In the

Supreme Court of the United States

GOLDEN STATE BOTTLING COMPANY, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 72-702
	)	
NATIONAL LABOR RELATIONS BOARD	)	

Washington, D.C.
October 11, 1973

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IN THE SUPREME COURT OF THE UNITED STATES

GOLDEN STATE BOTTLING COMPANY, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD	No. 72-702

Washington, D.C.

Thursday, October 11, 1973

The above-entitled matter came on for hearing at 10:18 o'clock a.m.,

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, 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:

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NORTON J. COME, ESQ., Assistant General Counsel, Department of Justice, Washington, D.C. 20530
For the Respondent

C O N T E N T S

ORAL ARGUMENT OF:	PAGE:
MORTON B. JACKSON, ESQ., For the Petitioner	3
NORTON J. COME, ESQ., For the Respondent	18
REBUTTAL ARGUMENT OF:	
MORTON B. JACKSON, ESQ., For the Petitioner	37

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now of docket No. 72-702, Golden State Bottling Company against the Labor Board.

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

ORAL ARGUMENT OF

MORTON B. JACKSON, ESQ.

MR. JACKSON: Mr. Chief Justice, thank you, and may it please the Court:

I would like to address myself briefly, if the Court please, to the general approach taken by the Board arguing in support of its point of view with respect to the two specific limitations on its power. I am speaking of the limitation contained in Section 10 (c) of the Act itself, the limitations contained in Rule 65, particularly 65-D of the Federal Rules of Civil Procedure.

I think those limitations are the ones that the Board has attempted to dispense with in reaching the result that it reached in this case on this successorship issue which is the heart of this case.

The Board, and the writers, tend to sweep these limitations aside. Of course the 10(c), the heart of that, again, is that -- states that the Board's remedial powers must be exercised only against those who have actually

engaged in unfair labor practices or are engaging in them and the language of Section 65(d), which had such penetrating analysis in the Regal Knitwear case, has to do with the circumstances under which a successor or an assigned may be drawn within ambient of an order directed to a wrongdoer.

Now, as I say, the Board tends to shut these off, really, by saying, first -- it is also in the same section, 10(c), given broad remedial powers to effectuate the Act and considered in the light of this, the end it has in mind here really justifies the means as taken and it tends to treat the limitations imposed by the two sections I have just mentioned as something rather technical or rather arbitrary and -- not arbitrary, but technical, at any rate and something that must give way before an argument addressed to considerations of substance, such as this, effectuating the policies of the Act.

In answer to that, I would say, first, and I think, again, that it is fundamental, is that both of these sections are not technical. Their terms embody provisions of fundamental substance and they articulate fundamental protections.

I think, throughout, it is well to bear in mind that what we are talking about is affording a party a hearing, yes, and that the one of the vices inherent in what the Board has done is to deny a party a hearing.

But, even more fundamental than that, and even more profound a vice, is the vice which lies in imposing sanctions

for illegal conduct, for wrongdoing, against a party who is guiltless of any wrongdoing, who is totally innocent of any wrongful conduct. This is what we are getting at.

So, these are not just technical limitations, they are limitations which contain expression, the embodiment of protections of considerable substance and can't simply be swept aside.

Q Is there any disagreement as to the applicability of Federal Rule 65(d) to the Labor Board?

MR. JACKSON: I think not, your Honor. It certainly sort of went without saying in the Regal Knitwear case, the language "successors and assigns" has regularly been used in these orders and they would be --

Q Of course, by its terms, I always thought that Federal rules are applicable to the Federal courts.

MR. JACKSON: This is true, but I think that what the Court addressed itself to in the Regal Knitwear case was the fact that the courts were going to be called upon to enforce these orders and what Justice Jackson said in Regal Knitwear was that no order can be enforced, no order which contains language which exceeds the limitations of Rule 65(d) can be enforced by a court and, to the extent that the court's enforcement powers are limited, quite clearly, they apply to the Labor Board, also.

However, an answer to each of these considerations

each on its merits that the Board has advanced is, again, contained in this very remarkable decision in the Regal Knitwear case. I would invite the Court's attention, first off, to a very trenchant statement of policy made by the Court in the Southern Steamship case where it says, "It is sufficient for this case," this Court speaking again on this end justifying the means argument, "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the National Labor Relations Act so singlemindedly that it may ignore the equally important Congressional objectives."

Justice Jackson echoes this sentiment when he says in Regal Knitwear that this language about broad remedial powers in order to effectuate the policies of the Act containing its own limitation -- he points out in the following language, that these powers must be exercised within the limits of the authority bestowed by the statute.

Administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority and then he goes on to say that the court may not grant, in the celebrated language, "an enforcement order or an injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law."

Now, again, it is suggested by the writers and,

notably, Professor Goldberg in the Northwestern Law Review, who is cited by the Board in its brief on page 21 and, indeed, whose views find reflection throughout in the Board's brief, that Regal Knitwear doesn't really mean what it says and, in any event, it has left the door open by language in giving two examples. The court gives two examples. It suggests, for example, the successive concept could apply in a situation where the successor is merely a disguised continuance of the predecessor and, therefore, has substantial identity with him, or where the succession itself, the transfer has been utilized simply as a means of evading or avoiding the thrust or the force of the order.

Q Mr. Jackson, is there, at issue here, both your client's liability for premerger, preacquisition backpay and --

MR. JACKSON: Yes, indeed.

Q -- post acquisition backpay?

MR. JACKSON: Yes, indeed, your Honor.

Q And reinstatement?

MR. JACKSON: That is correct. The successor --

Q Now, for preacquisition backpay, there had been an adjudicated liability?

MR. JACKSON: That is correct and that is not disputed as far as the predecessor is concerned.

Q Yes, I understand. They owe that.

MR. JACKSON: We do not dispute that. Of course,

the method of computation has been disputed.

Q Now, in mergers, normally, under state law, you can't get away with evading your clear debts by transferring away your property and did the succeeding corporation here assume any debts of the predecessors?

MR. JACKSON: It assumed specified obligations only. There were certain specified obligations set out in the sale agreement and it assumed only those.

Q Which would certainly be normal.

MR. JACKSON: That is customary. This was an asset purchase, your Honor.

Q Yes.

MR. JACKSON: It was not a merger and not a statutory merger, such as --

Q It was an asset purchase and you assumed certain --

MR. JACKSON: Certain specified obligations only, the successor did, All American and these were specifically enumerated. This particular item was not one of them. The predecessor --

Q I suppose perhaps, under state law, if the predecessor didn't pay it, you might have to.

MR. JACKSON: I think under the cases we've cited, for this particular obligation, the reverse would be true, your Honor, because --

Q Under state law?

MR. JACKSON: Under state law, yes.

Q Even though it was an adjudicated liability of the predecessor?

MR. JACKSON: That is correct.

Q You mean, under state law --

MR. JACKSON: We've cited one case in our brief.

Q -- the seller of assets can avoid the payment of a judgment by --

MR. JACKSON: Not the seller. Not the seller, the purchaser.

Q That is what I am talking about.

MR. JACKSON: Oh, I beg your pardon, your Honor, I beg your pardon, I misunderstood your Honor.

The seller certainly cannot avoid it.

Q Well, I know, but wouldn't it remain a claim on the assets he conveys away?

MR. JACKSON: Not if a lien has not been estabbished against those assets prior to the time they are conveyed.

Q I thought that was fundamental in fraudulent conveyance.

MR. JACKSON: If the conveyance is made with the intent of defrauding creditors, your Honor, I think, indeed, and the purchaser is not an innocent purchaser and is a party to that, I agree.

Q In any event, the Board purported to make the

successor liable for back pay based on labor policy, right?

MR. JACKSON: That is correct.

Q In other words, the predecessor remained in business as a corporation.

MR. JACKSON: That is correct. The predecessor had other business interests.

Q And was actively in business. It wasn't just an empty shell.

MR. JACKSON: That is correct. It did not go out of business. It had other interests. They were not in the soft drink field.

Q Right, but it was a corporation in being with assets.

MR. JACKSON: That is correct, your Honor.

Q Did the transfer of assets and the contracts relating to this transaction include an agreement to indemnify?

MR. JACKSON: It did not include an agreement imdemnify as such, your Honor. It included, Mr. Chief Justice, the customary warranty against pending litigation and against all litigation except that specifically disclosed to the purchaser. As the record discloses in this case, the pendency of this litigation had slipped everybody's mind and was not specified in the agreement, so its pendency and the liability attaching constituted, would ordinarily constitute, a breach of that warranty, giving rise to --

Q The catch-all indemnity clause would cover it, then, I take it?

MR. JACKSON: Well, as between the parties, any liability that was imposed against All American would be the subject of indemnification by Golden State, to the extent that All American was held liable, yes. I believe that is a fair statement.

Q Then this liability would not depend on any fraud on the part of the seller or any participation in that fraud on the part of the buyer?

MR. JACKSON: It was contractual and it stemmed from the breach of that warranty.

Thus, if All American suffered financial loss of any kind as a consequence of the existence of litigation which had been warranted not to exist, I take it that the Golden State Bottling Company would have to indemnify it against that loss.

Q Was this case before the Board pre-Burns?

MR. JACKSON: It was, your Honor.

Q And in the Court of Appeals, post-Burns?

MR. JACKSON: It was post-Burns in the Court of Appeals after the briefs were filed, I believe.

No, no, the Burns case was, I believe, dealt with in the briefs and it was the subject of a colloquy with the court.

Q Do you think Burns resulted in some new rules of the road with respect to successorships and the obligation of a successor to hire a predecessor's employees?

MR. JACKSON: I did not, myself, read Burns as having a bearing on the successor's obligation to hire a predecessor's employees, your Honor, but I believe that point was not --

Q Do you think under pre-Burns law that you would have had to hire your predecessor's employees, unless you could fire them for cause under the collective bargaining contract?

MR. JACKSON: Well, I think under the present state of the law, and I don't read Burns as changing that, that the successor is under no obligation, other things being equal, to hire any of his predecessor's employees, that they are, if I may cite a case --

Q Yes, well, I understand that. Was that true pre-Burns?

MR. JACKSON: I believe so. I believe so, and there is the Tri-State Maintenance case, which rejected a counter suggestion by the Board and the Board has since taken that view that there is no obligation on the successor, other things being equal, to hire any of the employees of the predecessor. I believe Mr. Come will concur with that, but I'd be happy to cite it.

Q Well, if this man had been reinstated before the transfer --

MR. JACKSON: Yes.

Q Would you have had to keep him on?

MR. JACKSON: No, I believe not.

Q But the argument is that because he wasn't --

MR. JACKSON: Because he had not been -- because the unfair practice remained unremedied in this respect and because the successor is the only party capable of fulfilling the remedy in this aspect, then it must be against this party that this aspect of the remedy is invoked. The Board does not consider -- and this, of course, goes only to the reinstatement aspect of it. This argument, of course, does not pertain to the financial aspect of it, the back pay aspect of it, at least certainly not as to that portion of it that accrued up to the time of sale.

There is, again, a question as to whether the successor should be liable for all of the back pay liability even before the time of sale. This is another way of looking at it.

Have I answered your Honor's question?

Q Yes, but as I understand the Board's position in Burns, the Board was arguing that the successor assumed the collective bargaining contract.

MR. JACKSON: This, again, has to do with the

obligation to bargain and I think that the two can't be --

Q No, it has to do with the obligations under the collective bargaining contract, one of which is, you don't fire without cause.

MR. JACKSON: Well, this is true. In Burns --

Q A rather substantial position.

MR. JACKSON: Yes, indeed, but that, again, would be a matter of contract, your Honor, which does not bear upon the present case.

Now, Burns was considered as having some bearing on this case since it threw light upon the significance of the Wiley against Livingston decision on which the Board in turn based its change of course in Perma Vinyl and Burns was read by Judge Kilkenny, who dissented in the Court of Appeals, as narrowing the scope of Wiley in its application of this type of case, in fact, excluding its application to cases involving liability for unfair practices as distinct from the succession to the obligation to bargain or the obligations of a collective bargaining agreement that resulted from a bargaining arrangement of the predecessor.

To return to the point I was making, the argument of Justice Jackson, or the language of Justice Jackson, the touchstone, I think, is found, as I say, Professor Goldberg suggests that there is an open door which leaves the way open for other situations, including the one before us, that of an

innocent successor but we suggest that is foreclosed by the language of the succeeding paragraph, in which he points out the common aspect of both of these examples he has given because in both of these cases, the reference is not merely to succession, but to a relation between the Defendant and the successor which might, of itself, establish liability within the terms of Rule 65.

We suggest, we urge to the Court that that says, as plainly as anything could, that an innocent successor, against whom there is no independent basis for assessing liability, who is guilty of no wrong, who is not in league with the predecessor or assisting him to evade the order or conspiring with him in a collusive manner to carry out this type of conduct, the term "successor and assigned" cannot reach out and bind such a person because to do so would be offensive to due process and to exceed the scope of that section.

We urge, therefore, that these limitations are limitations of substance and cannot be swept aside or cannot be ignored in view of the other limited considerations which the Board has advanced and we suggest that to do so amounts, really, to an exaltation not merely of form but of doctrine at the sacrifice of fundamental law and of substantive right.

If I may briefly address myself to one or two of

the practical or what we called in our brief, the policy considerations announced by the Board, I would like to point out, if I may, that the enforcement of the reinstatement remedy, whether it is against the original employer -- this is a well-settled remedy and one with which we have no quarrel, but in any event, and, particularly, against a successor, who, as we see, has, other things being equal, no obligation to hire any of his predecessor's employees, it does work a hardship on the innocent employee who has to be displaced to make way for the rehired discriminatee.

The argument is frequently seen only from the standpoint of the discriminatee, who is out of a job, who wants to be reinstated and who is now remedyless because the business has changed hands. It must be remembered that, in order to accommodate him in this respect, somebody else is going to have to be laid off.

Also, the argument that a successor can hire him, it will work no hardship and then, if he proves to be an unsatisfactory employee, may fire him for cause: In such circumstances, where the Board tends to try, as it has indicated in this case and it has frequently attempted to establish as Board policy, a presumption that the successor is going to continue the unfair practices of the predecessor and, given the burden which the employer has under this Court's Great Dane case to , in effect, establish that the

discriminatory reason was not the reason for the discharge, I think that this is not a realistic argument because, with a track record such as this, which is going to be raised against him, a successor is going to have a very difficult time discharging for cause and making it stand up against an 883 charge, as a purely practical matter. This is the way it works.

Also, by insisting on this type of remedial action, I should like to suggest again that a practical result, if this were to become settled policy, that successors would, in examining this, to the extent that they were aware of it, would be more inclined, other things being equal, to hire none of the predecessor's employees and, instead of promoting stability, it is likely to promote just the opposite result, in order to avoid being classified as a successor, in order to avoid being projected into this uncertain and potentially expensive situation.

I think, unless there are further questions, I would conclude with that to open and, if the Court please, reserve the balance of my time for reply.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Jackson.

Mr. Come.

ORAL ARGUMENT OF

NORTON J. COME, ESQ.

MR. COME: Mr. Chief Justice and may it please

the Court:

The principal question here is whether the Board may properly require one who acquires, through a bona fide sale, a business and continues it in substantially unchanged form, using the same work force, to reinstate with back pay an employee whom the predecessor employer had discharged in violation of the Act where, at the time of the sale, the successor, the employer, has knowledge of the unfair labor practice and of the predecessor's failure to remedy it.

Q Of course, that "where" in that concluding clause of yours, is one that is very much in dispute. In spite the findings below, they were told they were clearly erroneous and wholly without support in the record.

MR. COME: That is an issue that is up.

Q So the question you stated assumes the answer to another issue.

MR. COME: Well, I would -- I agree that both of those issues are here and I'll try to answer them.

It is undisputed that All American acquired, through a bona fide sale, the plant, the machinery, the accounts receivables, the trade name and other assets of the Golden State Bottling operation, that it retained virtually all of Golden State's employees, including the twelve distributors and all of Golden States supervisory and managerial employees, including the general manager, Eugene

Schilling, who is the one who discharged the employee in question when he was general manager of the Golden State.

And it is further undisputed that All American continued to manufacture the same products in the same location in the same plant and distribute them to the same customers. I think we are all agreed on that.

Thus, All American would be a successor-employer for purposes of the Act, not only under the test of the majority of the Court in Burns but also under the more stringent test of the dissenting justices in Burns, which requires that the new employer not only take over the same employee complement, but he also succeeds to some of the tangible or intangible assets of the predecessor company, and we've got that here.

Now, Petitioners deny that All American had knowledge at the time of the sale of Golden State's unremedied, unfair labor practices. The Board found to the contrary and the Court of Appeals sustained that finding and, normally, under Universal Camera, that issue would not be open. However, it was raised as a question in the petition and the grant of certiorari does not exclude it, so therefore, that issue is up here.

Now, with respect to that, we submit that there is adequate evidentiary support for the Board's finding that All American had knowledge. As I indicated before, All

American retained a general manager of the bottling operation, Eugene Schilling, who had committed the unfair labor practice in question. Schilling participated in one of the sale-negotiating sessions with All American at which, among other things, his retention as general manager was discussed. Shortly thereafter but still before the sale was completed, he met in the plant with a representative of All American and discussed general operations and, "Future plans."

He also signed the sales agreement of January 31, 1968 which agreement specifically provided for his retention as general manager. In these circumstances, we submit that the Board could reasonably infer, as it did, that Schilling had conveyed his knowledge of the pending unfair labor practice proceedings to All American, either before the consumation of the sale or, at the very least, Schilling's knowledge thereof could properly be imputed to All American.

Q Now, how is that? How can you impute his knowledge, if he had knowledge, as an employee of Golden State, was it not? And the very mere fact that Schilling was later hired by All American means that Schilling's knowledge means that -- prior knowledge meant that Golden State had prior knowledge? Isn't that a very odd application of agency law?

MR. COME: We submit that it is not. Here you had a man who was intimately involved in the unfair labor practice that was not only -- he didn't just come on board

after the sale was consummated, he was in negotiations with All American and its officials.

Q Yes, and you would tell us that the fact he was in negotiations would allow a permissable inference on the part of the board that he imparted this information which, to me, is quite a big step. But then, you said, that his knowledge as an employee of Golden State could be imputed to All American and that, to me -- that's the reason I asked the question -- I found it rather an impossible step as a matter of agency law.

MR. COME: Well, I think as of the time that he became an employee of All American, it could be imputed to All American and that took --

Q Well, what authority do you have for that, Mr. Jackson? Do you have cases? I agree with Justice Stewart. I've never seen that in your cited cases.

MR. COME: Well, we have some cases that we have cited in our brief, but I don't think that I have to rest on that position because I think that it is reasonable to infer knowledge from the circumstances.

Q Knowledge on the part of All American?

MR. COME: Yes, in view of Schilling's contact with All American officials prior to the consummation of the sale.

Q Well, the Court of Appeals agreed with you, didn't

it?

MR. COME: It did, your Honor. Furthermore, I should like to point out that although Golden State President Crofoot and Schilling testified that they did not tell All American prior to the consummation of the sale, the trial examiner discredited these denials and, I submit, that there was ample basis for his action in doing so in view of the fact that --

Q Well, you have the burden of proof.

Excuse me, I didn't mean to interrupt you.

MR. COME: We do have the burden of proof and this is not one of those cases where you have direct evidence. I think it is a situation which you have very often in many cases, particularly the Labor Board cases where you have to draw inferences from the total circumstances and one of the circumstances, in addition to the previous one that I outlined, is the fact that the denials were discredited by the trial examiner for the reason that he found that not only had Crofoot and Schilling contradicted themselves in their testimony before him, but there were a series of documents that they had signed in the course of this litigation which either concealed or failed to disclose the sale of All American to both the Board and to the Court of Appeals.

Thus, in November, 1968, more than six months

after the sale, in his authority to act for Golden State as entered, Schilling executed a letter and substitution of counsel in the court below, asgeneral manager of Golden State Bottle Company. On December 11th, 1968 as president of Golden State, he signed a notice to employees required by the Board's order and sent the Board a certification to that effect on the same day. On behalf of Golden State, he offered Baker, the wrongfully discharged employee, reinstatement as a driver-salesman, notwithstanding the fact that almost a year ago previous his authority to act on behalf of Golden State had ended.

Now, on November 24th, 1969, more than 21 months after the sale, Crofoot, as president of Golden State, verified, under penalty of perjury, the answer to the Board's original back pay specification and that answer made no mention of the sale alleged that Golden State had offered Baker reinstatement on December 11th, more than ten months after it had gone out of the bottling business.

On the basis of all of these factors, we submit that the trial examiner was warranted in discrediting the denials of Crofoot and Schilling that they did not tell.

Q Right, and he discredits the denials and that leaves the state of the evidence in equipoise. He discredits the denials because of the inferences that you said he was permitted to draw and so now it is in equipoise and who had

the burden of proof?

MR. COME: Well, we submit that we sustained the burden of proof by showing Schilling's contact with officials of All American prior to the consummation of the sale which warranted the inference that he conveyed his knowledge to them. The further factor here is the officials of All American were not called to testify, although, certainly, Golden State and its attorneys could have done so.

Q Well, so could you, if you had the burden of proof.

MR. COME: Well, we thought that we had sustained it by the circumstances.

Q Despite the fact that the only actual evidence in the record on this issue was that there was no knowledge.

MR. COME: Well, it is believed that --

Q I mean, other than the inferences you are talking about.

MR. COME: That is correct, your Honor.

Q The testimonial evidence was, all of it, uncontradicted, that there was no knowledge. Correct?

MR. COME: That is correct. That testimonial evidence was discredited and --

Q It was disbelieved, you said.

MR. COME: It was disbelieved and we felt that the circumstances were sufficient to carry the burden of

proof.

Now, maybe if we were trying the case today, we might have done differently but this is the state of the record and it did pass muster in the Court of Appeals. Of course, if we lose on that issue, then we don't need to reach the further question that I now want to get to as to the propriety of the Board's legal position that a successor employer with knowledge can be required to remedy the predecessor's unfair labor practice.

Now, Section 10(c) of the Act authorizes the Board to issue remedial orders against any person named in the complaint who is engaged in any unfair labor practice.

However, from the beginning, Board orders have covered not only the person found to have committed the unfair labor practice, but its officers, agents, successors and assigns and this Court has recognized that those orders could be applied not only to one who was merely a disguised continuance of the old employer but also, in appropriate circumstances -- and I'm reading from Regal Knitwear -- "To those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons."

Now, the question whether a successor was in the meaning of the Board's order not only an alter ego or an aider or abettor of the old employer, but also a bona fide purchaser where it continues the employing entity which was

the locus of the unfair labor practices and it acquires that entity with knowledge that the predecessor has failed to remedy those unfair labor practices, turns on an appraisal of the policies of the Act and also of Rule 65(b) of the Federal Rules of Civil Procedure.

Now, as to the policies of the Act. In Burns, this Court held that the policies of the Act were effectuated by imposing on a wholly independent new employer the old employer's bargaining obligation where he was a successor employer for purposes of the Act and we have that here, even under the dissenters' more stringent test.

Q Of course, all the old employees under the contract would not be employed.

MR. COME: That is correct, your Honor. There is no collective bargaining contract here. There wasn't any union in the picture. Baker was discharged because he was spearheading an organizational drive and the union never got into this plant so we don't have any question of continuity of a bargaining relationship or a collective bargaining agreement.

Q What is the argument, Mr. Come, that Burns put a different light on this case?

What is the argument?

You mean -- I'm sure you don't -- but the dissenting judge below thought that Burns did make a

difference in this case.

MR. COME: I submit that the dissenting judge misconceived the effect of Burns. I think that, if anything, Burns furnishes support for the Board's position here because it does recognize that the concept of successor employer has validity for purposes of the National Labor Relations Act.

Q How did Burns recognize that?

MR. COME: Well, it recognized that insofar as it held that an independent new employer who merely went as far as continuing the same bargaining unit in taking over a majority of the predecessor's work force, had succeeded to the predecessor's bargaining obligations.

Q Well, I am not sure that was because he was a successor.

MR. COME: Well, I know that the dissenters in Burns point out that the majority has not used the word "successor," however, in the latter part of the majority opinion in Burns when we come to the discussion of the unilateral action, the word "successor-employer" is used quite frequently.

Q Well, my question is whether or not, arguably, Burns does have a bearing on the case and the Board should look at it again in the light of Burns because the Board acted pre-Burns.

MR. COME: That is correct, but the -- but there --

Q Both you and your opponent rely on Regal Knitwear, on the Regal case.

MR. COME: Yes, your Honor.

Q And if that issue disposed of it in favor of either one of you, just the 10(c) argument, why, I suppose there is no need to go back to the Board, is there?

MR. COME: No, your Honor, I do not see that Burns would affect the Board's application of this case, of the principles that the Board applied in this case.

The only part of Burns that could be deemed to have a bearing on this case is that the Board relied very heavily on the Wiley against Livingston decision, that is, the policy reflected in Wiley against Livingston for holding that the new employer could be bound to the contract.

Q That is your impression, then?

MR. COME: That is correct. But since we don't have any effort here to bind the new employer to the predecessor's collective bargaining agreement since there was none, you do not have, in the Board's policy of requiring the successor the remedy of the unfair labor practices, any collision with the freedom of contract policy reflected in 8(d) of the statute.

Q But if the predecessor here had reinstated this employee one day before the sale, the successor need not have

kept him on?

MR. COME: He needn't have kept him on if he had good cause for --

Q No, no, no, he doesn't need to hire anybody.

MR. COME: That is correct. I mean, he needn't have kept him on but --

Q At all.

MR. COME: -- but he could not have fired him for a union reason because he would have committed a new unfair labor problem.

Q I agree with that, Mr. Come, but all he would have had to have done was say, "I don't want you."

Q "I'll fire you."

MR. COME: That is correct. However, if you get somebody fired the day after he is put on --

Q No, he's just not hired by a successor who just bought the assets.

MR. COME: That is correct.

Q You seem to agree with that.

MR. COME: Yes, yes, I do. But the point is that the successor here took over not only the assets but he took over the whole work force.

Q But, nevertheless, if he had been reinstated the day before, this man would not need to have been kept on by the successor.

MR. COME: Well, that is correct. As a matter of fact, the --

Q But he wasn't put back on and you say, therefore he must be hired.

MR. COME: That is correct, because there is an unremedied unfair labor practice here that the successor is the only person that can truly remedy and as long as he is continuing the same employee enterprise --

Q What does that mean, "employee enterprise?"

MR. COME: Well, the employee enterprise, I think, is fairly easy to describe here because what he has done is, he is continuing exactly the same business that Golden State had, the same plant, the same equipment, the same assets and, in addition to that, it has taken over the entire work force, including the managerial force.

Q Is that a word of art, "employee enterprise?"

MR. COME: Well, it has been a word of art that, I guess, goes back to that old sixth circuit case of Colton, NLRB against Colton, but it is synonymous with when you have a new employer who has identified himself with a predecessor to sufficient extent that he considered a successor for purposes of the Act.

Q An employing enterprise is what a successor continues, then?

MR. COME: Well, and if he continues enough of it to

become a successor for purposes of the Act, he has carried on the employing enterprise. But I don't want to get bogged down in the semantics of it because I think that under any standard, in this case, at least, if you are ever going to find a continuation of the enterprise or a successor for purposes of the Act, you have it here.

Now, in terms of the hardship on the successor, if you apply the Board's principle that he has to have knowledge, and whether you have it here, of course, is another question, he -- yes, your Honor?

Q Supposing the man was on a one-year leave-of-absence and the successor knew it, and the leave came up one month after the successor took over and his successor said, "I just don't want you." What would happen?

MR. COME: This was a dischargee?

Q No, he was just on leave. I'd have a problem with that one.

MR. COME: I would, too. I don't know exactly what the answer to that one would be.

Q No, why would he have any problem with that if he just said, "I don't want you." It's just like he wouldn't need to hire anybody else, any other prior employee.

MR. COME: If he -- we are assuming a situation where there has been no discharge at all?

Q No discharge, no unfair labor practice, he just

says, when the fellow comes back, he says, "You are among those that I don't want to hire."

MR. COME: Well, I think that that would probably be all right but that is not this case.

Now, with respect to the successor, as I started to say, if he is required to have knowledge of the unfair labor practice, he can protect himself by either negotiating an allowance in the sales price to cover his liability or an indemnity agreement as was true here.

It is not only an indemnity that flows from the sales agreement, but also at the Board hearing, the president of Golden State also agreed to indemnify All American for any back pay liability that might be imposed upon it.

Before sitting down, I want to address myself to -- yes?

Q Mr. Come, just one last question, if he need not take him on at all, why, if he does take him on, must he take him on with this albatross around his neck?

MR. COME:

/Well, when I say that he need not take him on, I have been assuming a situation where there is no unremedied unfair labor practice. If there is an unremedied unfair labor practice --

Q He must take him on.

MR. COME: Yes, yes.

Q And the legal knitwork actually settled that.

MR. COME: Well, I want to address myself to legal knitwork --

Q Unless they could not afford to do so.

MR. COME: That is correct.

Q That is, if the Board, as part of the remedy, orders reinstatement.

MR. COME: That is correct.

Have I answered your question or have I confused --

Q Is that position?

MR. COME: Yes, it is. I think I have appeared to give inconsistent answers because at one time I was assuming we were dealing with an employee who was not the victim of an unfair labor practice and at other times, I've been switching to the situation that we have here. But I do want to say a word about Regal Knitwear.

Regal Knitwear says, and although the court was not really addressing itself to the problem that we have here. In Regal Knitwear the court had a very academic question to this side, namely, whether the terms "successors and assigns and Board orders"should just be stricken and the court, in the course of answering that question, the court said, well, we'll leave it in there because, in any event, you can't breathe more life into it than Rule 65(d) of the Federal Rules of Civil Procedure would permit you to do.

Now, Rule 65(d) says that an injunctive order shall be binding on the parties of the action and persons acting in concert and participation with them.

Q Will receive actual --

MR. COME: Will receive actual notice, yes, your Honor.

The court, however, goes on to add that Rule 65(d) really reflects the old common law policy that an injunction can't go beyond binding the parties to the action and those persons in privity or legally identified with them and, furthermore, that the reason you have that limitation is that you don't want an injunction binding someone whose rights have not been adjudicated by the court.

Now, we believe that the Board, the principle of the Board as applying here comports with the basic policies underlying 65(d) in that a successor-employer for purposes of the Act, the kind of employer that I have been talking about, at least the one in this case, could be found to be in privity or legally identified with the original party to this action.

Q Well, your opponent said that under state law, that is not so, that this successor, if you want to call him a successor, would have not been liable for any back pay to this employee. It just wasn't one of those obligations for which he would have been liable.

MR. COME: I am not --

Q And to what law are you referring when you say --

MR. COME: I am referring to the labor policy.

Q Well, that's boot strapping, then, because that is the issue in the case. Does the labor law impose an obligation?

MR. COME: That is why I felt that it was necessary to show, and I have done so in more detail in our brief, that simply as a matter of effectuating the policies of the National Labor Relations Act, it is reasonable and proper to impose on a successor-employer the obligation to remedy the predecessor's unfair labor practices.

Q You mean to say there is room within the rule to go back and that Regal allows that much room?

MR. COME: That is correct and, furthermore, with respect to that part of Regal that attempts to ensure that you won't hold somebody whose rights have not been adjudicated, the Board does not hold a successor until the successor is given notice of its intention to apply the order to it and an opportunity, at a hearing, to show that it is not a successor, that it did not take with knowledge and that it would otherwise be inappropriate to apply the order to it. That opportunity was fully afforded All American here and it took full advantage of the opportunity, so we believe that if we are right on the policies underlying the

National Labor Relations Act, that 65(d) would afford no obstacle to holding the successor in this case.

Q The successor doesn't have the opportunity, though, to litigate the merits of the Board's determination that there was an unlawful discharge?

MR. COME: That is correct. He might, however, have the opportunity to show that he would have no room to take him back, which might effect whether or not the reinstatement obligation would apply to him or whether he would merely be required to put him on a preferential hiring list in case any vacancies open up.

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

Mr. Jackson, you have eight minutes.

REBUTTAL ARGUMENT OF

MORTON B. JACKSON, ESQ.

MR. JACKSON: Thank you, Mr. Chief Justice.

I should like to correct a misstatement of fact, quite unintentional, I'm sure, on the part of Mr. Come. It was another union here. One of the issues in the original and fair practice case was a question of domination of that union which was resolved --

Q Was there a collective bargaining agreement?

MR. JACKSON: And there was a collective bargaining agreement. There was no issue as to the obligation of a successor to abide by it. The successor organization did.

Q Did you assume it?

MR. JACKSON: Yes, we did.

Q Was that one of the --

MR. JACKSON: It was not one of the specific obligations assumed, as I recall.

Q Did you negotiate a new one or did you assume it?

MR. JACKSON: No, we simply assumed the obligations under the old one and continued right on the --

Q Which included the provision that, I suppose, you won't fire without cause?

MR. JACKSON: I don't honestly recall, your Honor, exactly what it did provide in this respect. It was not an issue in the case, sir.

Q Well, let's assume, then, Mr. Jackson -- well, it may not be an issue in the case before us now, but --

MR. JACKSON: I mean, it was not an issue below. I don't mean to say that it cannot be.

Q Let's assume that any other employee you had decided you didn't want to take on, and you had no reason whatsoever for it, you would have been in trouble with the union, wouldn't you?

MR. JACKSON: I believe not.

Q Why not?

MR. JACKSON: Because I believe that the assumption of the agreement was not a matter of the sale

contract. It was a voluntary assumption by the successor after having taken over.

Q Well, I still think that if you assumed it with the union and one of its members, you decided not to take on for no reason, you'd have been in some trouble.

MR. JACKSON: I think that is undoubtedly true. After those obligations attached and after we had assumed them without question, if the --

Q Well, what about this fellow?

MR. JACKSON: If he had been a member of the work force and we did contrary to the provisions of the collective bargaining agreement which we had assumed, attempted to discharge him without cause, it would have given rise to a cause for grievance under the contract without question,yes.

Q I gather this fellow was a member of the unit?

MR. JACKSON: He was, indeed.

Q that would qualify him with respect to this.

MR. JACKSON: Yes, your Honor.

Q What was the union, independent?

MR. JACKSON: It was an independent union, yes.

Q And the charge was domination?

MR. JACKSON: Yes, in the original case, which largely disposed of those domination charges, the original --

Q Was that the thrust of the original case?

MR. JACKSON: That is correct, your Honor. That

was the thrust of the original case. The discharge was an issue in that, but it was not one of the principal issues.

Q This was not part of the merger or part of the sale proposition?

MR. JACKSON: No, your Honor.

Q This was just the way you went about hiring and arranging your labor affairs?

MR. JACKSON: Yes, I believe so.

Q Independently with the union.

MR. JACKSON: That is correct.

I would like, if I may, in the time remaining, to address myself to the two questions posed by Mr. Justice White.

First, the question of the significance of the Burns case in this case and Judge Kilkenny's reliance on it. We have prefaced this by recalling that the Board's original position was premised on Regal Knitwear and the Symns Grocer decision of the Board was premised on Regal Knitwear and the Birdsall-Stockdale cases that came as a consequence of it.

The change of position in Perma Vinyl and the Board's rationale did not deal with these cases but went, instead, to the language of Wiley to support its change of course.

Burns contained language which suggested that

Wiley did not support that view in this language, "We do not find Wiley controlling in the circumstances here. Wiley arose in the context of a section 301 suit to compel arbitration, not in the context of an unfair practice proceedings where the board is expressly limited by the provisions of section A D. The decision emphasized the preference of national labor policy for arbitration as a substitute for a test of strength," and so forth.

But that language in Burns suggested that Wiley was not authority for imposing successorship liability for unfair labor practices, but that it was confined to this question of an assumption of contractual obligations which, as the Court in Wiley said, were essentially consentual in origin.

To the other question posed by Mr. Justice White concerning a common law state law regarding the obligations of the successor, we have cited two cases in our brief. We have not quoted extensively from them. They are on page 37 of our opening brief, Schwartz against McGraw-Edison and Kloberdanz against Joy but I'd like, if I may, to quote from those cases, as we did in our brief before the Court of Appeals. In the McGraw case, which was a California case, there was this language, and we find that the criteria, again, are very similar to those outlined by the court in Regal Knitwear , "As a general rule, where a corporation sells

or otherwise transfers all its assets, its transferee is not liable for the debts and liabilities of the transferor and that liability of a new corporation for the debts of another corporation does not result from the mere fact the former is organized to succeed the latter, it is generally held that if one corporation purchases the assets of another and pays a fair consideration therefore , no liability for the debts of the selling corporation exists in the absence of fraud or the agreement to assume their debts. There are certain instances, however, in which the purchaser or transferee may become liable ," and they go on to specify a few of these but there is an express or implied agreement of assumption, where the transaction amounts to a consolidation or a merger, where the transaction was fraudulent, where some elements of the purchase of good faith were lacking.

Q Do you have above sale clauses in your statement?

MR. JACKSON: Yes, we do indeed.

Q And you have to give notice to creditors?

MR. JACKSON: Yes, of above sale, otherwise --

Q Was there notice to creditors in this case?

MR. JACKSON: I believe there was. I believe that law was complied with. It is presumed fraudulent, otherwise.

Q And this gives creditors the opportunity to make

sure that their debts are going to be paid.

MR. JACKSON: Exactly, well and to come in to speak their peice, to assert any liens if they have them, surely.

Lastly, I would like to -- well, for just a moment, on this criterion for successorship, we indicated that the identity of the unit before and after the transfer is, of course, pertinent in determining whether or not a new expression of employee choice for the bargaining representative would have to go through this exercise and this makes sense. But in applying this to determine whether or not a person is a successor, and it is becoming a term of art, for purposes of liability, I suspect, as a practical matter, the Board has said to itself, "If there is substantial identity of unit and of personnel and of work, then it is highly probable that, but for this discrimination, the man would have been hired," and I suggest this is probably the reason for this criterion.

On the implied or the imputation-of-knowledge argument, I should like, if I may, to point out to the Court that one of the principal arguments advanced for this knowledge requirement is that it affords to the purchaser the ability to protect himself against this possible liability by indemnity agreements and that sort of thing.

However, by resorting to this imputation

argument the Board, in effect, is taking away the protection because by having to resort to such a fictional device in order to result in a finding of knowledge, the Board is, in effect, ceding the fact that no actual knowledge existed on the part of this purchaser and, therefore, this opportunity to protect itself and to investigate the possibility of the extent to which this might result in liability did not, in fact, exist and I think this is another aspect of the thing which argues the frailty of this argument.

I would point out, lastly, that Regal Knitwear this, "Or for other reasons" language to be found at the tail end of this one example given by Justice Jackson, does not open the door to any other things.

Q That's an internal quote, anyway.

MR. JACKSON: Exactly.

Q From a case in a somewhat different area, apparently.

MR. JACKSON: In the preceding paragraph he points out, and this is the limiting language, that both of these situations are those in which the relationship is one which might, of itself, establish liability and I think this is the touchstone.

Thank you very much, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Jackson, Mr. Come. The case is submitted.

(Whereupon, at 11:22 o'clock a.m., the case was submitted.)