In the

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs. No. 71-123

BURNS INTERNATIONAL SECURITY SERVICES, INC., et al.,

Respondents.

AND

BURNS INTERNATIONAL SECURITY SERVICES, INC.,

Petitioner,

vs. No. 71-198

NATIONAL LABOR RELATIONS BOARD, et al.,

Respondents.

Washington, D. C.
January 13, 1972

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v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

Respondents.

Washington, D.C.

Thursday, January 13, 1972

The above-entitled matter came on for argument at 11:35 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States.
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

NORTON J. COME, ESQ.,Assistant General Counsel, National Labor Relations Board, Washington, D.C. 20570

GORDON A. GREGORY, ESQ., Attorney for International Union, UPGWA, Detroit, Michigan.

CHARLES G. BAKALY, JR., ESQ., 611 West Sixth Street, Los Angeles, Calif. 90017, on behalf of Burns International Security Services, Inc.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-123, National Labor Relations Board against Burns International and Burns against the Board in 71-198.

Mr. Come, you may proceed whenever you are ready.

MR. COME: Mr. Chief Justice, and may it please the Court:

This case is here on writs of certiorari to the Second Circuit. It presents two questions concerning the extent to which the duty to bargain under the National Labor Relations Act survives a change in employers.

The first question is whether Burns International Protective Agency, which took over Wackenhut's job of furnishing guard services to Lockheed is a successor to Wackenhut for purposes of the National Labor Relations Board; and second, if Burns is a successor employer, is it obliged not only to recognize and bargain with the union represented by Wackenhut's employees but also obliged to honor the collective bargaining agreement which Wackenhut had entered into with the union, covering these employees.

Q Mr. Come, perhaps this question is a little too early, but if you will bear it in mind and answer it when you want, if Burns had not employed any of the Wackenhut people--they employed 27 I think, or some such figures--if they had not employed any, would you contend they were a

successor employer because they moved in and performed the same function?

MR. COME: I would say the fact that they--well, as I will develop further, the continuity of the employing enterprise is the test and among the factors that are very crucial, there is the complement of the work force and had they not employed for non-discriminatory reasons, the Wackenhut employees, that would be a big factor for holding that they were not a successor. Whether it would be conclusive or not, I will develop as I get to it.

The basic facts here are these: From July 1, 1962 to July 1, 1967, Wackenhut, a nationwide guard service, provided plant protection services for Lockheed Aircraft Service Corporation, a subsidiary of the Lockheed Aircraft Corporation, at its facility at the Ontario Airport in California. What Lockheed was doing there was maintaining and repairing planes, and Wackenhut was supplying guard service for the Lockheed operation.

On March 8, 1967, the Board certified the United Plant Guard Workers as the exclusive bargaining representative of the Wackenhut employees working at the Lockheed Airport facility.

Q How large a unit was that?

MR. COME: It was a unit of about 42 employees.

On April 29, 1967, about a month after the

certification, Wackenhut and the union entered into a 3-year collective bargaining agreement covering these employees and the collective bargaining agreements, among other things, contained a clause making the agreement binding on successors and assigns. Lockheed's then current service contract with Wackenhut was due to expire on June 10, 1967, unless extended by Lockheed. In May of 1967, Lockheed invited various guard services, including Wackenhut, to rebid the job. On May 15, Lockheed advised the prospective bidders, including Burns, that Wackenhut's guards were represented by the United Plant Guards Workers who had been certified by the Board and that there was an outstanding collective bargaining agreement between Wackenhut and the Union covering those employees. Although Wackenhut submitted a bid, the successful bidder was Burns.

In the next month of June, 1967, Burns sought to employ, when it took over on July 1, as many of the Wackenhut guards as possible for the reason that they had the security and top security clearance that was needed for this type of work. The Wackenhut guards applied for jobs with Burns, as they did so, Burns officials in turn assisted the American Federation of Guards, another union with whom Wackenhut had a contract covering its employees in Los Angeles County. The contract did not cover these employees because this was in San Bernadino County. But none the less, Burns assisted the

consideration of guards in obtaining membership applications from the Wackenhut guards as they came to apply for jobs with Burns. Representatives of Burns told the guards that could not get uniforms without signing American Federation of Guards membership cards and that they had to join the American Federation of Guards in order to work for Burns.

On June 29, Burns' Branch Manager concluded that a majority of the employees to be used at the Lockheed Airport job had signed American Federation of Guards membership applications or were already members of that union, recognized the American Federation of Guards as their bargaining representative.

Wackenhut terminated its guard service at midnight on June 30 and Burns began to furnish such service on July 1. On that date, Burns' Lockheed force, like Wackenhut's consisted of 42 guards. Of the 42, 27 or more than a majority had formerly been employed by Wackenhut, and 15 guards were transferred from other Burns jobs. The Burns guards performed essentially the same tasks at the same stations that the Wackenhut guards had performed. Moreover, although Burns used its own supervisors, their functions and responsibilities were similar to those of their Wackenhut predecessors. Both utilized area supervisors who performed similar functions and both had full-time supervisors on the Lockheed job with similar functions.

Q And how many of the former Wackenhut guards signed up with the other union, of the 27?

MR. COME: I believe all of them did, your Honor.

Q All 27?

MR. COME: Yes, your Honor.

Q And of course 15 brought over by Burns were already members?

MR. COME: They were already members. They were apparently transferred from Los Angeles County and thus were under the Burns contract with the American Federation of Guards, which I believe had a union security clause in it, as did the United Plant Guard contract with Wackenhut.

On July 12, the United Plant Guard Workers requested that Burns recognize it as the bargaining representative of the Burns employees of Lockheed, and honor the collective bargaining agreement that it had with Wackenhut. Burns refused and the union then filed Fair Labor Practice charges with the Board.

The Board found that Burns violated Section 8 (a) (2) and (1) of the Act, which prohibits illegal assistance by an employer to a labor organization by assisting the American Federation of Guards in organizing and by recognizing American Federation of Guards when it did not represent an uncoerced majority of Burns' employees. This finding was sustained by the Court of appeals and it is not in issue

here.

The Board also found that a bargaining unit limited to the guards working at the Lockheed Airport facility was appropriate, that Burns continued essentially the same operation at that plant that Wackenhut had, and therefore it was a successor employer to Wackenhut. Accordingly, the Board held that Burns violated Section 8 (a) (5) and (1) of the Act by refusing to recognize and bargain with the United Plant Guards.

Finally, the Board, drawing support from this Court decision in which Lee against Livingston, which I will get to later, the Board held that as a successor to Wackenhut, Burns was obliged to honor the collective bargaining agreement between Wackenhut and the United Plant Guards Workers and that by refusing to do that, that was an additional violation of the bargaining obligation.

The Court of Appeals opinion by Judge Hays sustained the Board's findings as indicated, of illegal assistance, sustained the Board's findings that Burns was a successor, sustained the finding that there was a refusal to bargain and in Burns refusing to recognize United Plant Guard Workers as the representative of the employees, but held that the Board had exceeded its powers under the statute in finding that there was a further refusal to bargaining in failure to honor the collective bargaining agreement.

Both the successor issue and the propriety of the

Board's findings requiring a contract to be honored are before this Court on cross-petitions for certiorari.

Now as this Court knows, enacting the National Labor Relations Act, Congress made the policy declaration, Section 1 of the Act, that protection by law of the right of employees to organize and bargain collectively safeguards commerce from interruption by removing a frequent source of industrial strife. The way the Act implements that policy is to provide a procedure whereby the Board can conduct a secret ballot election, to get the employees' wishes concerning a bargaining representative. If a majority vote for them, it certifies them as the exclusive bargaining representative and under Section 8 (a) (5) of the Act, its refusal to bargain, to refuse to honor the certification.

Furthermore, since the Act also rests on the premise that industrial peace is promoted by maintaining stability in the bargaining relationship, a Board certification is normally not subject to challenge for one year. This Court endorsed the Board's rule to that effect in the Brooks case, or longer if there is a collective bargaining agreement of reasonable duration and under Board principles that have been approved by the Courts, a collective bargaining agreement of up to three years is normally regarded as reasonable duration.

Q May I get this clear. Under the Court of Appeals decision, the only issue as to which we cannot agree with the

Board was whether although Burns has to recognize--is this United Plant Guards --

MR. COME: Yes, your Honor.

Q --and has to deal with the United Plant Guards and not the old American, whatever it was, nevertheless it will work out a new agreement, and that is between the Plant Guards and Burns, and that Burns was authorized to simply carry on the old agreement that the Union had made with Wackenhut, is that it?

MR. COME: That is right, your Honor.

Q And it's the cross-petition of Burns that this agrees with so much of the order that says that Burns has to deal with this Union?

MR. COME: That's right, your Honor.

Q And are those the only two questions that we have?

MR. COME: Yes, your Honor, those are the only two questions as I understand it.

Now in line with the general principles that I have just outlined, had Burns remained the employer, it would have been obliged to recognize the United Plant Guards Workers during the life of the three-year collective bargaining agreement, notwithstanding any changes in complement of the employees that occurred during the life of that agreement, and if Wackenhut had repudiated that agreement or had unilaterally modified its wage provisions or any other provisions relating

to the employees' terms and conditions of employment, it would not only have been subject to a suit for breach of the agreement, under Section 301 of the Labor Management Relations Act, but it would have violated Section 8 (d) and therefore 8 (a) (5) of the National Labor Relations Act as well, because Section 8 (d) provides in relevant part that where there is in effect a collective bargaining contract, the duty to bargain collectively shall mean that no party to such contract shall terminate or modify such contract without giving prescribed notice and waiting until the expiration date of such contract, and as I understand it, nothing in this Court's recent decision in Pittsburgh Plate Glass affects the general principle because this contract, almost exclusively, dealt with mandatory subjects of bargaining.

Now, I don't understand that Burns disagrees with what I have just been setting forth as the obligation that would have been imposed on Wackenhut nor do I understand that there is any disagreement with the next point that I am going to make, namely, that early in the administration of the Act, the Board evolved the doctrine and it has been uniformaly approved by the Courts of Appeals, although this Court has never had occasion specifically to pass on it, that the mere transfer of operations from one employer to another does not extinguish the obligation to bargain under the National Labor Relations Act. If such transfer leaves substantially

intact the identity of the employing enterprise, then the duty of the original employer to recognize and bargain with an incumbent union devolves upon the new employer as a successor employer, and the rationale for the doctrines simply is this: that if employing enterprise remains intact, continuation of the bargaining obligation serves the policy of averting industrial strife in that enterprise no less than by imposing the obligation upon the successor employer than did imposing it on the original employer. Moreover, where you have maintained the employing enterprise, there is little reason to believe that the employees' original choice of a bargaining representative would have been altered by the mere change in employers.

The point at which the difference between us develops is what are the criteria for determining whether you have a successor employer for purposes of the National Labor Relations Act , and it also gets back to the Chief Justice's question.

Q Before you go on with that, Mr. Come, what you have said sounds as though you are talking about a case in which Burns came in and took over and along with the take-over of the activity, took over employees. Now my reading of this record is that Burns is one of the competing bidders. A great many people bid for this contract and these companies awarded it to Burns as the low bidder, so they were competitors of the Company you now suggest is the Company to which they

are successor.

The 27 employees were then taken over on the open labor market, weren't they?

MR. COME: That is correct, your Honor.

Q Then they were hired one by one? I just wanted to be sure I understood that correctly.

MR. COME: Yes, you have, your Honor, and it's Burns' point that that does make a difference, that that distinction should be drawn between this kind of situation and one where you have a more conventional transfer assets or of facilities.

We submit and we believe that the cases in the Court of Appeals support our submission, that so long as the new employer ends up substantially with the same bargaining unit or industrial community, as it is sometimes called, he is a successor employer for purposes of the National Labor Relations Act, whether he does that as a result of direct dealing with the prior employer or he does it through dealing with a third party, as was done in this case, because the important thing, as I tried to indicate, the important rationale for writing this gloss of the successor employer on the bargaining obligation, is that the change in employer has not made a significant change in the bargaining unit which had originally selected the Union as the employees' representative and that is what we had here, because irrespective of how Burns ended

up with the contract and the findings of the Board, as sustained by the Court of Appeals, you had a situation where, and I am quoting from the Court of Appeals Appendix, Burns and Wackenhut are nationwide organizations, both. Both perform the identical services at the same facility, namely, providing plant protection service to Lockheed. Although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors, and finally and perhaps most significantly, Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42. Moreover, as shown by Burns' assistance to the American Federation of Plant Guards, it too recognized this Lockheed operation as a separate operation, as a separate bargaining unit, so that we submit that since the change from Wackenhut to Burns left substantially intact the employment conditions at the enterprise that is involved here, namely, supplying of the guard services to Lockheed, which was a separate unit, the Board properly found that Burns is a successor to Wackenhut, which brings me to the second question as to whether Burns was not only obligated to recognize and bargain with United Plant Guard Workers Union, and prohibit it from making any unilateral changes in existing working conditions without first bargaining with the Union, but whether it was also obliged to honor the contract.

Q How much longer did this contract have to run,

this collective bargaining agreement at the time Burns was awarded the basic contract by Lockheed?

MR. COME: It had been about two and a half years, I would say. It was entered into in--it's even more than two and a half years--it was entered into in April 29, 1967, and Burns took over on July 1, 1967.

Q And it was a three-year?

MR. COME: It was a three-year contract. There would be no question that Wackenhut would have been required to honor the contract for the three-year term.

Q Was it reopenable by either party at all during that three-year period?

MR. COME: As I recall, it was not. These three-year contracts are not uncommon in collective bargaining. There was a time when a one-year contract was the rule, then it went to two years and now three years is very standard.

Q The invitation to bids went out after the agreement had been signed?

MR. COME: After the new agreement had been signed.

Q Any evidence that anyone knew there were going to be invitations to bid?

MR. COME: Before they signed? Yes, your Honor.

(Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m. the same day.)

AFTERNOON SESSION

[1:00 p.m.

MR. CHIEF JUSTICE BURGER: Mr. Come, you may continue. You have six minutes remaining of your total time.

MR. COME: I should like to respond to Mr. Justice Brennan's question and reserve the balance of my time.

At the luncheon break Justice Brennan asked whether there was any indication that bids would be let at the time the collective bargaining agreement was entered into.

So far as the record shows, there was no indication, other than the fact that the Lockheed contract with Wackenhut was a year contract that was subject to removal. However, for the last five years Wackenhut had been retained to perform the guard service at this installation, and from all that appears in the record it had every intention of remaining.

Q Had previous contracts included successors and assigns?

MR. COME: That the record does not show, Your Honor.

Q Do they show whether there was any special attention given to the inclusion of that provision in this contract?

MR. COME: The record does not.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gregory.

ORAL ARGUMENT OF GORDON A. GREGORY, ESQ.,

ON BEHALF OF UPGWA, RESPONDENT AND INTERVENOR

MR. GREGORY: Mr. Chief Justice, and may it please the Court:

The United States Chamber of Commerce, in its amicus brief, stated, and I quote: "In a service industry such as the providing of plant protection service, generally the only variable in which productivity of efficiency gains can be made is labor."

I submit, Your Honors, that in this case the labor gains that have been made have been made at the sacrifice of rights that are federally protected and rights which this Court sought to stabilize in its Wiley decision.

In my view, there are classic facts here of Wackenhut Corporation having had a contract for guard services for a number of years on an unorganized basis. The guards that my client represents organized those people, they were certified by the National Labor Relations Board, they entered into negotiations for their first contract, which did contain a successors and assigns clause, and without at least a control of participation of the parties Lickheed elected to let its contract with Wackenhut up for bids.

Following the premise that the only commodity these guard agencies have is labor, Burns then was in a position to ignore the stability created by the bargaining agreement, and

effectively then to bid on the basis of labor only.

The result was that the employees lost the benefits of the gains they had made through the collective bargaining process.

I suggest that a doctrine that a successor-employer, and assuming for the moment that Burns was a successor, albeit a non-consenting party to what has clearly been held to be a nonconsensual agreement and rather a public obligation, does not do violence to clear concepts of federal labor law policy as they were established prior to the time of the Burns decision.

Because prior to that time, in a successor situation, it was held that the successor was bound to recognize and to bargain with the incumbent union. It was held that the successor was bound to recognize existent terms and conditions of employment, whether or not those terms and conditions of employment were established by a bargaining agreement or otherwise.

Q Well, not in service situations, you have it in mergers and purchases of assets. Right?

MR. GREGORY: Well, Your Honor, if I understand the question, I had understood that in, for example, the Board's decision in Maintenance, the physical acquisition of assets was not essential to a finding of successorship, nor was privity, which was --

Q I know, but there was a deal -- was there a deal

there between the predecessor and the successor?

MR. GREGORY: Not in Maintenance, Incorporated.

Q Well, what about in the government contract cases?

MR. GREGORY: In Emerald Maintenance, I don't believe there was privity or an understanding between the successor or predecessor in that case.

Q I mean, what about the Board decision in government contract cases, where, on government bid one person replaces another, and the successor is held not to be bound?

MR. GREGORY: Yes, that decision was subsequent, of course, to the determination in Burns. I believe the case is on appeal, and --

Q Well, it didn't overrule any prior cases, did it?

MR. GREGORY: No, it didn't overrule Burns.

Q Well.

MR. GREGORY: It distinguished, I think, Your Honor, on the basis of "unusual circumstances." Of course I personally disagree that there were unusual circumstances to warrant a departure from Burns. And hopefully that matter will be set forth on appeal.

But I don't see any distinction between Emerald Maintenance, and what the Board had held earlier in Maintenance, Incorporated. And then as set forth in Burns, where they --

Q What would you say if Burns had a collective

bargaining agreement with another union that gave the other union the bargaining rights with respect to any of its installations in California, and then it won this bid with Lockheed?

MR. GREGORY: Well, that was asserted below, Your Honor, and rejected --

Q Well, I know it was rejected, but let's assume that it was true.

MR. GREGORY: This, I would say, would be one of the numerous factors to determine whether or not initially there was a successorship involved, and whether the collective bargaining agreement of the predecessor bore a reasonable relation to that of the predecessor. I don't believe -- well, it's not the case before the Court, because here you had a completely separate facility.

And if I might add on that point, first, Wackenhut and the plant guards negotiated a collective bargaining agreement, which I think we can assume was tailored to the needs of plant protection services at that facility.

Q Well, was the wage scale of Burns actually lower than Wackenhut?

MR. GREGORY: Yes. The record shows it was 10 to 12 cents lower, and then at the future date, some two months after its takeover, Burns did raise the wages to the level of its predecessor, and maintained them there for a time --

Q Was that wage rate higher than Burns' other establishments?

MR. GREGORY: Yes, it was. It was higher than the so-called Ontario sub-office, that they would rely upon as being the more appropriate unit.

Q What would you say if the Burns -- if the wage rates at Wackenhut had been lower than the Burns rates?

MR. GREGORY: Had they been lower, the employees would have been stuck with them. They had negotiated them, and Burns could then pay those wages at that particular facility, if, in fact, they were a successor.

Q Yes. But you wouldn't -- but I suppose the union would have objected, but I'm not sure the employees would have objected if they had been included in the Burns bargaining unit.

MR. GREGORY: Perhaps not, Your Honor, but a companion case with Burns was the Dura Kota Division, wherein the union desired not to be bound by collective bargaining agreement where there had been a change in ownership; and the Board has indicated that the rule set forth in Burns would apply equally to unions as well as employers. And I submit that is a correct rule.

Q Well, except that the Board, as I understand it, has given itself a little leeway in the Emerald Maintenance case; is that correct?

MR. GREGORY: Yes, Your Honor.

Q If, in other words, the wage rates that Wackenhut was paying were lower, as a result of the fact that Wackenhut was a failing company or some other extraordinary reason, the Board has held that this Burns doctrine will not be applicable; hasn't it?

MR. GREGORY: Yes, it has. I would point out, Your Honor, that that involved an application of the Service Contract Act. In fact, I submit, a misunderstanding of what that Act involves; basically it's a minimum wage or Davis-Bacon Act, for service industry employees working under government contract. And of course those factors were not present in the Burns case.

Indeed, we had two sophisticated, well-established, giant guard agencies. And I would make the point that Burns not only had advance knowledge, but with the sophistication and experience was in a position to adapt to the situation of the collective bargaining agreement that was present.

Q Mr. Gregory, that language, "successors and assigns", has that language historically been the kind of language used to describe successors in this context? Or is that standard lawyer's work in contracts and documents of all kinds?

MR. GREGORY: Mr. Chief Justice, in my opinion it is standard, it's been a form of boilerplate, I think we've placed

in bargaining agreements, although until Wiley, at least, until Burns there may have been doubt whether, as a matter of law, it would bind the nonconsenting successor or assigns.

More ideally in our bargaining agreements we attempted to make it a condition of sale or assignment that the predecessor would see that the successor adopt it.

But, realistically, and in terms of placing this Court's Wiley decision and the rationale there of promoting industrial stability through arbitration and of giving employees some modicum of protection against changes in ownership, I submit Burns is in harmony with that doctrine. Because under Wiley if there has to be arbitration for the successor, it's implicit there cannot be that arbitration unless the bargaining agreement survives.

Q Well, there's a continuity factor from the standpoint of the employeer, too, is there not? That is, Burns, having established relationship with other unions, or anyone in the posture of Burns, might have some real problems if they had to divide up and deal with a number of unions; would they not?

MR. GREGORY: If I understand the question, Your Honor, Burns I don't believe would be any worse off in that situation unless you are alluding to the American Federation of Guards -- or perhaps I didn't understand the question.

Q Well, I'm speaking to this particular union;

but assume they had a union that was part of the American Federation of Labor, an established, recognized, acknowledged union, you have some jurisdictional problems then, wouldn't you? If they came in with a contract that they were obliged to recognize that union in any acquisitions that they came to, if they acquired any new plants or branches or agencies.

MR. GREGORY: I don't believe they would, Your Honor. The client I represent has had experience with Burns throughout the country where we have other units, and I know of my own knowledge that Burns has other unions besides AFG and the UPGWA. But I don't believe that potential threat, if it is, can destroy the fact there was continuity of identity of an employing enterprise, there was previously an appropriate unit certified by the National Labor Relations Board.

Moreover, I would point out that the Act contains adequate machinery for dealing with jurisdictional disputes as soon as they develop.

Q Would your position be the same if five or six or seven of the employees of Burns had gone over to Wackenhut instead of twenty-some?

MR. GREGORY: Yes, it would be, Your Honor. I think that the --

Q Well, then, how about none? How about if there were no employees?

MR. GREGORY: Well, that was the situation in

Monroe Sander, for example, decided by the Second Circuit, where the possible, either refusal to employ or transfer to a new location or to the successor in turn might be either an unfair labor practice or, as I understand Wiley, a breach of the collective bargaining agreement, or a matter subject to arbitration.

So I would not state that a head count is absolutely essential to the operation of the successorship concept.

May I conclude by indicating that in situations such as presented here it would appear to me a certain stability is created, not only for the employees on whose behalf I argue but for those employers who operate in the service industry area which is highly competitive, but typified generally by competition based on labor rates, rates of people who, generally speaking, are barely above the minimums to begin with.

So I would submit there could be stability for the employer. Moreover, sophisticated parties in the field of labor relations so enter into voluntary adjustments to adapt to such parochial changes as might take place with a change in ownership; and, finally, this Court has made it clear in Wiley that the arbitration machinery is to be fostered and is of course available and binding upon a successor to correct these situations.

I submit that Burns has finally placed an entire

National Labor Relations Act in harmony with the federal labor policy generally, which is to promote and foster bargaining through agreements and informal arbitration of disputes.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Gregory.

Mr. Bakaly.

ORAL ARGUMENT OF CHARLES G. BAKALY, JR., ESQ.,

ON BEHALF OF THE RESPONDENT BURNS

MR. BAKALY: Mr. Chief Justice, may it please the Court:

I think the Court has zeroed in on the narrowness of this case with respect to the successorship issue. It does involve service industry type businesses, and our position before this Court at this time, which has not been answered by the court below or by counsel, is that this facility operation of either Burns or Wackenhut was not an employing industry under either Burns or Wackenhut, and therefore there could not be any continuity of the employing industry.

We're not contesting the general law that a successorship shall be found where there is no change in the employing industry. We're dealing with a particular service industry, and what this facility was, which everybody has assumed, this facility operation was just a small portion of Wackenhut's business in California, and it was a very, very small portion of Burns' business in California.

Now, the cases, unfortunately, have not dealt with

this question of what is an employing industry in the service industry context.

And we say that an employing industry must be of large enough portion to where there is managerial authority and skill which is necessary to run the business and make decisions on matters that are critical to employees, and that the employing industry is used to the purpose, therefore, to determine the employees' desires about having a union.

Now, as regards the facts in this case, as has been pointed out, there was an annual renewal contract between Lockheed and Wackenhut. There was not a term agreement between Wackenhut and Lockheed. And that the contract between Wackenhut and the plant guards was the first contract, so that the successors and assigns clause had not been on any previous agreement.

Now, why didn't this facility have the indicia of an employing industry? As we have said, it was a very, very small portion of the business of each. There was only one supervisor there, part-time, when Wackenhut had it; when Burns took it over there was one supervisor with limited authority, limited authority. The wages, the benefits, the working conditions, all other decisions were established at the corporate headquarters, not at the facility. With respect to Burns, it was established at the Ontario base.

There were separate office staffs -- there was no

office staff at the facility for Burns. There was no payroll, no accounting staff; all that was handled at the sub-office for Burns, and at the California office for Wackenhut. And there were separate manuals and procedures of these two competing companies, of which this facility was merely a very small portion.

In any event, there was a substantial change primarily because of the quickness within which this operation facility was integrated into Burns' regular operation. Because of Burns' practice of interchanging guards regularly, to have the flexibility, to have a particular guard working more than one location, where his services could be best utilized, they had this practice. And within six months, less than a majority of the former Wackenhut employees were employed at the facility. So that immediately upon Burns taking this over, it was integrated into this other unit.

From a policy standpoint, as the Chief Justice, I think, pointed out, there would be serious problems to this rule of successorship applied in the service industries to the companies like Burns, and it would cause a lack of stability in labor relations, because --

Q Well, Mr. Bakaly, do you contest the decision that the union was the bargaining agent?

MR. BAKALY: We do -- upon the takeover, yes; we do not believe that Burns was a successor to Wackenhut, and, there-

fore, the UPGWU was not the bargaining representative.

Q Do you have to win on that?

MR. BAKALY: We don't have to win on that for the contract question, no.

Q Why not? Why not? If the union is the bargaining agent, it's that because Burns was a successor.

MR. BAKALY: That's right. And that would be the only -- that would be the only basis on which we would have to operate.

Q Then if he was the successor, how can you say that the -- that Burns isn't bound?

MR. BAKALY: Well, because, Mr. Justice White, Section 8(d) of the National Labor Relations Act very precisely proscribes certain powers to the Labor Board. The Labor Board, the National Labor Relations Board does not have the power to tell an employer to become a party to an agreement. This is a cardinal principle, and --

Q Well, I know, but --

MR. BAKALY: -- this is what the Labor Board has done here. They have --

Q I know, but by becoming a successor the employer agreed.

MR. BAKALY: In what regard, Mr. Justice White? There was no -- there was no law at the time that the employer because a successor that he was obligated under this agreement.

Q Well, he became a successor voluntarily?

MR. BAKALY: That's correct. He bid for the job and was awarded it by Lockheed and any relationships --

Q Well, he said, "I voluntarily want to be a successor."

MR. BAKALY: Right. But the law for 35 years to that time was that a successor was not obligated to honor the agreement.

Q Even though he was obligated to --

MR. BAKALY: To bargain --

Q -- bargain with the union?

MR. BAKALY: Yes, sir. That has been the law for 35 years until the Board, in this case, for the first time since 1934, changed that rule.

Q And the parties, by saying successors and assigns, couldn't make --

MR. BAKALY: Couldn't obligate a third party by the mere successors and assigns language. Now, the Court, in Wiley, in a 301 action, did hold for the purposes of arbitration that a successor was obligated to arbitrate; but that was a far cry from holding that the person arbitrating was bound. It was up to the arbitrator to decide the portions, if any, of the collective bargaining agreement to which the successor was obligated.

Now, --

Q Well, the Second Circuit opinion that we're reviewing here held that your client was a successor and had to bargain, but that it was not bound by the contract.

MR. BAKALY: That's correct, Mr. Justice. That's correct.

Q And you petitioned for cert on the first part?

MR. BAKALY: On the first part, on the successorship part.

Q You say you're not obligated even to bargain?

MR. BAKALY: That's correct. Because this small facility operation was not -- was not -- an employing industry as that term should be applied in order to have the stability.

Think what would happen to a service company in the Greater Los Angeles area that has a collective bargaining agreement with one union, that it recognizes that union for Los Angeles County, and they're competing constantly for these jobs. Now, if every time they take over a new job they're going to take over a new union, that's going to cause serious problems of instability, it's going to cause jurisdictional strikes, and it's going to put the employer in the middle between two competing unions.

Now, this is the policy reason why in this industry -- we're not talking about successorships generally; but in this service industry, where there is so much of the interchange of employees and the changing of jobs so regularly.

Q Well, if it were clear -- if it were clear in advance that in a situation like -- that in a transaction like Burns engaged in, that you were (a) going to have to bargain and (b) honor collective bargaining contracts, then I don't know what confusion there would be. Burns would know what it was bidding on. It's just that there wouldn't be as much flexibility in one element of its cost and one element of its bid as they thought there might be.

MR. BAKALY: Well, they couldn't interchange employees. You can't require employees to join two or three different unions, Mr. Justice White, I mean, and require them to pay dues in these unions, as a practical matter. So you couldn't interchange employees from one job to another, even though you thought that in order to do it you'd have -- and to have efficiency, you'd want to.

Q I don't understand that.

MR. BAKALY: Well, because if over here at Job A you have Union X, and over here at Job B you have Union Y, and you have union shop agreements with both of them requiring union membership within 30 days --

Q Yes?

MR. BAKALY: -- you couldn't transfer an employee from this job over here on a temporary basis without requiring him to be a member of the union.

Q Well, that's true; but that is -- that might be

a -- that is really no difference in kind from saying that you have to recognize and bargain with one union one place and one at another.

MR. BAKALY: We think it is in this small, minimal area of service industries. That's why we're not trying for a principle of law here that will stop the general rule of successorship and obligation to bargain when you acquire a factory, when you acquire a business that's a going concern, with an office staff and so forth; we're not attempting to alter that rule of law.

Q You mean requiring you to bargain?

MR. BAKALY: Requiring you to bargain as opposed to the agreement. I'll get to the agreement, because that's a matter of great concern to us.

But on the successorship issue, we are not trying for a -- maybe our position is somewhat different from the amicus in this regard, but as far as Burns is concerned we are trying only here to show the Court the difference between a service industry and industries generally in this area of successorship. We're not trying to adopt a rule of successorship different from the present rule of successorship except in this narrow service industry.

Now, --

Q Doesn't this all depend on your right to shift these men from place to place?

MR. BAKALY: Yes.

Q Well, I would submit that --

MR. BAKALY: Is there any reason why --

Q I would submit that on your hypothetical from the plant end, maybe if you tried to shift them the union might have a good grievance.

MR. BAKALY: Well, it depends on the collective bargaining agreement, Mr. Justice Marshall.

Q That's what -- you just don't want the agreement.

MR. BAKALY: No. No. Employers today, to get flexibility, obtain provisions in the agreement permitting transfer of employees, in order to have this opportunity to utilize people at different locations.

Now, you might, because of economics you might bargain that away in a particular situation, but generally speaking employers have the right in service industries to transfer people.

Now, let's suppose -- and here's why you have to -- I'm building --

Q Tell me, how broad is this service industry in your mind?

MR. BAKALY: I'm thinking particularly of the maintenance contractor and the guard service primarily. Take a building that has a maintenance contractor, and the particular

employee servicing a floor gets into a fight with the tenant. Now, that building contractor -- the owner of the building is going to say to the maintenance company: "Move that fellow out of there." And the maintenance company is going to transfer him to another building. Now, this happens all the time --

Q Well, how about --

MR. BAKALY: -- where they have to do it.

Q -- the Lockheed Company, if a machinist punches a customer in the nose, does that take Lockheed out?

MR. BAKALY: No. Lockheed would discharge an employee for that.

Q He'd have to go through the grievance machinery to do it.

MR. BAKALY: Go through the grievance procedure. I suggest that this would be less of an impact upon employees to permit the maintenance company to say, "We know, Joe, that your relationship with that company was bad, but we think that you could have a good relationship with another company, so we're going to give you another chance", rather than firing the man.

Q Well, I agree that probably there is a great difference with the service industry.

MR. BAKALY: We submit that there is a difference because of the -- primarily of the interchange, the integration, the fact that you are operating at hundreds and hundreds of

different locations in the general area. If every location becomes a bargaining unit, there's going to be great instability and difficulty, we submit.

Q Well, I take it, that the Board indicated to you that -- that it would be a wholly different case if you had decided to bring in your own employees; had not hired any of the Wackenhut employees?

MR. BAKALY: Well, Mr. Come did not say that exactly. He said it would be a factor --

Q Well, he said it would certainly be a different case.

MR. BAKALY: It would be a different case.

Q Yes.

MR. BAKALY: Mr. Gregory said that he would not find it a different case if we brought in all of our own employees. And, in fact, where you have this policy of integration,within six months, Mr. Justice White, there was a majority of non-Wackenhut employees there. That's a relatively short period of time.

And because of this Burns policy that I'm talking about that happened. Now, just because it didn't happen on Day One -- I'll tell you just exactly why it didn't happen on Day One, because of the peculiar requirement for security clearances at Lockheed. Burns did not have in his other operations enough employees that had top secret security clearance

so needed. And that kind of circumstance is the only reason why they did not transfer in a majority of their guards from other locations, which is their normal practice.

Q So they had to be -- rely on some sort of continuity with the old organization?

MR. BAKALY: Yes.

I'd like to go -- assuming, which obviously we do not, for the purposes of argument -- go to the second point --

Q Good.

MR. BAKALY: -- on the contract issue, and call to the Court's attention the long line of authority that says that the purpose of the National Labor Relations Act was not to allow governmental regulations of the terms and conditions of employment.

This Court, in H. K. Porter, in 1970, held that, in Chicago and Northwestern Transportation Union the same principle, the statute, the legislative history, all say that the Labor Board, distinguished perhaps from a court, does not have the power to order somebody to make a concession or to a particular proposal or to the entire agreement.

And that it's this section 8(d) which controls the Board here and prohibits what the Board has done in this case.

The language of 8(d) is "but such obligation does not compel either party to agree to a proposal or require the making of a concession."

Q In Wiley, if the arbitrator had ultimately decided that the successor was bound, --

MR. BAKALY: No problem with that.

Q No problem. Then the Act doesn't prohibit a successor from being bound by a prior contract that he never agreed to?

MR. BAKALY: Section 301, and the policy created by this Court that it favors arbitration as the method of resolving these disputes is not circumscribed by Section 8(d); that 301 and 8(d), which regulates the Board's power, are separate.

Q But, nevertheless, in Wiley, the ultimate result might have been that the successor was bound by everything in the contract, even though he never agreed to any part of it, and even though he never agreed to arbitrate it.

MR. BAKALY: That is correct. And that we feel is in the interests of following the policy of promoting arbitration and using arbitration as the manner and the means of resolving these disputes. But let the arbitrator who, as Mr. Justice Douglas has said, is the person that has the most competence in this area, that has the knowledge of the law of the shop, let him be the one to decide that.

As of course you know, the arbitrator in the Wiley case, after deciding that the contract was binding for a couple of months, was then not binding thereafter.

As Mr. Justice Hays has said in an extremely well-

reasoned opinion, that H. K. Porter and the legislative history of the Act really control here.

We'd like to call this Court's attention to a very recent case decided by the Sicth Circuit on the 30th of December, in NLRB v. Interstate 65 Corporation, which doesn't have a cite yet, No. 71-1198, in which the Court of Appeals for the Sixth Circuit agreed with the Court of Appeals for the Second Circuit, finding a successorship in the particular facts of that case, but --

Q What's the caption of that case? I get the slip opinions from the Sixth Circuit.

MR. BAKALY: National Labor Relations Board vs. Interstate 65 Corporation, d/b/a Continental Inn, before Judges Weick, Celebrezze, and Peck, with --

Q Interstate -- what is it?

MR. BAKALY: Interstate 65 Corporation.

Q -- 65 Corp., doing business as something else?

MR. BAKALY: Continental Inn.

Q And that's December --

MR. BAKALY: 30th. No. 71-1198, Court of Appeals for the Sixth Circuit. It's a very short statement, that they recognized that Burns gave his opinion before this court, they say: We agree with the Second Circuit's resolution of this issue in Burns. That court decided the Board had exceeded its powers in ordering a successor employer to honor a

collective bargaining contract they had not been a party to. The Board had never, before Burns, found such a requirement to exist, and we see no change in case law or statutory law which would permit the Board to suddenly reverse itself upon this question. Any further discussion of this issue is unnecessary in light of the Supreme Court's pending decision thereon, we simply hold that in our view the Second Circuit's determination of the issue was correct, and we adhere to it.

Q That case was not in the service industry?

MR. BAKALY: Pardon?

Q That case was not in a service industry?

MR. BAKALY: It was a motel. It was a motel operation, an entire motel, was the facts of that case. And on the successorship they found --

Q Someone had bought out or somehow acquired the motel?

MR. BAKALY: Yes, they reacquired a motel and made some changes; but the court agreed with the Board in that case on the successorship, on the facts of that case, that it was a successor but, nevertheless, held that they were not bound to the predecessor's collective bargaining agreement.

Q Don't hotels regard themselves as being in the service industry?

MR. BAKALY: They may well, Mr. Justice Blackmun; I wasn't considering them. I'm talking about the independent

contractor, maintenance company, guard service that operates in most buildings and in a lot of plants.

Now, this --

Q But your contract point is not limited to the service industry?

MR. BAKALY: Oh, no. My contract point is not limited to the service industries at all. We don't believe the Board has the power to order any employer to be bound to any contract at all.

And I should point out, of course, as the briefs show, the Tenth Circuit, in an opinion which, interestingly enough, does not cite the Second Circuit opinion or Wiley, supported the Board and found that there was power for the Board to have an employer honor the collective bargaining agreement. That case is in the briefs.

But there are three circuits now, that two have decided against the Board's power and one in favor of it.

The Board's reliance on Wiley is really misplaced. It was not implicit in Wiley that the agreement was binding on them, as the Board has stated in its brief; it was argued by the amicus AFL-CIO that that ought to be the rule, but the court did not hold -- they held it was up to the arbitrator to decide in each instance.

Q Yes, but the source of the arbitration was the contract, wasn't it?

MR. BAKALY: They --

Q There would not have been an arbitration except for the collective bargaining agreement that required arbitration?

MR. BAKALY: That's correct.

Q At least to that extent --

MR. BAKALY: To the extent --

Q -- Wiley held the successor bound by a provision of the collective bargaining agreement.

MR. BAKALY: Bound to arbitrate; I'm not talking about --

Q I know, but there would have been no obligation to arbitrate except for that created by the collective bargaining agreement. Is that right?

MR. BAKALY: That's correct. But, as the Court -- this is a critical point, as the Court points out, what they are doing there is they are favoring the policy of settling disputes by arbitration. They are not saying that the Labor board, which its powers are set forth by Congress, has the power to do this.

Now, I --

Q Well, that just wasn't a species of compulsory arbitration, though?

MR. BAKALY: I beg your pardon?

Q Wiley just wasn't a species of compulsory

arbitration which would be wholly contrary to the Act. As Mr. Justice Brennan says, it was because, presumably, the party was bound to arbitrate. He was ordered to arbitrate, and it was because of the contract provision.

MR. BAKALY: Well, that's right. But the point that I'm making, though, is that we are not here now where a court has ordered the employer to be bound by the agreement. We're here under an unfair labor practice.

Q Well, suppose this contract did provide for arbitration?

MR. BAKALY: It does.

Q What then?

MR. BAKALY: And if there was arbitration requested, Burns would be obligated, if they are successor, would be obligated to arbitrate. No question about that.

Q Well, that's different from this one?

MR. BAKALY: Yes, sir. It is.

Q Why?

MR. BAKALY: Because of the policy permitting arbitration, and the resolving of disputes and because Congress has not given the Board that power.

Q Well, I thought you said you were not bound by the contract at all?

MR. BAKALY: We're not bound by the contract -- we're not bound to obey the Board's order that we honor this agreement.

Q Well, I misunderstood you.

MR. BAKALY: Now, if at this --

Q I thought you said you were not bound by the contract.

MR. BAKALY: No -- if I said that, Mr. Justice Marshall, I'm sorry. We're not taking the position, assuming that we're a successor, that we would not have to arbitrate. We would have to arbitrate if that -- and we would have to arbitrate the extent to which the agreement is binding. What they did in Wiley.

I'd like to --

Q Well, what about the other provisions of the contract, other than arbitration? Does it apply to all of them?

MR. BAKALY: Only if the arbitrator would so order, Mr. Chief Justice.

Q Wiley wasn't an NLRB case, was it?

MR. BAKALY: Not an NLRB case, and it's clear that the principles of 301 are not necessarily applied to unfair labor practice cases.

Three years ago I argued before this Court in Strong Roofing, in which Mr. Justice White wrote the opinion against us. We were arguing in Strong Roofing that the Labor Board did not have the power to order an employer to pay fringe benefits. This was a subject of arbitration. But because of a clear, as Mr. Justice White said, because of the clearer provisions of

Section 10(a) and 10(c) of the Act, giving the Board large remedial powers, in that case the doctrine of 301 applied to courts, did not apply to the Board because of the provisions of Section 10 of the Act.

We say that the same thing applies here. The rules with respect to Section 301 do not apply because of the clear intent of Congress in 8(d) not to permit the Labor Board -- they were very concerned --

Q Well, I take it from your argument, at least, The Board went way beyond Wiley, in the sense that it ordered you to comply with every provision in the contract?

MR. BAKALY: Right.

Q And that any provision of the contract that you refused to comply with would be an unfair labor practice?

MR. BAKALY: And contempt.

Q Yes. And whereas Wiley said, You're bound to arbitrate but we don't know whether you're bound by any other provision of the contract or not.

MR. BAKALY: That's correct.

And they left it to the arbitrator and his expertise to so hold.

Now, the Board really is overreaching when they say that the result called for here is to promote industrial peace, and that there is a policy of maintaining collective bargaining agreements. The policy, in Section 1 of the Act, is to promote

collective bargaining, not the imposition on unconsenting parties of collective bargaining agreements.

And that's what they have done here, and of course the strike argument was made in H. K. Porter, there it was a flagrant case of the employer bargaining in bad faith and refusing to a dues checkoff provision, where in other plants it had a dues checkoff provision; it just didn't want to have one here in that plant. And no legitimate economic reasons whatsoever.

And it would have saved economic strife, they wouldn't have had so much economic strife possibly if this Court had ordered the employer to be bound to the dues checkoff provision. But it did not. There would be industrial peace if there was compulsory arbitration in this country, maybe. Although in some European countries, where they've had co-determination and government intervention, they've had national strikes. They've had anything but industrial peace. But maybe it would.

But that's not what Congress has intended here. Plant closures cause industrial strife. But in Darlington this Court held that you could close a plant for union activities, because you didn't like -- you didn't want your plant organized. And that kind of industrial strife is great.

So, under free collective bargaining, which is what we have at this time, strife and strikes are sometimes necessary. Of course, the fact that you have a collective bargaining

agreement doesn't mean that you're necessarily going to be free from strikes. All of us know the situations where employees and unions have struck in violation of collective bargaining agreements and refused to go back in the face of court orders.

Q In --

MR. BAKALY: Yes, sir?

Q -- going back to the successor point, the duty to recognize that union and bargain with it might have existed wholly independently of whether you're a successor?

MR. BAKALY: I don't follow that, Mr. Justice White. I don't know quite how to do it --

Q Well, --

MR. BAKALY: -- if we were a successor --

Q -- 27 out of 42 of the Wackenhut employees were already represented by a union, and if they had demanded bargaining, without even saying you were a successor, I suppose you'd have had some obligations to bargain.

MR. BAKALY: Well, no. They could have filed a petition and there could have been an election.

Q If they won?

MR. BAKALY: If they had won, yes, then we would have it.

And that's really where we are on the successorship issue; we're not saying that there isn't a way for these

employees to have the union, we're just saying that we ought to have an election as the way rather than having the union imposed upon the employees and --

Q Well, certainly you didn't challenge -- were you in any position to challenge the unit at that point?

MR. BAKALY: No. We were not. That unit had been agreed to, it was consent --

Q And --

MR. BAKALY: It was a consent unit. It wasn't a Board determination on a unit, it was --

Q Oh, it wasn't?

MR. BAKALY: -- a consent unit.

Q No, but the Board -- there hadn't been a certification?

MR. BAKALY: There was a certification based upon a consent agreement.

Q Well, based upon a unit, then?

MR. BAKALY: But the parties, not the Labor Board, agreed to the unit.

Q Nevertheless, under the rule, you couldn't challenge that unit?

MR. BAKALY: Yes, we think we could challenge that unit. Yes, sir. And we so argued below, that we could challenge that unit. The third case in here is not all-encompassing, that there are unusual circumstances. And we

think that in this case this change of ownership, the integration, et cetera, would be an unusual circumstance --

Q Did the Board rule against you on that?

MR. BAKALY: I believe so. I believe so.

Q And you haven't challenged that ruling, have you?

MR. BAKALY: No, sir.

Q But we are going on the assumption here, anyway, that the unit was fixed, and the only question was your duty to bargain with a union that had previously been certified?

MR. BAKALY: Yes, sir. We're not contending that the appropriate unit and the employing industry are the same thing at all. We're saying they are two different --

Q I understand that.

MR. BAKALY: -- two different concepts. And we did contest the unit, and we did not raise it specifically, unless it's raised in our question No. 1 in our cert petition in this case.

Q Mr. Bakaly, the Board's holding on unfair labor practices, this as to the contract point, was that your refusal to honor the contract was a violation -- what? -- of 8(a)(5)?

MR. BAKALY: Yes, sir.

Q Well, 8(a)(5) as informed by 8(d)?

MR. BAKALY: Yes, sir.

Q Not specially on 8(d), but just 8(a)(5) derived

from 8(d); was that it?

MR. BAKALY: I think both --

Q Both?

MR. BAKALY: -- both were allowed, yes, sir.

Q Well, did you make any argument below, or do you make any here, based on the language of 8(d)? As I recall, 8(d) says, "That where there is in effect a collective-bargaining contract" and so forth, "the duty to bargain collectively shall also mean that no party to such contract shall" and so forth.

MR. BAKALY: That's -- we make that point, that --

Q That you're not a party to the document.

MR. BAKALY: -- we're not a party to the agreement. And that the language -- Congress was clear in the language of that part --

Q Well, doesn't the Board have to rely on 8(d) to say you're bound?

MR. BAKALY: They are relying on 8(d) --

Q They just can't rely on 8 -- on 8(a)(5) --

MR. BAKALY: 8(d)?

Q No --

MR. BAKALY: Because 8(d) defines (a)(5). 8(d) is the section that tells us what (a)(5) means. But (a)(5) just says, refuse to bargain in good faith. That 8(d) says what that means; so they go together, you can't separate them.

Q Well, of course the Board's brief says that their holding relied principally on Wiley.

MR. BAKALY: That's right.

Q And also concluded that its decision effectuated 8(d). They don't say -- at least they don't in their brief, concede that they relied on 8(d) to, for the 8(a)(5) finding against you.

MR. BAKALY: I don't see how they can separate the two.

Q But in any event you do?

MR. BAKALY: In any event we rely on 8(d) as a proscription on the Board's power in unfair labor practice cases to require somebody to be obligated to an agreement.

Q You have to be a party to the contract?

MR. BAKALY: You have to be a party.

Q Yes.

MR. BAKALY: The Board has no power to order you to be a party.

Q Well, that's true, but the Board, to hold you guilty of an unfair labor practice in that respect, had to find that you were bound to the contract and had modified it without bargaining?

MR. BAKALY: Well, they don't have to go with the last part.

Q Why?

MR. BAKALY: If we are successor, then if we have unilaterally modified the agreement --

Q I mean, where does the Board get their jurisdiction to enforce labor contracts?

MR. BAKALY: Well, that's a good question --

Q Well, it's not an unfair labor practice to breach a -- automatically to breach a contract?

MR. BAKALY: That's right.

Q Well, you have to go to 8(a)(5) -- there is a provision wherein it says that you cannot modify --

MR. BAKALY: Modify; that's 8(d).

Q 8(a).

MR. BAKALY: And that's the provision that the Board relies on to find a violation of 8(a)(5) for a unilateral modification.

This Court, as you point out, has never so ruled on that point. In Strong Roofing there is some dicta that would indicate in that direction; but this Court has not, on all fours, ruled on that question. And the Board, in its most recent Collyer case, while not conceding that it doesn't have the power, now it says that it is going to defer questions of modification to arbitration. A position that many of us have been urging the Board for some time; and this most recent Collyer case indicates that that's the direction the Board is going to go at this time.

Now, the purposes of the Act will be effectuated by assuming a successorship, by requiring good faith bargaining, and the arbitration that Wiley permits. We are not asking the Court to back away at all from the Wiley case. The arbitrator is more qualified, and desirable, and quicker to interpret these matters than the Labor Board.

And we submit that the Board's rule of imposing collective bargaining agreements will cause serious inequities upon the parties. As Judge Hays pointed out, counsel alluded to the Dura rule -- as Judge Hays pointed out, it would be very unfair to a labor union that made a collective bargaining agreement with a failing company, let's say, for three years on very favorable terms to then have that company acquired by Sears, Roebuck, or some large company that is not at all failing, and be obligated to that agreement for two and a half to three years.

So that this would be a serious inequity, as Judge Hays pointed out, --

Q Mr. Bakaly, would you concede that the Board could enter an order compelling you at least to arbitrate in this situation, or would you say that that had to be done through a Section 301 proceeding?

MR. BAKALY: Through Section 301.

Q As there was in Wiley?

MR. BAKALY: Yes, sir. No question about that.

Q But the Board could have abstained for the arbitrator?

MR. BAKALY: I don't follow that.

[Laughter.]

Q But even if the Board was right in saying that it was an unfair labor practice, or might be, they could have abstained pending arbitration?

MR. BAKALY: Yes, they could have deferred, deferred to arbitration; and that's why they've now done in Collyer. That's what they've done.

The Board's rule, really, also, from a policy standpoint in our view, would really unduly restrain competition in this area. The Board points this out in Emerald Maintenance, and they point out that there it's under a Service Contract Act, that there's a policy permitting the government contractor to bid.

Lockheed is 99 percent government contractor. While it's true that this contract with Burns was not under the Service Contract Act, that the same policy applies of saving the government money, which is really what the Air Force argued in Emerald Maintenance, that a policy of contract honoring would cost the government because of its inability to have lower bids.

That same principle would apply here.

Also, oftentimes the alternative for a company that

is in the place of being acquired is to go out of business if it can't be acquired. Now, we submit that this rule of contract honoring, requiring, imposing a collective bargaining agreement is going to be a deterrent to acquisitions; because an employer that comes in and wants to acquire a company, even if he's a successor, he has no -- he doesn't mind about bargaining with the union, but he wants to try to get some changes. And that collective bargaining agreement says it may well be that collective bargaining agreement that has caused the company to be in the position it's in.

Now, if this is permitted, we're going to have a lot more industrial strife.

Q You might as well say that rather than say it restrains acquisitions, it restrains competition.

MR. BAKALY: Yes, sir; it does. And I've just said that.

Q In the service industry?

MR. BAKALY: In the service industry, and in any industry. In any industry. It would have that effect, if the contract is -- because no one could come in and bid any -- and particularly would it be so in these industries where the big bulk of the price is the cost of the service.

Q Well, if you prevail, then the employer may bargain with a labor factor in his bid?

MR. BAKALY: He could bargain -- if he were a successor

he could bargain with the union and may, depending upon economic power, may get a better economic arrangement or not. And this is the system that we've been under.

Now, we submit that Burns is not a successor because of the peculiar industry involved here, and that, in any event, assuming that Burns is a successor, that the Board has no power to impose a collective bargaining agreement.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Bakaly.

Mr. Come, you have about seven minutes remaining.

REBUTTAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE PETITIONER

MR. COME: Thank you.

Q Mr. Come, --

MR. COME: Yes, Your Honor?

Q -- just what does the Board opinion mean? This is on the contract.

MR. COME: I refer you to Appendix 10, --

Q Yes, that's what I'm looking at.

MR. COME: -- in which the Board says, "We find, therefore, that Burns is bound to the contract as if it were a signatory thereto, and that its failure to maintain the contract in effect is violative of Sections 8(d) and 8(a)(5)" --

Q But 8(d) is not an independent unfair labor practice, is it?

MR. COME: No, you have to --

Q It's only a definition of the failure to bargain collectively, isn't it?

MR. COME: Yes. Which is the unfair labor practice in 8(a)(5).

Q In 8(a)(5). Yes.

MR. COME: Which says that it is an unfair labor practice to fail to bargain collectively.

Q Right.

MR. COME: Now, 8(d) defines in large part what constitutes a failure to --

Q Well, I don't suppose it's that important, but I gather technically the violation is 8(a)(5)?

MR. COME: Yes, Your Honor.

Q Yes.

MR. COME: Now, to be sure, Wiley only compelled arbitration. However, the considerations upon which the Court compelled a nonconsenting employer to the contract to go to arbitration under that contract, we submit, are precisely the same considerations that justify the Board in applying the same principle to its interpretation of 8(d).

The Court relied upon the fact that a collective bargaining agreement is not, in any real sense, the simple product of a consensual relationship; it's a code governing an industrial community that is negotiated under the principles

and requirements of the National Labor Relations Act.

It binds employees who didn't even consent to the contract, or weren't even employed at the time it was negotiated. He may not even be a member of the union which negotiated it, albeit a member of the bargaining unit that the union has to represent.

More importantly, the Court relied upon the fact that the objective of national labor policy requires that the rightful prerogatives of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to employees from a sudden change in the employment relationship, because the employee in the union usually doesn't have a say in these transfer negotiations. And we submit that that is a fortiori in an industry like the service industry, which is subject to this rapid turnover.

Finally, the Court relied upon the fact that the industrial strife could be avoided by submitting the employees' claims to arbitration rather than leaving them to a test of economic powers.

Q Mr. Comes, --

MR. COME: Yes?

Q -- I take it your position means that the employer-successor is bound by the contract, and, hence, he could not bring in his own employees if he wanted to?

MR. COME: Well, --

Q He could not fire the existing employees because there's no clause under the provision of the contract?

MR. COME: As to -- if the contract is applicable, the extent to which he has to abide by the contract, the extent to which he can make changes to meet his situation are all matters that he is free to bargain with the union about and, fa-ling agreement, to take to arbitration.

The Board's decision here, far from being in derogation of arbitration, permits arbitration to work. All the Board is saying here is that if you are a successor under the National Labor Relations Act, as we have defined it, you have taken over --

Q Well --

MR. COME: -- willingly this employing enterprise, you just can't say that you're not going to pay any attention to the --

Q Then your answer to my question is yes. It does mean that. He's not free to bring in his own employees without following the contract provisions with respect to discharge?

MR. COME: That is correct. He may be free at the decision as to whether, before he takes over the business, as to --

Q So the other 15 employees of Wackenhut that he

didn't employ, if they had wanted to be employed and were refused, had grievances under the Board provision?

MR. COME: They might have, although they were not subject to that contract originally; but --

Q Well, why weren't they?

MR.COME: Well, at the time that he took over, I mean before --

Q They were part of the Wackenhut work force, as I understand.

MR. COME: Well -- well, they --

Q They were part of the union.

MR. COME: There were 26 -- there were 42 members of the Wackenhut work force when Wackenhut shut down. Burns employed, I believe it was, 27 of those members of the work force.

Q What about the other 15, if they had wanted to be employed and were refused?

MR. COME: Conceivably they would have had a grievance under the --

Q Conceivably?

MR. COME: I think that they would have, but at that point, however, -- the reason I'm hedging is that they were discharged by Wackenhut, and their contracts of employment were not renewed by Burns.

Q Well, that's what creates a grievance, isn't it?

MR. COME: But, in any event, this is a problem for the arbitrator.

Q Tell me, Mr. Come, --

MR. COME: Yes.

Q -- does -- do the decisions in Emerald Maintenance and Collyer, which I gather is about a year later than the decision here by the Board, do they represent some retreat from the principles of this case?

MR. COME: No, Your Honor. In formulating the principle in this case, the Board --

Q Well, the fact is that in neither case was the employer held bound to the --

MR. COME: Well, the Board found successorship in Emerald Maintenance, --

Q But --

MR. COME: -- it did not bind them to the contract because in Burns, as Mr. Justice Stewart indicated earlier, the Board had a caveat in there for unusual circumstances.

Q Certainly.

MR. COME: And the Board found that the peculiarities of government procurement practice, coupled with wage determinations under the Service Contract Act, created a situation where, at least with respect to certain types of government contracts, there wasn't the flexibility for negotiation that was present in the typical civilian type of contract

which is what we have here.

We do not have here Lockheed's government contract involved in this case.

Now, if I may be permitted to just make one other point.

Wiley also, we submit, disposes of the contention that what the Board is doing here is writing a contract for the parties, because the Court in Wiley specifically pointed out that this case, where they had found the kind of continuity that you had in Wiley, and the continuity here is much stronger than you had in Wiley, the Court said: this case cannot readily be assimilated to the category of those in which there was no contract whatever, or none which is reasonably related to the party sought to be obligated.

There was a contract with Interscience, Wiley's predecessor was party to it. We submit that is precisely the situation here, a fortiori, in view of the substantial identity with the original work force.

Q Mr. Come, I have one question.

MR. COME: Yes, sir?

Q I guess you can deal with it with a very short answer.

Do I get your position correctly, the Board's position now, that someone taking over a large operation with either its maintenance force or its security force, having a

large number of employees, and instead of the bidding process such as we had here, Burns underbidding Wackenhut and the others, the basic factory or operator is terminating their contract with the guard service company because they are unreliable, untrustworthy, inefficient, that there's pilfering going on,all sorts of things that happen in these types of service organizations.

Now, is it your position that the "successor" who takes over that function, either of maintaining the building or protecting it, has got to take lock, stock, and barrel all the employees in those circumstances?

MR. COME: No.

Q Is it pretty close to that?

MR. COME: No, I don't think so.

Q Then what did you have in mind when you suggested in response to Mr. Justice White that perhaps the other 15 that they didn't take might have a grievance for not being taken over by Burns?

MR. COME: But the grievance doesn't mean that they will prevail. I mean, if there were --

Q Well, I assume you meant a colorable claim.

Q Well, it means they're still employees, though, Mr. Come, until they're fired in accordance with the contract? That must be what you meant.

MR. COME: I think that this is a question that the

arbitrator would have to determine, as to whether or not --

Q Well, they are employees until they're discharged in accordance with the contract, aren't they?

MR. COME: But clearly whether it would not be cause under the contract for --

Q I agree. I agree.

MR. COME: -- for Wackenhut to say that, "Since I am closing down my operation, I am terminating you as of five o'clock tomorrow."

Q Whose employees are they? Isn't that the question?

They're the employees of the first, the one in the posture of Wackenhut here. But I took your position before, as expressed, to say that for all practical purposes they're employees of whoever takes over that function, whether it's on winning them by a low bid or whether cancellation or termination of a prior contract.

MR. COME: Well, they certainly were here, because Burns voluntarily took over a majority of the Wackenhut employees for reasons that were of advantage to its own operation, these --

Q But your friend, when he argued, said that even if they hadn't taken over any, even if they hadn't taken over a single employee, the legal situation would be the same.

MR. COME: We do not go that far. We don't think that

you have to go that far in --

Q Do you think it has to be a majority?

MR. COME: I wouldn't say that it has to be a majority, I think it has to be a substantial number. It has to be enough to give you a continuity of employment conditions in the bargaining unit.

Q Well, Mr. Come, I suggest that your position means that they have to take over all of them. They can't come in with just part. They have to take over all of them until and unless they are discharged in accordance with the contract.

MR. COME: Well, I'm not prepared to go that far, Your Honor. I think that there may be a difference for purposes of compelling arbitration under 301, and what would be the rule for purposes of establishing a bargaining obligation or representation status under the National Labor Relations Act.

The Court in Wiley was very careful to indicate that it was not passing on the question as to whether you had enough there to impose representation status on the union.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Come, I've kept you overtime.

MR. COME: It's been a pleasure.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:05 o'clock, p.m., the case was submitted.]