard Workers, 55 L.R.R.M. 2554 (9th Cir.), *rev'd on rehearing,* 332 F.2d 954 (9th Cir. 1964); Livingston v. Gindoff Textile Corp., 191 F. Supp. 135 (S.D.N.Y. 1961); Office Employees v. Ward-Garcia Corp., 190 F. Supp. 448-49 (S.D.N.Y. 1961).

30. See United Steelworkers v. Reliance Universal, Inc., 227 F. Supp. 843, 845-46 (W.D. Pa.), *rev'd,* 335 F.2d 891 (3d Cir. 1964), where the district court reasoned that to impose the previous owner's labor contract upon the new owner would be "such a complete innovation that it cannot be regarded as a feature of federal common law under 29 U.S.C. § 185 [§ 301], but must await adoption through the legislative sanction of Congress." *Ibid.*

effect that the agreement to arbitrate was a matter of contract.[31] Prior to *Wiley*, no court had accepted the argument that the legal hiatus between a prior employer's express agreement to arbitrate and a subsequent employer's failure to adopt the agreement could be spanned by federal labor policy.

B. The Wiley Decision

In the *Wiley* case itself, Interscience, a relatively small publisher, had been merged into Wiley, a large publisher,[32] none of whose employees were represented by a union.[33] Interscience had previously entered into a bargaining agreement, which contained a broad arbitration clause,[34] and which did not expire until four months after the merger. The union made numerous efforts to negotiate a settlement on the effects of the merger, first with Interscience and later with Wiley, but the parties were unable to reach an agreement.[35] While the negotiations continued, most of the former Interscience employees were transferred to the Wiley plant, which was nearby, and integrated into the larger, substantially identical Wiley unit. A week before the termination date of the contract the union brought action under section 301 to compel Wiley, who contended that the bar-

31. See, *e.g.*, Office Employees v. Ward-Garcia Corp., 190 F. Supp. 448, 449 (S.D.N.Y. 1961). The court quoted from Mr. Justice Douglas' opinion in the *Warrior & Gulf* case to the effect that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute to which he has not agreed so to submit." 363 U.S. 582.

32. It should be noted that in neither *Wiley* nor its progeny has there been any dispute that transfer was for other than genuine business reasons.

33. At the time of the merger Interscience had about eighty employees, forty of whom were represented by the Retail, Wholesale and Department Store Union, AFL-CIO. Wiley had about three hundred employees, none of whom were represented by a union. 376 U.S. at 545. See generally Brief for Petitioner, pp. 5-15, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964).

34. *Id.* at 553. The Wiley-Livingston Agreement provided that:

> Any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement, shall be subject to the following procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute, hereinafter referred to as "grievance."

313 F.2d at 64.

Moreover, the agreement did not contain a "successor clause," 376 U.S. at 544, nor did *Wiley* expressly assume the labor obligations under the contract. *Ibid.*

35. *Id.* at 545. See generally Brief for Petitioner, pp. 6-15, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964).

gaining agreement had terminated with the merger, to arbitrate regarding rights which the union claimed had survived.[36]

In affirming the Second Circuit's order submitting the dispute to arbitration,[37] the Supreme Court maintained that the question of whether the duty to arbitrate survived was for the court, not the arbitrator, to decide.[38] In a unanimous opinion 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 rights of the employees covered by the agreement, and . . . in appropriate circumstances, present here, the successor employer

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36. The employees' claims involved seniority, pensions, severance pay, vacation, and job security. 376 U.S. at 552.

Since United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 595, 599 (1960), it has been recognized that if an agreement has terminated before an arbitration award is granted, this does not prevent arbitration so long as the grievance occurred during the period covered by the agreement. The Court has also recognized that the union is the proper party to enforce rights claimed by employees even though its collective bargaining agency may have terminated. Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc., 369 U.S. 17 (1962). *But cf.* Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962), *cert. denied,* 374 U.S. 830 (1963). In addition to claiming a survival of the contract grievance procedures, the union claimed survival of "vested" substantive rights, see 313 F.2d 58 n.4, and Brief for Respondent, pp. 21-37, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964), embracing both post-merger claims and claims accruing at a time beyond the term of the agreement. 376 U.S. at 545. See note 6 *supra.* The Court noted that:

> [T]he Union has framed its issues to claim rights not only "now"—after the merger but during the term of the agreement—but also after the agreement expired by its terms. . . . We see no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired.

376 U.S. at 554.

37. 313 F.2d 52 (2d Cir. 1963). The district court assumed, without deciding, that the collective agreement survived the merger and that Wiley was bound by its terms. Livingston v. John Wiley & Sons, Inc., 203 F. Supp. 171 (S.D.N.Y. 1962). The court nevertheless held that the union was not entitled to demand arbitration since it "failed to avail itself of the procedures under the contract which were a condition precedent to arbitration." *Id.* at 173. However, the Second Circuit held that the district court erred in considering the issue of "procedural arbitrability," *i.e.,* that the arbitrator, not the court, should determine whether the union had adhered to the grievance procedure outlined in the contract. 313 F.2d 52, 60-64 (2d Cir. 1963). As for "substantive arbitrability" it was not clear whether the Second Circuit had ruled on the issue or had left the matter for the arbitrator. 376 U.S. at 546 n.1.

38. 376 U.S. at 546-47.

may be required to arbitrate with the union under the agreement.[39]

The Court dismissed the contention that express consent was necessary to bind Wiley. It reasoned that the federal policy favoring settlement of labor disputes by arbitration, previously invoked in the *Trilogy* to extend the scope of a general arbitration provision,[40] was equally applicable to support survival of a duty to arbitrate. The Court indicated that countervailing circumstances, which were not delineated, should be considered in balancing the conflicting employer-employee interests. It added, however, that the national policy in favor of arbitration could be overcome only if such circumstances were compelling.[41] It further noted that the union in *Wiley* had expressed its position on survival well in advance of the merger, thus eliminating any substantial threat of unfairness or surprise to the purchasing employer.[42]

39. 376 U.S. at 548. The Court also considered the issue of procedural arbitrability, see note 26 *supra*, and held that the arbitrator and not the Court is the appropriate body to decide whether procedural prerequisites, which condition the duty to arbitrate, have been met. 376 U.S. at 555-59. For a critical analysis of this holding, see generally Comment, 73 YALE L.J. 1459 (1964). See also Dunau, *Procedural Arbitrability, A Question for the Court on Arbitration*, 14 LAB. L.J. 1010 (1963); 15 SYRACUSE L. REV. 553 (1964).

40. *E.g.*, United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580-85 (1960).

41. 376 U.S. at 549-50.

42. *Id.* at 551; *accord*, Polaner v. Gold Medal Grill, Inc., 52 Ohio Op. 282 117 N.E.2d 62 (1951) (purchaser of assets with notice bound by prior collective bargaining agreement). See generally, Gould, *The Supreme Court and Labor Law—An Analysis of Recent Trends*, 16 W. RES. L. REV. 819, 821 (1965) where the irrelevancy of any "bargaining away concept" is noted.

Since the union will normally be expected to claim a survival or rights, it does not seem likely that the courts will strictly require, as a condition for survival, an active affirmance of a claim to rights expressly listed in the agreement. However, courts should interpret an inconsistent position or apparent abandonment of any rights in the agreement as an estoppel to a later attempt to enforce them if there is a showing of reasonable and detrimental reliance. See 113 U. PA. L. REV. 914, 930-31 (1965). This rationale would also apply to a case where a union presses claims based on unwritten past practices or interpretation of the collective bargaining agreement which are not apparent from the text of the agreement. Thus, as to unlisted "rights" or past practices, active affirmance would be necessary. *Ibid.*

This approach, requiring no notice for expressly listed rights, seems sensible since in most cases it is difficult to tell from post-transfer negotiations which party, if either, first suggests abandonment and renegotiation. See Wackenhut Corp. v. International Plant Guard Workers, 55 L.R.R.M. 2554, 2556-58 (9th Cir.), *rev'd on rehearing*, 332 F.2d 954 (9th Cir. 1964); compare Opening Brief for Appellant, pp. 1-12, Wackenhut Corp. v. International Union Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964).

It is also interesting to speculate on the converse situations, where the employer has an advantageous contract and seeks to preserve it by giving notice to the union of his intent to seek arbitration on the survival issues. Rationally, the same criteria and requirements would apply since the policy of peaceful settlement is the same in both cases. See 113 U. PA. L. REV. 914, 931 (1965).

1. *The Scope of Judicial Inquiry into Survival*

Equally as important as the Court's action in finding the survival of a duty to arbitrate was its abstinence on the issue of successorship—*i.e.*, the question of what rights and duties actually survived to bind the successor.[43] The Court reached this result by explicitly delegating a decision on the survival of substantive rights to the arbitrator.[44] Indeed, this initial judicial restraint was not unanticipated, since it evidences a continuation of the patronage which the Court has recently given arbitration as a substitute for industrial strife and as an integral part of the collective bargaining process.[45]

2. *The Scope of Business Transfers Subject to the Wiley Doctrine*

In discussing the types of business transfers to which the *Wiley* doctrine might apply—*i.e.*, mergers, sales of assets, or consolidations—the Court indicated that the appropriate circumstances warranting survival of the duty to arbitrate would not be limited to the merger context. The Court pointed out that the circumstances warranting the submission of survival issues to arbitration would generally be present in all transfers where one owner replaced another so long as the "business enterprise" remained substantially the same.[46] Accordingly, the *Wiley* rationale of business continuity was held applicable in a recent Ninth Circuit case, *Wackenhut v. International Plant Guard Workers*,[47] where the transfer of an entire corporate business was accomplished through a sale of assets.[48] Similarly, the Third Circuit was able to apply the *Wiley* doctrine in *United Steelworkers v. Reliance Universal Inc.*,[49] where the

43. 376 U.S. at 555.

44. *Ibid.* "Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts." *Ibid.*

45. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

46 376 U.S. at 551.

47. Wackenhut Corp. v. International Plant Workers, 332 F.2d 954 (9th Cir. 1964).

48. Accord, McGuire v. Humble Oil & Ref. Co., 247 F. Supp. 113 (1965). At the time of the sale each company was engaged in providing guard service to oil and chemical plants. The principal assets acquired by Wackenhut were leaseholds, customer lists and contracts, all assignable permits and licenses, trade names and trademarks, and the company name. Wackenhut Corp. v. International Plant Guard Workers, 332 F.2d 954, 956 (9th Cir. 1964). See notes 77-78 *infra* and accompanying text.

49. United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964).

transfer was a divestiture through sale of assets by one of the many manufacturing entities in a corporate giant.

In sum, it can be expected in arbitrability disputes following transfers, as in disputes on the issues covered by a general arbitration clause, that the courts will resolve doubts on arbitrability in favor of submission. This seems particularly appropriate when it is recognized that the "business continuity" test employed in *Wiley* is probably nothing more than a jurisdictional prerequisite to arbitration.[50] The result would also appear just, in the last analysis, so long as judicial review is available to determine that the arbitrator has not exceeded his remedial authority and that his award has not produced violations of controlling law.[51]

Yet, even with the broad jurisdictional test of *Wiley*, extreme alterations in business operations should be recognized as sufficient to vitiate the duty to arbitrate.[52] Since the cases subsequent to *Wiley* have involved similarly clear situations of business continuity however, the minimal elements of the continuity test cannot be definitively enumerated at this time.[53] It appears,

50. See note 27 *supra.*

51. See Hays, *The Future of Labor Arbitration,* 74 YALE L.J. 1019 (1965). The author summarizes this approach noting that "No great harm is done by applying a liberal rule as to arbitrability, if the court carefully scrutinizes what the arbitrator later decides." *Id.* at 1028.

52. 376 U.S. at 551. "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives." *Ibid.*

53. See Note, *The Contractual Obligations of a Successor Employer Under the Collective Bargaining Agreement of a Predecessor,* 113 U. PA. L. REV. 914, 922-23 (1965). The author suggests that the courts may draw an analogy from non-polar NLRB decisions, implementation of the Board's continuity test on the question of whether a contract survives to act as a bar in a certification proceeding. See notes 93-94 *infra.* This note lists five elements the Board has considered in applying its continuity standard, namely: location of the business, and similarities of personnel, supervision, equipment and mode of operations. However, with valid analysis, the note suggests that location and employment of the predecessor's employees should be eliminated as significant factors in the *Wiley* test. *Ibid.*

A similar approach was adopted in McGuire v. Humble Oil & Ref. Co., 247 F. Supp. 113 (E.D.N.Y. 1965). In determining the guide lines for implementing the Supreme Court test of substantial identity in the business enterprise, the court discounted the value of the factors of similar physical location of the employing industry and the factor that employees are working in different offices, with different supervisors. *Id.* at 118. After distinguishing the issues in the analogous Board certification proceeding, the court concluded that the relevant criteria were: (1) similarity of work performed by the employees; (2) similarity in the employing industry; and (3) similarity in the employment relationship. *Ibid.*

The detail of these suggested criteria again raises the problem of where the line should be drawn between the issues of jurisdiction and the merits, and how

nevertheless, that in addition to the postulated case of union abandonment through failure to give notice,[54] there will be at least three types of cases where the courts will find no duty to arbitrate. The first will result when there has been a substantial change in the business from the employees' point of view. This might occur when, for example, the employees subsequently produce a substantially different product or when the employee group has changed substantially.[55] Indeed the United Steelworkers conceded at the district court level in *Reliance* that none of the contract provisions would survive if premises which had been formerly used for making cement pipe were subsequently used in a different type of business such as the manufacture of chocolate candy.[56]

A second category of cases resulting in an abolition of the duty was suggested by the AFL-CIO in its amicus curiae brief in *Wiley*.[57] This categorization involves changes primarily from the viewpoint of the employer. The AFL-CIO suggested that no duty to arbitrate would survive in the extreme case where there was a transfer of assets to a trustee for liquidation or to an auctioneer for sale. Since both transfers involve an anticipated cessation of business activity and disappearance of the business entity prior to the transfer, the situation appears to be by definition beyond the substantial continuity test advanced in *Wiley*. A category based on a test involving a change in or disappearance of the business entity is often a vague one,[58] how-

far a court may go in examining the facts in the pre-arbitration hearing. Through its detailed examination and interpretation of the facts, the court may in reality decide the merits of the grievance. Jones & Smith, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751, 754 (1965). At least a determination of non-arbitrability has the same effect as a determination on the merits. See Biggs, *Assumption of Union Contracts by Successors: Court Decisions and Arbitration Awards*, 20 ARB. J. 22, 30 (1965).

54. See note 42 *supra* and accompanying text.

55. 376 U.S. at 551; *cf.* McGuire v. Humble Oil & Ref. Co., 247 F. Supp. 113, 118-19 (E.D.N.Y. 1965).

56. United Steelworkers v. Reliance Universal, Inc., 227 F. Supp. 843, 846 (W.D. Pa.), *rev'd*, 335 F.2d 891 (3d Cir. 1964).

57. 376 U.S. at 555. "It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as non-arbitrable because it can be seen in advance that no award to the Union could receive sanction." *Ibid.* See Camden Indus. Co. v. Carpenters Union, 246 F. Supp. 252 (D.N.H. 1965); Worcester Stamped Metal Co. v. United Steelworkers, 234 F. Supp. 823 (D. Mass. 1964). In *Worcester* the court ordered arbitration, reasoning that it could not be seen in advance that no award to the union could receive judicial sanction.

58. *Id.* at 549-50, where the Court noted that denial of arbitration would result "only if other considerations compellingly so demanded."

ever, and it will undoubtedly be applied with caution by the courts.

Notwithstanding the factual categorization, the issue for the court at the pre-arbitration hearing becomes much like the issue at a hearing on a motion for summary judgment—whether as a matter of law on any finding of facts an arbitrator's award for survival could be sustained.[59] To deny arbitration, a court would probably have to find that the policy of fostering industrial stability through arbitration is outweighed, not only by the policy against burdening a business with obligations not reasonably suited to it, but rather by the very slight burden which the successor must bear in defending the arbitration claim. With the slight disadvantage to the successor and the great value of arbitration, factual situations warranting a denial of the duty on this ground will probably be infrequent.[60]

A final category may well include several types of cases all of which involve a conflict of law between the federal labor policy favoring arbitration and some supervening federal policy. The best example of this category might occur following a transfer in a bankruptcy proceeding[61] where the business is sold as a

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59. Brief for AFL-CIO as Amicus Curiae, pp. 12-13, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964).

60. It is possible that such a test would create a loophole in the otherwise broad *Wiley* coverage. An attempt to avoid the continuity standard might be made by tailoring the form of the transaction. To do this the successor might attempt to limit his purchases to certain assets. However, the loophole may well be more apparent than real since in few cases would a successor interested in acquiring a going concern be willing to risk dismantling and removing the assets for a piece-meal purchase. Furthermore, the courts will undoubtedly look with disfavor on such an attempted avoidance since by its very nature it contradicts the goal of industrial stability. See 113 U. PA. L. REV. 914, 935 (1965).

61. See Bankruptcy Act § 70(f), 76 Stat. 572 (1962), 11 U.S.C. § 110(f) (Supp. V, 1964); Bankruptcy Act § 70 (g), 52 Stat. 882 (1938), 11 U.S.C. § 110 (g) (1958); General Orders in Bankruptcy 18, 305 U.S. 688 (1939).

The issue could also arise in a reorganization under Chapter X, see Bankruptcy Act §§ 111-17, 52 Stat. 884-85 (1938), 11 U.S.C. §§ 511-17 (1958), or an arrangement under Chapter XI, see Bankruptcy Act §§ 311-16, (1938). In these situations, however, the successor is usually little more than the alter ego of the predecessor. The courts apparently have the power, nevertheless, to approve a plan repudiating existing executory contracts. See Bankruptcy Act § 116(1), 52 Stat. 885 (1938), 11 U.S.C. § 516(1) (1958) (reorganization); Bankruptcy Act § 313(1), 52 Stat. 906 (1938), 11 U.S.C. § 713(1) (1958) (arrangements). See also note 95 *infra* and accompanying text.

going concern free from its labor contracts.[62] In this case the trustee or the court has merely exercised its statutory power to avoid the contracts of the bankrupt employer. Here, in a conflict between federal statutory policy favoring creditors and a federal common law favoring arbitration, the statutory policy obviously prevails to bar arbitration of survival issues. By analogy, the courts might also seek to resolve at the pre-arbitration hearing a potential conflict between concurrent jurisdictions over the survival issues. Such a conflict might result from the dual jurisdictions of the arbitrator and the NLRB.[63] Since most of these conflicts are speculative at the pre-arbitration stage, however, judicial intervention will probably be delayed until the award has produced an actual conflict.[64]

C. Wiley Progeny—The Doctrine's Development and Expansion

As was noted above, the *Wiley* rationale was recently elaborated in *United Steelworkers v. Reliance Universal Inc.*[65] There Martin-Marietta, pursuant to an order by the Federal Trade Commission, sold a concrete pipe plant as a going concern to Reliance, who continued its operation substantially unchanged.[66] In an apparent effort to counteract the effect of a successor clause[67] in the outstanding bargaining agreement, the contract of sale contained an express declaration that the "Buyer shall not assume any obligation of the . . . [seller] under any collective bargaining agreement."[68] The union disregarded this unilateral renunciation by Reliance and brought an action for declaratory judgment. It raised the question whether the bar-

62. See Van Huffel v. Harelrode, 284 U.S. 225 (1931); Oppenheim, *Sales of Property in Bankruptcy Free and Clear of Encumbrances,* 29 ILL. L. REV. 67 (1934). *But cf.* In re Overseas Nat'l Airways, 238 F. Supp. 361 (E.D.N.Y. 1965) (Railway Labor Act limits referee's right to disaffirm bargaining agreement). See also Muskegon Motor Specialties Co. v. Davis, 313 F. 2d 841 (6th Cir. 1963) where the court rather than the arbitrator determined the merits of claims against a bankrupt employer.

63. See notes 83-94 *infra* and accompanying text.

64. *Cf., e.g.,* McGuire v. Humble Oil & Ref. Co., 247 F. Supp. 113, 124-25 (E.D.N.Y. 1965); Camden Indus. Co. v. Carpenters Union, 246 F. Supp. 252 (D.N.H. 1965); Worcester Stamped Metal Co. v. United Steelworkers, 234 F. Supp. 823 (D. Mass. 1964).

65. United Steelworkers v. Reliance Universal Inc., 335 F. 2d 891 (3d Cir. 1964).

66. *Id.* at 893. The court noted that subsequent to the transfer, Reliance continued the operation "without significant change, employing substantially all of the operating, supervisory, and managerial personnel who were formerly employed." *Ibid.*

67. See note 20 *supra* and accompanying text.

68. *Ibid.*

gaining agreement had survived the transfer, and, if so, whether Reliance was required to submit issues on its application to arbitration.[69]

The district court, in a decision rendered prior to *Wiley*, denied relief under section 301 on the theory that under common law contract principles Reliance, as a stranger to the contract, was not subject to its terms.[70] After *Wiley*, however, the Third Circuit reversed in a carefully worded opinion. The court viewed *Wiley* as standing for the proposition that federal policy favoring amicable settlement of labor disputes by arbitration is so strong "that the emerging federal common law of labor relations requires a succeeding proprietor of a business to take the business subject to a duty to arbitrate grievances."[71]

The court in *Reliance* reached the same result as had the *Wiley* court in ordering arbitration, but its holding on the current status of the collective bargaining agreement was significantly different. The court held that the preexisting contract remained, at least tentatively, "the basic charter of labor relations."[72] The court however apparently gave the arbitrator power to avoid the the agreement "giving weight to any change of circumstances created by the transfer which may make adherence to any term or terms of that agreement inequitable."[73]

Although *Reliance* can probably best be interpreted as an application of *Wiley* rationale tempered by the procedural context of a declaratory judgment,[74] it points to the area where expansion of the doctrine will probably first be attempted. That issue involves the question of whether a court may rule conclusively on the issue of rights survival. It will be recalled that the Court in *Wiley* did not pass on the question of whether the various substantive rights claimed by the union (other than the jurisdictional right to arbitration) actually survived the transfer. The

69. It appears that Reliance could have prevented the court from making any ruling on the merits of survival by moving to stay the judicial proceeding until an arbitrator had ruled on the matter. However, by failing to do this it waived the right. *Cf.* E. T. Simonds Constr. Co. v. Local 1330, International Hod Carriers, 315 F.2d 291 (7th Cir. 1963). Here the court held that when a union unduly delayed a motion to stay an action for breach of a no-strike clause pending arbitration, it waived its right to have the issue arbitrated. Courts will usually grant a timely motion by a party to stay a legal proceeding which is within the scope of the arbitration agreement. *E.g.,* Drake Bakeries Inc. v. Local 50, Bakery Workers, 370 U.S. 254 (1962).

70. United Steelworkers v. Reliance Universal Inc., 227 F. Supp. 843, 845-46 (W.D. Pa.), *rev'd,* 335 F. 2d 891 (3d Cir. 1964).

71. United Steelworkers v. Reliance Universal Inc., 335 F.2d 891, 893 (3d Cir. 1964).

72. *Ibid.*

decision on survival of substantive rights was implicitly delegated to the arbitrator for his determination after a plenary hearing on the merits.[75] The Court's opinion did leave in doubt, however, the proper disposition of cases arising out of different factual contexts. It seems fairly certain, therefore, that unions will point generally to the federal labor policy favoring industrial peace and urge that *Wiley* means subsequent employers are automatically bound by obligations contained in outstanding agreements. Thus, they will argue, all that remains for an arbitrator is to interpret terms and apply the agreement to a particular occurrence.[76]

Surprisingly enough this position finds support in the Ninth Circuit's recent decision in *Wackenhut Corp. v. International Plant Guard Workers*.[77] Here the court held that the prior agreement survived in its totality and interpreted *Wiley* to mean:

> [W]here there is substantial similarity of operation and continuity of identity of the business enterprise before and after a change in ownership, a collective bargaining agreement containing an arbitration provision, entered into by the predecessor employer *is binding upon the successor employer*.[78]

Nevertheless, *McGuire v. Humble Oil & Ref. Co.*,[79] the most recent and in many respects the most thorough lower court in-

73. *Ibid.*

74. See note 69 *supra*.

75. 376 U.S. at 552-55.

76. Wackenhut Corp. v. International Plant Guard Workers, 332 F.2d 954, 958 (9th Cir. 1964).

77. *Ibid.*

78. *Id.* at 958. The prior employer had entered into a collective agreement with a union which provided for grievance arbitration as the final and binding step in the grievance procedure. During its term, Wackenhut purchased substantially all of the assets of the business to effect a horizontal combination. Wackenhut invited General Plant employees to apply for employment and there was a substantial continuity of supervisory personnel. Nevertheless, Wackenhut pointed out that it had not expressly assumed General Plant's labor obligations and refused to abide by the agreement or to submit the issue to grievance arbitration. However, the district court found that Wackenhut had *expressly* agreed to be bound and ordered arbitration. *Id.* at 955-57. The court of appeals reversed the district court in an opinion prior to *Wiley*, but on rehearing after *Wiley*, it affirmed on the basis of the policy considerations in *Wiley*. Wackenhut Corp. v. International Plant Guard Workers, 55 L.R.R.M. 2554 (9th Cir.), *rev'd on rehearing*, 332 F.2d 954 (9th Cir. 1964).

79. 247 F. Supp. 113 (1965). In this action, Teamster Local 553, representing the employees of the predecessor, Weber-Quinn, sued the subsequent employer, Humble, to compel arbitration of some twenty-six grievances. Humble had purchased the assets and business of Weber-Quinn, a fuel oil distributor,

terpretation of *Wiley*, augurs strongly for a limited judicial role. Although the transfer involved problems of unit intermingling even more complex than those in *Wiley*, the court found compliance with the *Wiley* substantial continuity test. Accordingly, it ordered Humble, the successor, to arbitrate twenty-six grievances.[80] In addition to an order requiring arbitration, the plaintiff, a Teamster local, had requested that *Humble* be enjoined from disregarding the agreement pending arbitration. The court refused the injunctive relief since it was, in effect, a request for specific performance of the bargaining provisions. The court concluded, quoting at length from *Reliance*, that the continued validity of the various provisions was clearly a matter for the arbitrator's determination.[81] Thus, a ruling on the issue of specific performance would clearly "usurp the jurisdiction of the arbitrator."[82]

It can be argued that the desire for short-term industrial stability, which in part underlies *Wiley*, taken alone supports automatic survival. A careful reading of *Wiley* demonstrates, however, that the Court's sole concern was the *duty to arbitrate.* Furthermore, the goal of *short-term* industrial stability is achieved regardless of which body—court or arbitrator—decides the issues of survival. The Court has long noted its preference for arbitration, and extensive judicial participation in the interpretation of collective argreements prior to arbitration would contravene much of the Court's endorsement of the procedure. Thus, to the extent that the Court regards arbitration as an in-

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and had integrated the acquired operation into its existing distribution system.

The Teamster-Weber-Quinn bargaining agreement ran until December 1965. The Teamsters gave Humble timely notice of its representational status and requested that Humble adopt the agreement. Humble refused, stating it was not bound since the Weber-Quinn unit had disappeared and since the Weber-Quinn employees were now members of the Humble unit by accretion, all rights under the old contract had disappeared. Humble's employees were represented by an independent, the Industrial Employees Association, and their bargaining agreement ran until April 30, 1966.

In an attempt to resolve the dispute, Humble instituted an NLRB unit clarification proceeding prior to the district court decision. The Board ruled that the employees of Weber-Quinn had become members of the Humble unit. Humble Oil & Ref. Co., 153 N.L.R.B. No. 111 (1965).

Although the court recognized the problems which would confront the arbitrator because of the prior Board ruling, 247 F. Supp. at 116 n.1., the court found under the *Wiley* continuity test that the duty to arbitrate had survived. The court reasoned that survival of the duty was not inconsistent with the Board's determination on unit status since the union did not lose the right to arbitrate merely as a result of the disappearance of the employer or the old bargaining unit.

80. 247 F. Supp. at 120-21.
81. *Id.* at 125-26.
82. *Id.* at 127.

formal, inexpensive, expeditious forum and the arbitrator as the adjudicator more likely to comprehend the parties' relative interests, *long-term* industrial stability can best be achieved by initial judicial abstention on the merits of survival.

III. Contract Arbitration and the Survival of Rights—New Problems for the Arbitrators

A. Potential NLRB—Arbitrator Conflict

Since imposition of a duty to arbitrate after a transfer will forestall possible strikes, the immediate result of *Wiley* has been the achievement of short-run industrial stability. The long-run effect of *Wiley* and the influence it will have on overall industrial stability and economic growth depends to a large extent on the manner in which individual arbitrators exercise their broad powers. While the Court expressed confidence that the arbitrator's expertise would yield fair and equitable results, inherent in his new powers are additional pitfalls to achieving that goal.

Not the least of these hazards is the potential conflict between the NLRB and arbitrators which may result from their concurrent, and often simultaneous, jurisdiction over related questions of survival.[83] This dual jurisdiction may occasionally produce problems following simple transfers, such as that in *Wackenhut* or *Reliance*, where both employee and manufacturing units remained unchanged. The most serious problems are likely to arise, however, from "intermingling" situations such as in *Wiley* and *Humble*.[84] Intermingling results when, following a merger or a

83. *Cf.* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964) (arbitrator has concurrent jurisdiction with NLRB on issue involving determination of bargaining unit); Smith v. Evening News Ass'n, 371 U.S. 195, 197-98 (1962); McGuire v. Humble Oil & Ref. Co., 247 F. Supp. 113, 121-23 (E.D.N.Y. 1965). Compare Brotherhood of Ry. & S. S. Clerks v. United Air Lines, Inc., 325 F.2d 576, 580 (6th Cir. 1963), *cert. granted*, 377 U.S. 903, *cert. dismissed as improvidently granted*, 379 U.S. 26 (1964). See Jones & Smith, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 Mich. L. Rev. 751, 795 (1965) where the authors conclude that a party having a contractual remedy as well as one before the Board arguably is entitled to pursue both. *But see* Kentile, Inc. v. Local 456, United Rubber Workers, 228 F. Supp. 541 (E.D.N.Y. 1964) (arbitration enjoined pending final determination of issue by the Board).

84. 376 U.S. at 551-52 n.5; McGuire v. Humble Oil & Ref. Co., 247 F. Supp. 113, 121-23 (E.D.N.Y. 1965). Both courts noted that problems would clearly result if the arbitral award resulted in special treatment to the employees of the predecessor since they had now been absorbed into a different representational unit. *Ibid.* The Second Circuit in *Wiley* had suggested that this problem of special treatment might be resolved by a fair lump sum settlement. 313 F.2d 59 n.5

consolidation, there is an integration of the predecessor's employees into the successor's preexisting operational unit.[85] While *Wiley* involved two sets of employees, one of which was represented by a union, *Humble* involved an infinitely more complex situation of intermingling where the two sets of employees were represented by rival unions.

In any of the above situations either prior or subsequent to an arbitral ruling on survival of contract rights, the Board may be called on to determine the employer's duty to bargain with the union or rival unions.[86] Here the Board must decide whether the successor is bound by a bargaining agreement of the predecessor so as to bar an election during its stated term. The hearing will thus involve a determination of the status of a union as bargaining agent[87] and thereby the status of the bargaining agreement as a bar to a representation proceeding. If the arbitrator's criteria for determinating survival are materially different from those applied by the Board difficulties are inevitable. For example, the Board on one hand, might determine that the prior agreement did not operate as a contract bar, thus permitting a new election. On the other hand, the arbitrator could then determine that current contractual rights and duties had survived the transfer. With the findings of the Board, a newly certified union representing all employees could then obtain an agreement with the subsequent employer setting forth rights and duties entirely different from those which the arbitrator had found survived under the agreement with the prior employer. Arguably, the employees of the acquired business would then

85. See Gould, *The Supreme Court and Labor Law—An Analysis of Recent Trends*, 17 W. Res. L. Rev. 823 (1965); 113 U. Pa. L. Rev. 914 (1965).

86. The NLRB is most often confronted by the question of contract survival indirectly when a petition for an election certifying or decertifying a union or a petition for unit clarification is filed. If the Board finds that the contract survived, it will act as a bar to an election. See generally, *Contract Bar to Representation Elections*, 29 Geo. Wash. L. Rev. 450 (1960); Freidin, *The Board, the "Bar," and the Bargain*, 59 Colum. L. Rev. 61 (1959); Smith, *Establishing the Collective Bargaining Relationship under the Labor Management Relations Act, 1947*, 6 S.C.L.Q. 429 (1954).

Apparently the only situation where the NLRB can decide the issue of contract survival directly is in a hearing involving an unfair labor practice for making an illegal bargaining agreement. See 29 U.S.C. § 160(a) (1958); Argo Steel Constr. Co., 122 N.L.R.B. 1077 (1959). Otherwise, the Board has no jurisdiction over contracts per se. See also note 88 *infra*.

87. In such litigation, the union which had a bargaining agreement with the prior employer will argue that the subsequent employer is bound by the agreement. The union petitioning for election, which may be an outside union or a union representing some of the employees of the successor employer, will argue that the prior contract is not binding and therefore not a bar to a new election.

have an election and could choose the superior of the newly contracted or the survived rights.[88]

Similar problems of seeming inconsistency might result if, under the foregoing assumptions, the union in the acquiring firm retains its status in a reconstituted bargaining unit. If the employees of the acquired firm enjoyed superior rights under a survived agreement, the union might have difficulty bargaining with the successor employer both at negotiation and in the administration of the agreement. Even if the incumbent union felt concessions to the employer were warranted, this would involve an unduly serious loss of face to a rival union. The confusion would certainly be inimical to the successor's labor–management relations and might involve a violation of the principle that a union is entitled to recognition because of its majority status.[89]

It is clear that in order to avert such conflict some correlation between the activities of the NLRB and individual arbitrators is essential. This is true even though in many cases, the conflict will be avoided since both bodies will defer to the rulings of the other.[90]

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88. The preferential treatment of a predecessor's employees could conceivably result in a § 8(a)(3) unfair labor practice charge of discrimination by the successor's employees against the successor employer. See 113 U. PA. L. REV. 914, 926 n. 59 (1965). See also Electrical Workers v. Illinois Power Co., 52 CCH LAB. L. REP. 16, 806 (7th Cir. 1965). Here the court held the employer could not be compelled to arbitrate a dispute over reclassification of certain employees as supervisors after the union had raised the representation issue in an NLRB hearing. The court reasoned that the possibility of conflict between the Board's determination as to the supervisory status of the employees and the award of the arbitrator warranted the denial of arbitration.

89. See, *e.g.*, J.I. Case Co. v. NLRB, 321 U.S. 332, 338-39 (1944). See also Local 453, IUE v. Otis Elevator Co., 201 F. Supp. 213 (S.D.N.Y. 1962), *rev'd*, 314 F.2d 25 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963).

90. Although not bound by an arbitrator's award even though it purports to promote the policy of promoting industrial stability and peace, the Board will often defer to such an award. See, *e.g.*, International Harvester Co., 138 N.L.R.B. 923, 927 (1962); Spielberg Mfg. Co., 111 N.L.R.B. 1080, 1082 (1955). See generally McCullock, *Arbitration and/or the NLRB*, 18 ARB. J. 3 (1963). This acceptance is customary unless the arbitration procedure is unfair, irregular, or the decision is repugnant to the purpose and policies of the labor acts. See Ford Motor Co., 131 N.L.R.B. 1462 (1961) where the Board refused to defer to an award dismissing an employee for engaging in protected activity.

In *International Harvester* the Board dismissed a complaint charging unfair labor practices under §§ 8(a)(3) and (1) and §§ 8(b)(2) and (1)(A). Without passing on the merits, the Board found that the trial examiner had erred in not honoring a prior arbitration award which had reduced an employee's seniority because of nonpayment of dues under the union-security provisions of the collective agreement. The Board reached this result noting that it was "well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair

This inter-body deference will result in a greater avoidance of conflict, however, if a correlation between the standards on survival employed by the NLRB and arbitrators is developed. In such a development it would seem appropriate for an arbitrator in determining whether particular contractual rights survive to proceed in substantially the same fashion that the NLRB has in developing the contract bar doctrine.[91] In performing its function, the NLRB has been motivated principally by a desire to promote industrial stability[92]—the precise responsibility that *Wiley* places on individual arbitrators. The test evolved by the Board turns on the question of whether a business transfer renders a bargaining agreement ineffective as a stabilizing force. In examining the merits of survival, the Board considers the effect of a business transfer on both the employer, who may have substantially discontinued the operations of his predecessor,[93] and the union, which may no longer properly represent the

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labor practices if to do so will serve the fundamental aims of the Act." 138 N.L.R.B. at 925-26. The Board also relied on § 203(e) of the Labor Management Relations Act of 1947 which provides that "final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." *Id.* at 926.

In the converse situation where the Board has established its jurisdiction over alleged unfair labor practices and a party subsequently institutes arbitration proceedings on the same issue, federal courts have on occasion stayed arbitration proceedings pending a final determination by the Board. See Kentile Inc. v. Local 456, United Rubber Workers, 228 F. Supp. 541 (E.D.N.Y. 1964).

Although on the facts of *International Harvester* the issues before the arbitrator and the Board were identical, similar reasoning would seem to apply where the issue before the Board is one of contract bar and the issue before the arbitrator is one of survival of contractual rights and duties. This should not be affected by the fact that unfair labor practice allegations involve §§ 8 and 10 of the act, while the doctrine of contract bar is an adjunct of § 9.

91. In a similar context Professor, recently Solicitor General, Cox has noted the guiding applicability which judicial precedents may have for arbitrators, stating that:

> Many legal rules have hardened into conceptual doctrines which lawyers invoke with little thought for the underlying reasons, but the doctrine themselves represent an accumulation of tested wisdom, they are bottomed upon notions of fairness and sound public policy. . . .

Cox, *The Legal Nature of Collective Bargaining Agreements,* 57 MICH. L. REV. 1, 14-15 (1958).

As for the precedent value which one arbitration award should have on a subsequent one, see notes 109-14 *infra* and accompanying text.

92. See, *e.g.,* General Cable Corp., 139 N.L.R.B. 1123, 1125 (1962); L. B. Spear & Co., 106 N.L.R.B. 687, 689 (1953).

93. Until recently, the NLRB has generally taken the view, with respect to the *employer,* that unless the new owner is in effect the alter ego of the previous one, he is not bound by the pre-existing agreement. See, *e.g.,* Herman Loewenstein Inc., 75 N.L.R.B. 377 (1947). *Compare* M. B. Farrin Lumber Co., 117 N.L.R.B. 575 (1957) (contract binding where transfer of ownership accomplished by sale of stock notwithstanding new management), *with* Ameri-

employee group.[94] In either case, there may be no reasonable basis for continuing the former bargaining relationship.

However, the desire for uniformity is not a goal in itself and should not require blind adoption by arbitrators of the rules presently enforced by the Board. Upon re-examination, these rules may fail to fully effectuate the arbitrator's objective in particular situations. Thus, it seems unlikely that all conflicts in this area will be avoided. Rather it is probable that the judici-

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can Concrete Pipe Inc., 128 N.L.R.B. 720 (1960) (new owner not bound by prior contract where he acquired business through purchase of assets notwithstanding rehiring of prior employees); Jolly Giant Lumber Co., 114 N.L.R.B. 413 (1955); and Southwestern Greyhound Lines Inc., 112 N.L.R.B. 1014 (1955).

This rather mechanical approach to survival from the standpoint of the employer has been seriously criticized by unions. See Brief for AFL-CIO as Amicus Curiae, pp. 16-22 & n.5, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964). However, there are growing indications that the Board may change its position and, like the Supreme Court in *Wiley*, approach survival in terms of business continuity with less emphasis on the form of the transfer. See Grainger Bros. Co., 55 L.R.R.M. 1380 (1964); Farrin Lumber Co., 117 N.L.R.B. 575 (1957). This trend was particularly apparent in Maintenance Inc., where the Board stated:

> The duty of an employer who has taken over an "employing industry" to honor the employees' choice of bargaining agent is not one that derives from a private contract, nor is it one that necessarily turns upon the acquisition of assets or assumption of other obligations usually incident to a sale, lease, or other arrangement between employers. It is a public obligation arising by operation of the Act. The critical question is not whether Respondent succeeded to White Castle's [the employer] corporate identity or physical assets, but whether Respondent continued essentially the same operation, with substantially the same employee unit whose duly certified bargaining representative was entitled to statutory recognition. . . .

148 N.L.R.B. 1299, 1301 (1964). See McGuire v. Humble Oil & Ref. Co., 247 F. Supp. 113, 123 (E.D.N.Y. 1965) where the court observed that due to the impact of *Wiley*, the Board may very well have begun to reexamine its entire § 9 procedure. In the process, it may have overruled many time-honored precedents. *Id.*

94. Even if the Board determines that a change in ownership warrants the contract's survival as a bar, a change in the nature of the business operation from the *employees'* point of view may also preclude survival. See, *e.g.*, General Extrusion Co., 121 N.L.R.B. 1165 (1958). This occurs when there has been a material alteration in the unit covered by the contract, thus destroying the union's representative status as a bargaining agent. *Id.* at 1167-68. See also Sheets & McKay, 92 N.L.R.B. 179 (1950). For example, in order for a merger (or consolidation) to effect a sufficient change in the bargaining unit to remove the contract as a bar, the merger must create an entirely new operation with major personnel changes. Although this condition is not satisfied where the transferred employees retain the same or comparable jobs, when a merger results in the integration of facilities to the extent that employees are intermingled without any distinction as to the work they formerly performed, a prior contract will not bar an election. L.B. Spear & Co., 106 N.L.R.B. 687 (1953). Similarly, where the integration of different plants reduces one of the original employee complements covered by contract to a fraction of the resulting enlarged complement, see *e.g.* Industrial Stamping & Mfg. Co., 111 N.L.R.B. 1038 (1953), or where the number of former employees presently

ary will be called on periodically to exercise its supervisory function and resolve conflicting results.

B. Arguments for Survival—New Procedural and Evidentiary Problems for the Arbitrators

1. *Questions of the Parties' Intents*

While arbitrators have been granted broad powers their discretion is not absolute.[95] Since the court will overturn an award if it does not draw its "essence of the agreement,"[96] the arbitrator must always carefully scrutinize the document. The problem of survival by definition, however, does not involve situations where the agreement contains express declarations of intent. This fact does not mean that the arbitrator is precluded from examining the agreement to find the parties' implied intent or from considering extrinsic evidence to discover that intent.[97] Indeed it

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needed is substantially reduced due to the permanent abandonment and reconstruction of the separate original facilities, see Michigan-California Lumber Co., 96 N.L.R.B. 1379 (1951), an outstanding contract will not survive to bar an election petition.

Changes other than mergers or consolidations which may materially alter the employees' bargaining unit are (1) the addition of a new product which constitutes a "wholly new business venture," see Mitchell Mfg. Co., 70 N.L.R.B. 1268 (1946), or (2) the severance and removal of a department from an original plant to a separate geographical location when there is no more than a slight interchanging of employees and equipment, see General Elec. Co., 84 N.L.R.B. 150 (1949).

95. See 376 U.S. at 551-52 n.5, 555; United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593, 597 (1960). *Compare* Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959) and Summers, *Judicial Review of Labor Arbitration*, 2 *Buffalo L. Rev.* 1 (1952), *with* Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519 (1960); Jones & Smith, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751 (1965); Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 115 (1964); Hays, *The Future of Labor Arbitration*, 74 YALE L.J. 1019 (1965); and Herzog, *Judicial Review of Arbitration Proceedings—A Present Need*, 5 DE PAUL L. REV. 14 (1955). See generally Meltzer, *The Supreme Court, Arbitrability, and Collective Bargaining*, 28 U. CHI. L. REV. 464 (1961); Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529 (1962); Wellington, *Judicial Review of the Promise To Arbitrate*, 37 N.Y.U.L. REV. 471 (1962).

96. "[H]is award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

97. *But cf.* Torrington Co. v. UAW, 242 F. Supp. 824 (D. Conn. 1964). The court held that the past practice of granting one hour paid voting time was no longer a part of the common law of the shop when that benefit had been debated at the bargaining session, and the parties' final agreement made no provision for continuation of the practice.

may be that unless such an investigation has been made any award rendered would be subject to judicial avoidance.[98]

Because of the usual sparsity of evidence on intent, arbitrators will certainly be faced with the claim that the presence or absence of a so-called successor clause[99] conclusively establishes the intent of the parties concerning the obligations of a subsequent employer. It will be recalled that although the *Wiley* contract did not contain such a clause, this fact received little more than summary notice by the Court. This treatment accords with the Court's ruling that the source of the survived duty to arbitrate was the general arbitration clause. The Court's treatment does not mean that an arbitrator should consider a survival clause immaterial. Quite the contrary, the presence or absence of this clause should be quite relevant to a determination of the survival of substantive rights other than the duty to arbitrate. In situations where no successor clause is present there may be no other credible evidence as to the actual intent of the parties. Furthermore, the labor history of the shop will seldom evidence a similar previous transfer. Thus if the agreement contains no survival clause and there is no indication of the parties' intent, the arbitrator might best effect long-run stability by finding that no current rights survive.

Related to the question of intent is the collateral issue of the scope of an arbitrator's power to alter an agreement. Since an arbitrator must draw his authority from the agreement and the intent of the parties incorporated therein, it has been suggested that his power might include authority to modify, by reduction or avoidance, an existing term.[100] Such power might be exercised in situations such as *Reliance* or one involving the sale of a failing business. Here, in determining the issue of survival of established wage rates and fringe benefits, the arbitrator might reduce them in the interest of long-term industrial stability.[101] Some have suggested that the arbitrator's powers might include

98. *Cf.* Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 99 N.W. 2d 132 (1959), *cert. denied,* 362 U.S. 962 (1960) (procedural due process includes right of employee to appear at arbitration when union has adverse interest in outcome).

99. See note 14 *supra.*

100. See United Steelworkers v. Reliance Universal Inc., 325 F.2d 891, 895 (1964).

101. *Ibid.*

the positive authority to create terms.[102] Thus, if a small, impecunious firm or a failing business was merged into a prosperous, large producer, an arbitrator might conceivably order an increase in wage rates or additional fringe benefits. It is obvious however, on reflection, that deviation in either direction from the express terms of an agreement, while possibly following the unexpressed intent of one party, would seldom achieve a result mutually anticipated by the parties.[103] The arbitrator might avoid this logical impasse, however, by finding that although the parties had no fixed intent as to an ultimate result,

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102. *Cf.* 376 U.S. at 552 n.5. Professor Wellington has summarized what he sees as a trend in this direction in *Judicial Review of Promises to Arbitrate,* 37 N.Y.L.U. REV. 471 (1962):

> [L]abor arbitration may not always be a dispute settlement technique that relies solely on pre-existing standards and norms found in a collective bargaining agreement and in the common law of an enterprise. Sometimes arbitration may be a technique that relies upon considerations of expediency for preserving industrial peace and keeping everyone as happy as possible. This may mean that the arbitrator will give less than full attention to the terms of the agreement or the common law of the enterprise. This may be what the parties expect when they choose their arbitrator.

Id. at 482. See also Chamberlain, *Work Assignments and Industrial Change—Job Security, Management Rights, and Arbitration,* in LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS 235, 237-40 (Kahn ed. 1964).

103. See Chamberlain, *Work Assignments and Industrial Change—Job Security, Management Rights, and Arbitration* in LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS 235, 237-40 (Kahn ed. 1964). *Compare* Chamberlain, *op. cit. supra, with* Seward, *Work Assignments and Industrial Change-Reexamining Traditional Concepts* in LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS 240-51 (Kahn ed. 1964). While both authors recognize the business needs for both stability and change in labor-management relations, their approaches are quite different. Chamberlain prefers solving the problems by giving arbitrators broad discretion at "interpretation" of the agreement, so long as there is evidence of the parties' basic intent. He concluded:

> I suggest that the agreement *incorporates* the surrounding relevant circumstances at the time it was negotiated, and that when such relevant circumstances have changed, the clause—even though it remains in the agreement—necessarily takes on a different meaning which the arbitrator can interpret when he is asked to do so. And the injunction found in many agreements that the arbitrator may not add to or change the content of the agreement should not—I am tempted to say *cannot*—rob him of that authority of fresh interpretation.

Chamberlain, *op. cit. supra* at 235.

Seward, on the other hand, favors a more literal interpretation, with problems of business change and stability to be resolved through continuous collective bargaining. He concludes that:

> If there is to be a mutual effort of both unions and management satisfactorily to adjust to change and the need for change, if there is to be the hard and constructive thinking that there *must* be, if the labor agreements are to provide both adequate flexibility and adequate security, this is, I think, where continuous collective bargaining should start.

Seward, *op. cit. supra* at 251.

both intended the arbitrator to resolve the dispute in light of the change in circumstances.[104]

While a flexible approach, premised upon the expertise of the arbitrator, seems best calculated to effect a just result, arbitrators should not be permitted to justify a complete departure from their role as interpreters of the collective agreement solely on equitable grounds.[105] Indeed, it is questionable whether courts would approve such positive action absent strong evidence of the parties' actual intents. In any event, it is clear that if an arbitrator is willing to assume the power to alter terms without a clear manifestation of intent, his disposition of the problem in such a discretionary and original manner will more closely resemble contract arbitration than grievance arbitration.

2. *Precedent Value of Court Decisions—A Problem of Uniformity and Predictability*

It is beyond the scope of this article to attempt an answer to the multitudinous problems which will face arbitrators in ruling

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104. See note 5 *supra.* Contract containing the general restriction that the arbitrator may not alter or add to the agreement may limit this discretion. Metal Products Workers Union v. Torrington Co., 242 F. Supp. 813 (D. Conn. 1965). About 50% of all bargaining agreements providing for arbitration contain such restrictions. BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 51:9 (5th ed. 1961).

In *Torrington* the court refused to enforce an award citing the following provision in the agreement: "The arbitrator shall be bound by and must comply with all of the terms of this agreement and he shall have no power to add to, delete from, or modify, in any way, any of the provisions of this agreement. . . ." 242 F. Supp at 817 n.3. *But cf.* Desert Coca-Cola Bottling Co. v. General Sales Drivers Union, 335 F.2d 198 (9th Cir. 1964) (broad power of interpretation implied); Camden Indus. Co. v. Carpenters Union, 246 F. Supp. 252 (D.N.H. 1965); see Jones & Smith, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law,* 63 MICH. L. REV. 751, 801-03 (1965) (limitations should be "clear and specific provisions" before court should attempt to "second guess" arbitrator).

105. As a general rule arbitrators have been reluctant to find that rights survived against the subsequent employer. *E.g.,* C.M.F. Co., 37 Lab. Arb. 980 (Kates 1962); Di Giorgio Wine Co., 28 Lab. Arb. 746 (Jones 1957); *cf.* United Packers Inc., 38 Lab. Arb. 619 (Kelliher 1962). *But cf.* Walker Bros., 41 Lab. Arb. 844, 848 (Crawford 1963); see St. Antoine, *Contract Enforcement and the Courts,* 15 LAB. L.J. 583, 589 (1964) (wide substantive applications of *Wiley* predicted—collective agreement "will run with the enterprise").

In *C.M.F. Co.* a successor clause covering sale of the "operation" did not create survival rights when the transfer was a sale of physical assets and resulted in no continuation of the prior activities. In *Walker Bros.,* a survival clause was found to warrant survival of rights in an interim award which the successor employer was required to act as surety for performance of duties for which the predecessor remained primarily liable. However, the final award was made contingent on the outcome of a related NLRB proceeding.

on the merits of survival in particular situations.[106] The question of the value as precedents to be given court holdings on identical issues of survival does warrant discussion however. This body of court-made law is evolving from situations where a bargaining agreement contains no grievance provision or, for some other reason, no resort is had to arbitration.[107] In these situations, a court is called on to resolve the dispute in an action brought under section 301. Accordingly, judges may decide exactly the same issues that arbitrators decide.[108]

Most commentators agree that the need for predictability of result within a particular bargaining relationship warrants an application of the principle of stare decisis within that unit.[109] There is little agreement among arbitrators, however, on the value of decisions on related facts from another bargaining relationship.[110] Arbitrators as a general rule have adamantly denied that they are bound by either arbitral or judicial precedents.[111] However, a federal judge has summarized the position that arbitrators should follow court decisions, noting that unless they do,

> the courts will be . . . faced with the anomaly of enforcing in one case the uniform federal law fashioned in the courts . . . and on the same issue in the next case enforcing awards of arbitrators at variance with that law.[112]

While either position can and has been defended,[113] it seems likely that the position advocating uniformity will ultimately prevail.[114] And if it does, this will afford an added basis for seeking judicial review of an arbitral award.

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106. See note 105 *supra.*

107. See notes 108, 153 *infra* and accompanying text.

108. Although such cases have been infrequent in the past, it is possible that over a period of time federal courts will develop a sizeable body of federal common law on the incidents of survival.

109. See Jones & Smith, *Management and Labor Appraisals and Criticism of the Arbitration Process: A Report with Comments,* 62 MICH. L. REV. 1115, 1150-52 (1964).

110. *Ibid.*

111. *E.g.,* United Packers Inc., 38 Lab. Arb. 619 (Kelliher 1962). *But see* Justin, *Arbitration: Proving Your Case,* 10 Lab. Arb. 955, 968 (1948).

112. Hays, *The Future of Labor Arbitration,* 74 YALE L.J. 1019, 1022 (1965).

113. See Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments,* 62 MICH. L. REV. 1115, 1150-53 (1964).

114. *Cf., e.g.,* Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962) (federal law fashioned under § 301 must be paramount and uniform).

C. Judicial Review for Wiley Awards?

The ascendance of arbitration as a substitute for litigation and for the bargaining-strike process in settling labor disputes has raised many questions concerning the role of the courts in arbitration. Traditionally, courts have become involved in arbitration at two stages—namely, prior to arbitration or subsequent to the granting of an award. In the pre-arbitration phase, a court is most often called on to determine the issue of arbitrability, *i.e.*, the issue of the arbitrator's jurisdiction to hear the dispute.[115] This inquiry is a limited one, and commentators are in substantial agreement as to the wisdom of limiting the inquiry at this stage to the jurisdictional issue.[116]

The second phase of intervention may occur after an award is rendered and will result when a party seeks to avoid or to obtain enforcement of the award. It is at this post-arbitral phase where a new confrontation between the arbitrator and the courts is now developing.[117] This confrontation is due in part to a growing sentiment that the Court's "romanticisms"[118] in the *Trilogy* expounding the virtues of arbitration may in fact be subject to severe limitations.[119] There has been a resurgence of judicial interest in the grievance process and the judiciary has reasserted an expertise and competency for dealing with labor disputes equal to, and in many ways superior to, that of arbitrators.[120] Commentators have also suggested the superior ability of the

115. "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." John Wiley & Sons v. Livingston, 376 U.S. 543, 547 (1964). See Jones & Smith, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751, 753 (1965). See note 26 *supra*.

116. See, *e.g.*, Hays, *The Future of Labor Arbitration*, 74 YALE L.J. 1019, 1027 (1965); Sipser, *Arbitration and the Courts: Arbitrability, Forum Shopping, and Public Policy*, 16 N.Y.U. CONF. LAB. 319, 325 (1963); Smith, *Arbitrability—The Arbitrator, the Courts, and the Parties*, 17 ARB. J. 3, 15 (1962).

117. Hays, *The Future of Labor Arbitration*, 74 YALE L.J. 1019 (1965).

118. Hays, *The Supreme Court and Labor Law*, 60 COLUM. L. REV. 901 (1960).

119. See, *e.g.*, Fleming, *The Labor Arbitration Process: 1943-1963*, in LABOR ARBITRATION—PERSPECTIVE AND PROBLEMS 53-55 (Kahn ed. 1964); Hays, *The Future of Labor Arbitration*, 74 YALE L.J. 1019, 1034-38 (1965); Jones & Smith, *Management and Labor Appraisals of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115, 1146-52 (1964); 16 SYRACUSE L. REV. 545, 566 (1965).

120. Hays, *The Future of Labor Arbitration*, 74 YALE L.J. 1019 (1965); Sipser, *Arbitration and the Courts: Arbitrability, Forum Shopping, and Public Policy*, 16 N.Y.U. CONF. LAB. 319, 323 (1963).

judiciary to more nearly insure uniformity of result in the developing common law of labor relations.[121]

It is not surprising, therefore, that in many situations post-arbitration judicial review is coming to be recognized as a means for attacking an arbitrator's award.[122] While review of the award on the "merits" will probably continue to be shunned, there are several general areas where review has been obtained that are of particular relevance for attacking *Wiley* awards. One such attack has been based on the general argument that an arbitrator's award is unforceable because he exceeded his remedial authority or disregarded other limitations in the agreement.[123] This attack would seem particularly appropriate in *Wiley* situations where an award varies any term of the original agreement.

Judicial review has also been recognized where an award is contrary to some legal limitations on the arbitrator's remedial authority. It has recently been suggested that such an attack might include any of at least five general arguments, including the claims:

> (1) that the arbitrator decided an issue not submitted; (2) that the award requires a violation of federal or state statute; (3) that the award, although not requiring an illegal act, is inconsistent with public policy; (4) that the arbitrator, in analyzing the issue presented under the labor agreement, disregarded or misapplied some principle of federal substantive law relating to the labor agreement; (5) that fundamental principles of due process were violated in the conduct of the hearing.[124]

Of these arguments, claims two, three, and four appear most pertinent in the *Wiley* context. As has been noted, in the area

121. See Hays, *The Future of Labor Arbitration,* 74 YALE L.J. 1019, 1022-23 (1965).

122. See cases cited Hays, *The Future of Labor Arbitration,* 74 YALE L.J. 1019 (1965); Jones & Smith, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law,* 63 MICH. L. REV. 751, 801-06 (1965).

123. *E.g.,* Local 784, Truck Drivers Union v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964); Torrington Co. v. UAW, 242 F. Supp. 824 (D. Conn. 1965); Leeds & Northrup Co. v. Leeds & Northrup Employees' Union, 52 CCH LAB. L. REP. 1P 16, 766 (Pa. Ct. C.P. 1965); *cf.* H.K. Porter Co. v. United Steelworkers, 333 F.2d 596 (3d Cir. 1964); see Jones & Smith, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law,* 63 MICH. L. REV. 751, 800-02 (1965).

124. Jones & Smith, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law,* 63 MICH. L. REV. 751, 803 (1965); see Kollsman Instrument Corp. v. Crivelli, 52 CCH LAB. L. REP. 1P 51, 414 (N.Y. Sup. Ct., App. Div. 1965) (award set aside when arbitrator passed on matter not submitted).

of NLRB-arbitrator encounter there is a strong argument that a court should set aside any award to which the Board would not defer.[125] These arguments are also available to seek judicial resolution of court-arbitrator conflict. Finally, the claim that an award violates "public policy" may open a Pandora's Box and suggests numerous approaches for attacking an award.[126] In conclusion, while the exact limits of post-arbitral judicial review are still undefined, this procedure may often be available to attack an undesirable award.[127]

IV. PRE-TRANSFER BARGAINING: A POSSIBLE RESOLUTION OF A BUSINESS IMPASSE

As suggested above, unless the effect of a transfer is positively delineated in a collective argreement, the issue of rights survival will in all probability be resolved by arbitration. In effect, this

125. Glendale Mfg. Co. v. Local 520, Ladies Garment Workers, 283 F.2d 936 (4th Cir. 1960), *cert. denied,* 366 U.S. 950 (1961); *cf.* Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964); see Hays, *The Future of Labor Arbitration,* 74 YALE L.J. 1019, 1027 (1965).

The Court in *Carey* noted that "should the Board disagree with the arbitrator, . . . the Board's ruling would, of course, take precedence. . . ." 375 U.S. at 272.

126. See, *e.g.,* NLRB v. Darlington Mfg. Co., 380 U.S. 263 (1965) (public interest in efficient economic system); Jenkins Bros. v. Local 5623, United Steelworkers, 341 F.2d 987 (2d Cir. 1965), *cert. denied,* 34 U.S.L. WEEK 3111 (U.S. Nov. 12, 1965); Local 453, Electrical Workers v. Otis Elevator Co., 314 F.2d 25 (2d Cir.), *cert. denied,* 373 U.S. 949 (1963); United Steelworkers v. Reliance Universal Inc., 335 F.2d 891, 893 (anti-trust policies).

127. A good summary of this problem states:

> In this area the ultimate answers, for the most part, seem to us to be unclear. The basic question is whether the Court, in discharging its role of superintendence of the development of emerging federal law concerning the collective bargaining agreement, will determine for reasons of policy that arbitral as well as judicial decisions should be in conformity with principles approved by the Court. An affirmative view would place issues of this kind in a special category to be differentiated from other kinds of alleged errors of contract interpretation, fact, or law with respect to which the orthodox rule of non-reviewability would obtain. In view of the relatively high degree of involvement of arbitrators, rather than courts, in the interpretation and application of collective bargaining agreements and the importance the Court evidently attaches to the development of an appropriate conceptualization of the collective agreement, we think it would regard some of these issues as fundamental and subject to judicial review. . . .

Jones & Smith, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law,* 63 MICH. L. REV. 751, 806 (1965).

It has been suggested that a common law development recognizing judicial review may fail to materialize, and legislative action may ultimately be necessary to increase the scope of judicial review of arbitration proceedings. See Smith, *Arbitrability—The Arbitrators, the Courts, and the Parties,* 17 ARB. J. 3, 15-16 (1962).

permits an arbitrator to make a finding ranging from a complete survival of rights to no survival at all.

The consequent uncertainty which surrounds the arbitrator's powers has been criticized by both unions and employers. The problems that may develop from such uncertainty are well illustrated by the situation in *Reliance*.[128] There, Martin-Marietta sold its plant to Reliance to comply with a divestiture order issued by the Federal Trade Commission. Martin-Marietta had practiced company-wide bargaining and because of the economics inherent in its large scale operation was able to offer greater concessions to labor than could a small competitor like Reliance. The purchase from Martin-Marietta had been made prior to the *Wiley* decision, and Reliance contended that had it been aware of the possible survival of Martin-Marietta's wage obligations neither it nor any purchaser would have dared complete the acquisition. In other words, had the possibility of survival been anticipated this contingency would have frustrated both the Federal Trade Commission's order and the federal policy of fostering free and vigorous competition.[129]

Although *Reliance* involved a forced sale, it suggests that all potential purchasers may be reluctant to risk subjection to outstanding labor obligations. Thus, vendors may be forced to sell at a discount unless they can at least obtain a provision in the outstanding collective agreement which delineates the effect of transfer.

While both employers and unions express a desire for certainty of result prior to the actual transfer, thus far their approaches to the goal have been diametrically opposed. For example, most employers have concluded that certainty can best be obtained through an automatic termination of outstanding labor obligations on transfer, with current labor obligations determined solely by subsequent bargaining.[130] On the other hand, unions have

128. United Steelworkers v. Reliance Universal Inc., 335 F.2d 891 (3d Cir. 1964).

129. See *e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).
Among the wage and fringe benefit reductions which Reliance had felt compelled to institute were a reduction in reporting pay, elimination of a holiday, reduction in holiday pay, stiffened eligibility requirements for vacations, shorter vacations, lower vacation pay, lower insurance coverage, and a requirement that employees pay a portion of the premium for insurance coverage. Brief for Appellant, p. 3, United Steelworkers v. Reliance Universal Inc., 335 F.2d 891 (3d Cir. 1964).

130. See *e.g.*, cases cited in note 9 *supra;* Brief for Petitioner, pp. 5-12, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964); Brief for Respondent, p. 4, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964).

argued that a future which is certain, stable, and free from strikes can best be achieved by treating the subsequent employer as the alter ego of the prior employer.[131] In view of the irreconcilable conflict posed by adherence to either position, and the uncertainty of arbitration, pre-transfer bargaining could be an effective means for accomplishing post-transfer certainty.

Section 8(d) of the Taft-Hartley Act[132] provides that an employer and a majority union must bargain in good faith concerning wages, hours, and other terms and conditions of employment. The courts have consistently held that this statutory duty to bargain does not cease with the signing of a valid collective agreement but continues during the entire term of the contract.[133] Although some commentators have criticized the continuing nature of this duty, particularly where there is a general arbitration provision,[134] interim bargaining has often proved mutually beneficial where significant changes in the operation of a business, not anticipated in the agreement, are either anticipated or have occurred.[135] Moreover, where an employer plans to relocate his business[136] or subcontract part of his work,[137] he is required to

131. Brief for AFL-CIO as Amicus Curiae, pp. 8-16, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964). Compare Reply Brief for Petitioner, pp. 14-17, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964). The AFL-CIO in its amicus curiae brief in *Wiley* argued for maintaining a status quo by declaring that:

> [A] union, representing employees who are performing the same jobs in the same enterprise, is not going to submit voluntarily to a reduction in the standards which it had negotiated with the prior owner. Similarly, a new owner is not voluntarily going to agree to terms and conditions of employment more burdensome than those which the union previously accepted—and indeed by which the union would still be bound but for the fortuity of the sale.

Brief for AFL-CIO as Amicus Curiae, *supra* at 10. But see note 135 *infra* and accompanying text.

132. Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 158(d) (1958).

133. See, *e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

134. See Cox & Dunlop, *The Duty To Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097 (1950); Wollett, *The Agreement and the National Labor Relations Act: Courts, Arbitrators and the NLRB—Who Decides What?*, 14 LAB. L.J. 1041 (1963). It has been suggested that when the contract contains a broad arbitration clause, it should govern all terms of the parties' relationship and that there is no duty to bargain unless the employer successfully resists a union request to arbitrate. See 77 HARV. L. REV. 1100, 1106 (1964).

135. See, *e.g.*, Humphrey v. Moore, 375 U.S. 335 (1964).

136. See Note, *Labor Law Problems in Plant Relocation*, 77 HARV. L. REV. 1100, 1103-06 (1964).

137. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964). See generally Farmer, *Bargaining Requirements in Connection With Subcontracting, Plant Removal, Sale of Business, Merger and Consolidation*, 14 LAB. L.J. 957 (1963).

bargain about the effects of such action. A primary purpose of such bargaining is to permit the union to offer concessions to an employer who otherwise would be justified in effecting the change.[138] The same principle seemingly applies to an anticipated business transfer in a situation where the labor costs under an existing collective agreement place an insuperable financial burden on the purchaser. Here, the mutual interest of the parties might well lead to the adoption of an amended wage agreement. Similarly, since *Wiley* leaves the question of a general survival of substantive rights to the arbitrator, to the extent that both parties desire more certainty and effective control over the consequences of transfer, each will benefit, but undoubtedly in varying degrees, from an amended agreement.[139]

If the present employer has a duty to bargain under section 8(d), there seems to be no valid reason why, prior to transfer, a potential employer and the union cannot be required to bargain collectively concerning the effects of the transfer.[140] It might be argued that, strictly interpreted, the term "employer" in section 8(d) does not include a potential employer, and thus, that a union would be justified in refusing to bargain with him. Despite the fact that this view seems unduly restrictive in light of the purpose of the act,[141] this issue could be avoided if the prior

138. See, *e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); Town & Country Mfg. Co., 136 N.L.R.B. 1022, 1027, *enforcement granted*, 316 F.2d 846 (5th Cir. 1963). *But see* footnote 125 *supra*.

139. The penchant for either party to enter into an agreement will vary with the past success of similarly situated parties, and with the role which precedent comes to play in arbitral decisions. The party who has traditionally won before an arbitrator will be reluctant to agree to take much less in pre-transfer bargaining. See note 105 *supra* and accompanying text.

140. There can be little doubt that pre-transfer bargaining with respect to the incidents of transfer would constitute a mandatory subject of bargaining, *i.e.*, one concerned with wages, hours, and other terms and conditions of employment. See, *e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 408 (1952); Star Baby Co., 140 N.L.R.B. 678 (1963). *But cf.* NLRB v. Royal Plating & Polishing Co., 349 F.2d 191 (3d Cir. 1965) (no employer duty to bargain concerning decisions involving investment of *new* capital).

In a situation involving intermingling, see note 84 *supra* and accompanying text, an extra party—namely, the incumbent union of the purchasing employer—might be included in pre-transfer bargaining. Although many issues raised by the transfer would be of interest to the incumbent union, primary interests would probably center on issues such as the seniority to be afforded employees of the acquired firm.

141. A flexible policy is suggested by § 203(d) of the Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 173(d) (1964), which states in relevant part that: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance

employer initiated a bargaining session with the union and the subsequent employer assumed any resulting agreement.

However, the predisposition of parties to enter pre-transfer agreements will depend to some extent on the disposition of courts to permit attacks on amended agreements by individual union members. This is true since no vendee desires to purchase a lawsuit. Although the freedom of a union and employer acting jointly to modify, amend, interpret, or supplement an original collective agreement has been well established since 1953,[142] recently both unions and individual employees have questioned this principle on the theory that rights which vest under a collective agreement vest absolutely and are not subject to divestiture.[143] Thus, it is urged that any attempt by a union to alter existing contractual rights by entering a new agreement with the em-

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disputes arising over the application or interpretation of an existing collective-bargaining agreement."

To prevent the union from being forced to bargain with numerous prospective buyers, the Board might condition the duty to bargain, imposing it only after the prior and subsequent employers had agreed to terms of a transfer, that transfer to be contingent upon signing a specified supplemental agreement with the union. Any amended agreement reached with the union could likewise be made contingent on culmination of the transfer.

Such a procedure was impliedly approved in *Wiley* when the Court noted that one reason for its balancing policy was the fact that "employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership," [and therefore] "the negotiations will ordinarily not concern the well being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations." John Wiley & Sons v. Livingston, 376 U.S. 543, 549 (1964). Pre-transfer bargaining would in effect permit such negotiations.

142. See Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). In *Huffman* the union and the employer entered into a supplemental agreement providing a seniority credit for war veterans not granted in the original agreement. The amendment enhanced the seniority of the veterans and resulted in lay-offs which otherwise would not have occurred. In justifying its result the Court noted that:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Id. at 338.

143. See Blumrosen, *The Worker and Three Phrases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1458, 1467-72, 1514 (1963). See generally Ratner, *Some Contemporary Observations on Section 301*, 52 GEO. L.J. 260-66 (1964).

ployer is void and constitutes a breach of the union's duty of fair representation.[144]

This argument was for the most part rejected by the Supreme Court in *Humphrey v. Moore*,[145] a class action brought by an individual employee seeking to enjoin the implementation of the decision of a joint employer-employee committee to dovetail seniority lists following a business transfer. The transfer effected a business contraction and the agreement to dovetail seniority lists resulted in discharge of several employees of the acquiring firm,[146] since the acquired company had been in existence longer.

The Supreme Court refused to grant the injunction reasoning that under applicable federal law no basis for relief had been demonstrated. The joint committee decision was within its contractual powers and the union's course of conduct did not constitute a breach of its "duty of fair representation."[147] The Court in defining the duty stated that in the absence of fraud, deceitful action, dishonest conduct, or action based on "capricious or arbitrary factors," no breach is committed when a union, in good

144. See Humphrey v. Moore, 375 U.S. 335, 341 (1964). It should be noted that the likelihood that claims by individual employees will be asserted has been greatly enhanced by recent holdings to the effect that individual union members may maintain an action against their employer under § 301. *E.g.*, Smith v. Evening News Ass'n, 371 U.S. 195 (1962). *But see* Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). See generally Kleeb, *Recent Problems in the Creation of Federal Law Under Section 301*, 52 GEO. L.J. 296 (1964); Ratner, *Some Contemporary Observations on Section 301*, 52 GEO. L.J. 260 (1964).

While individuals may obtain access to the courts under § 301, it has been said that "the right to arbitrate under a collective agreement is not ordinarily a right incident to the employer-employee relationship, but one which is incident to the relationship between employer and union," Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963), and thus cannot properly be exercised by an individual. See Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1963). *But cf.* Humphrey v. Moore 375 U.S. 335, 341, 344 (1964). See generally *id.* at 351-59 (Goldberg, J., concurring); Kleeb, *supra*, at 299-301.

145. 375 U.S. 335 (1964); *cf.* Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) (employee has no cause of action against employer unless attempt first made at arbitration).

146. The discharged employees persuaded a Kentucky state court to issue the injunction on the grounds that (a) the joint committee had exceeded its powers under the collective agreement and (b) the decision of that committee was arbitrary and the result of dishonest union conduct in breach of its duty of fair representation. See Moore v. Local 89, 356 S.W.2d 241 (Ky. 1962).

147. Humphrey v. Moore, 375 U.S. 335, 350 (1964). See generally 2 S.C.L.Q. 289 (1950).

faith, takes a position contrary to that of some individuals whom it represents.[148]

The concurring opinion of Mr. Justice Goldberg also bears significantly on the stability and freedom from litigation which should be afforded amended agreements.[149] He would go even farther and deny individual employees the right even to claim under section 301 "that the collective bargaining contract is violated because the parties have made a grievance settlement going beyond the strict terms of the existing contract."[150]

Clearly, the Court's adoption of Justice Goldberg's rationale would result in greater certainty surrounding joint union-management negotiations to amend or interpret collective agreements. Under this view, the individual employees have no right to attack the product of their joint efforts under section 301. Even though there is still the possibility of debilitating litigation under the Court's approach, a degree of certainty is still possible since the Court so broadly defined the duty of fair representation that most amended agreements will be readily upheld.

It is also possible that the declaratory judgment will become recognized as a procedural device of some value for avoiding the uncertainties inherent in post-transfer arbitration.[151] It cannot be denied that the great weight of authority holds that de-

148. *Id.* at 349-50. The Court's rationale is suggested by the following language:

> Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

Ibid.

149. *Id.* at 355.

150. *Id.* at 355. Mr. Justice Goldberg would not even recognize under § 301 jurisdiction an employee's claim for breach of the union's duty of fair representation. *Contra* Thompson v. Brotherhood of Sleeping Car Porters, 243 F. Supp. 261 (E.D.S.C. 1965) ($56,500 verdict against union for loss of seniority caused by breach of duty of fair representation). Goldberg's statement was qualified, somewhat, by the notation that "this is particularly apparent where," as here, "no fraud is charged against the employer." 375 U.S. at 355. He went on to point out that the duty of fair representation is "derived not from the collective bargaining agreement but implied from the union's rights and responsibilities conferred by federal labor statutes." *Ibid.* Consequently, § 301 does not provide an individual employee with a remedy for a union's breach of that duty. Instead, any relief must be sought from the NLRB, which is specifically authorized to enforce such statutory duties. *Ibid.*

151. See Hays, *The Future of Labor Arbitration,* 74 YALE L.J. 1019, 1026 (1965).

claratory judgments are available under section 301.[152] Thus far, however, the declaratory actions have involved only decisions on the jurisdictional issue of arbitrability, not a resolution of the merits of the dispute.[153] Accordingly, a declaratory action to determine that the duty to arbitrate does not survive would be of value in pre-transfer planning only when the employer is certain that there will be insufficient elements of business continuity. This is true since an adverse judgment would still require submission of the dispute to arbitration following the transfer.

It is possible, nevertheless, that future courts will be willing to hear the merits of the survival issues in a declaratory proceeding.[154] Employers seeking such a judgment would be faced primarily with a union argument that judicial determination derogates from the mutually agreed jurisdiction of arbitration. This charge could be countered, however, by the argument that the proceeding was beyond the scope of agreed arbitration since the contemplated transfer will seldom have ripened into a griev-

152. *E.g.,* Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962); see 93 CONG. REC. 3656-57 (1947) (remarks of Congressman Hartley). See cases cited Jay, *Arbitration and the Federal Common Law of Collective Bargaining Agreements,* 37 N.Y.U.L. REV. 448, 452-53 n.20 (1962).

153. Todd Shipyards Corp. v. Industrial Union of Marine and Shipbuilding Workers, 344 F.2d 108 (2d Cir. 1965) (declaratory action to determine legality of bargaining provision upon which current grievance based); Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962); Council of Western Elec. Technical Employees v. Western Elec. Co., 238 F.2d 892, 897 (2d Cir. 1956) (L. Hand, J.) (merits of arbitrable matter expressly reserved for arbitral determination); Fitchberrg Paper Co. v. MacDonald, 242 F. Supp. 504 (D. Mass. 1965) (declaratory action on the propriety of anticipated conduct). *But see* Chesapeake & Potomac Tel. Co. v. Communications Workers, 239 F. Supp. 334 (D. Md. 1965) (*semble*).

Most declaratory judgments have not questioned the arbitrability of a dispute which would be raised by anticipated, future actions. Most have really been little more than camouflaged actions to compel arbitrability of current disputes. *Compare* Fitchberrg Paper Co. v. MacDonald, 242 F. Supp. 504 (D. Mass. 1965) (declaratory action on the propriety of anticipated conduct), *with* Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962) ("declaratory judgment" ordering arbitration of a current dispute).

Federal courts will, however, hear the merits of a labor dispute in a declaratory action if there is no clause in the bargaining agreement providing for arbitration. Allied Oil Workers v. Ethyl Corp., 341 F.2d 49 (5th Cir. 1965); UAW v. Webster Elec. Co., 299 F.2d 195 (7th Cir. 1962) (all steps taken necessary to precipitate the dispute, thus declaratory judgment of the actual controversy proper).

154. See Hays, *The Future of Labor Arbitration,* 74 YALE L.J. 1019 (1965).

ance as defined by the bargaining agreement.[155] Nevertheless, an attempt to obtain a declaratory judgment on the merits of the survival issues will probably be unsuccessful. At best it will be a form of forum shopping of questionable value which should be attempted only as a last resort after pre-transfer bargaining has failed.[156]

V. CONCLUSION AND SUMMARY

The *Wiley* doctrine has had and will continue to have a substantial influence on labor-management planning both during bargaining sessions and when a transfer is contemplated. In its simplest form, the doctrine requires submission to arbitration of disputes concerning the survival of rights after a transfer when the bargaining agreement contains a general arbitration provision. When the duty to arbitrate does survive, the incidents of survival are left largely to the discretion of the arbitrator. Where the terms of the agreement and available evidence do not provide a reasonable basis for imposing current obligations on the successor employer however, the arbitrator should abstain. This practice is proper not only because he lacks the power to conjure up new contracts but also because long-run industrial stability will be enhanced by resolving the issues through continuous collective bargaining.

Although arbitrators have traditionally approached the problem of rights survival with caution, judicial respect for arbitral awards would indicate that most awards will be judicially enforced. Nevertheless, an arbitrator's award will probably be unenforceable if he exceeds his remedial authority or disregards other limitations in the agreement. Judicial review will also be possible where an award is contrary to some external legal limitation on the arbitrator's authority. Accordingly, non-enforce-

155. See Schofield Mfg. Co., 45 Lab. Arb. 225 (Duff 1965) (abstract grievance held non-arbitrable since not a mature controversy and advisory opinions were unauthorized). *But cf.* Allied Oil Workers v. Ethyl Corp., 341 F.2d 49 (5th Cir. 1965); UAW v. Webster Elec. Co., 299 F.2d 195 (7th Cir. 1962). Compare Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 173(d) (1958) (method of final adjustment selected by parties for settling grievance disputes, the desirable method).

When legal action has been instituted on a matter that is arbitrable, courts have usually granted a motion to stay the legal proceedings pending the outcome of the arbitration. See cases cited note 69 *supra.*

156. While courts would need a different rationale, it is quite possible that they would grant a motion to stay pending arbitration as they would when a judgment is sought on the merits subsequent to a grievance but the agreement contains an arbitration provision.

ment by the reviewing court appears possible when the award requires a violation of federal or state statute; when the award is inconsistent with public policy; or when the arbitrator disregards or misapplies some principle of federal substantive law relating to the bargaining agreement.

The many uncertainties in labor relations which may be precipitated by a transfer of business can be substantially eliminated through collective bargaining. If either the employer or the union foresees a possibility of transfer, the parties should bargain for a provision in the collective agreement governing that contingency. Even absent such foresight, uncertainty can be obviated if a purchasing employer and the incumbent union enter into an amended agreement prior to the actual transfer. Thus, pre-transfer bargaining permits the interested parties to retain control over survival and avoid the uncertainty inherent in arbitration and possible litigation.