In the

Supreme Court of the United States

HOWARD JOHNSON CO., INC.,

Petitioner,

vs

DETROIT LOCAL JOINT EXECUTIVE BAORD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO,

Respondent.

No. 73-631

Washington, D. C.
March 20, 1974
March 21, 1974

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HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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HOWARD JOHNSON CO., INC., Petitioner,	
v.	No. 73-631
DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO, Respondent.	

Washington, D. C.,

Tuesday, March 19, 1974

The above-entitled matter came on for argument at 2:34 o'clock, p.m.

BEFORE:

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

JAMES D. TRACY, ESQ., Dykema, Gossett, Spencer, Goodnow & Trigg, 2700 City National Bank Building, Detroit, Michigan 48226; for the Petitioner.

LAURENCE GOLD, ESQ., 736 Bowen Building, Washington, D. C., 20005; for the Respondent.

C O N T E N T S

[Second day - pg. 21]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 73-631, Howard Johnson Company against Detroit Local.

Mr. Tracy.

ORAL ARGUMENT OF JAMES D. TRACY, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here, as you know, on writ of certiorari to the Court of Appeals for the Sixth Circuit. That court affirmed a decision of the United States District Court, which had held that petitioner, together with another employer, was required to arbitrate under the collective bargaining contract of the other employer.

Actually, there were two other employers. They're referred to in the brief as Grissoms, because there were several names; I'll use that name for convenience.

The issues presented are whether petitioner is a successor employer, as that term is used as a term of art in labor law, and whether petitioner is required to arbitrate grievances presented by respondent union under the contract between respondent union and the other employer, the Grissoms.

The case arose, beginning in June 1972, when petitioner Howard Johnson Company entered into an agreement

with these other employers referred to as Grissoms, under which it was to buy a motel and a restaurant then being operated by the Grissoms, who were franchisees of the Howard Johnson Company.

That agreement provided for sale of certain assets in the motel and restaurant and for leasing of property on which they stood.

It did not provide for assumption of contracts other than a contract with respect to advertising.

On July 9, the -- excuse me, on June 28, the Howard Johnson Company, petitioner, notified the seller that it would not assume the labor contract which the seller had with respondent union; two contracts existed.

On July 9, the other employer notified its employees that they would be terminated on July 23.

On July 13, the petitioner notified respondent union, who had inquired at that time, as to petitioner's intent, that it would not recognize the union contract which respondent had with the other employer.

A few days later the petitioner commenced interviewing prospective employees. It put advertisements in the local newspapers. Indeed, it put a sign in the very motel and restaurant where this business was being conducted, saying that it would be hiring employees.

QUESTION: Did it conduct the business without

interruption or did it stop for some period, for changes, physical changes?

MR. TRACY: There was no stop, Mr. Chief Justice.

QUESTION: For one minute, between 11:59 and midnight.

MR. TRACY: Yes, sir.

The contract ultimately called for closing at 12:01 a.m., and the testimony is -- and this was put in on stipulated facts; but the record is clear that at 12:00 o'clock the franchisee discontinued its operations.

QUESTION: I take it you concede that that's a factor of some importance in the case.

MR. TRACY: Yes, Mr. Chief Justice. That certainly goes to the question of the meaning of a successor employer. And I'll certainly discuss that issue with the Court.

The petitioner did hire employees. It hired some who had worked for this predecessor employer. Actually it was 9 out of 33, I think, in the restaurant, and none of approximately 12 in the motel.

It had a complete change of supervisory employees, none of the supervisory employees of the predecessor were retained; an entire new supervisory staff was brought in.

The employees who were hired prior to July 24, the date on which the transaction was closed, were trained at another Howard Johnson facility, which was nearby.

And thereafter, on July 24, the transaction was ready for closing. That was a Sunday night or a Monday morning, but on the Friday preceding that, respondent union brought suit in State court, seeking an injunction against what it termed locking out of employees. And also seeking an order that both the predecessor employer and the petitioner should be required to submit to arbitration issues which the union desired to raise as to the rights of the employees to continue at their jobs, as to the right of the union to insist that the collective bargaining continue in effect.

And at a subsequent date that case was removed to federal court, it was quickly submitted to the court under Rule 65 of the Rules of Civil Procedure. There was an immediate final hearing. The case was submitted on stipulated facts.

The court was puzzled, frankly, as to appropriate application of this Court's decision in National Labor Relations Board vs. Burns, and this Court's decision in John Wiley & Sons vs. Livingston. And the court attempted to accommodate those two decisions.

And we submit the court committed error.

The Court of Appeals also faced the problem of the accommodation of Wiley and Burns.

The District Court said that it was holding only that the union's request that the matter go to arbitration

should be sustained, and that that didn't necessarily mean that the contract in total should be applied.

That was in recognition of the decision of this Court that a contract does not survive the transfer of a business, as stated in Burns.

When that question got to the Court of Appeals, the same problem existed in the mind of the court. This Court having said that the contract does not survive, but, nevertheless, this Court not having overruled Wiley, what should be the application of this contract to this petitioner?

I might point out, unlike Wiley, in this case there is still a predecessor employer. The entities which I have referred to as Grissoms appeared in the original proceeding, first in the State court and then in the United States District Court. They did not contest the union's request for arbitration. They stipulated that they will arbitrate the issues which the union has sought to raise. So there will be an arbitration proceeding, if the respondent desires to press that.

And that, as I say, is a very large difference from the Wiley situation in which the predecessor employer had disappeared by merger.

QUESTION: You don't mean that the Grissoms, that the issue of whether some of these employees should be in the

Howard Johnson -- working for Howard Johnson is going to be arbitrated in any Grissom arbitration?

MR. TRACY: No, Mr. Justice Brennan, I did not mean that in that proceeding --

QUESTION: Well, what issues are there, then, in the Grissom arbitration?

MR. TRACY: The issue as to whether Grissoms have breached the contract they made with respondent. Did they, when they agreed that that contract would be binding on themselves and successors commit, that if they sold the business they would require the successor to assume the contract.

QUESTION: Well, suppose an arbitrator concludes that yes, they did breach it. What's the award?

MR. TRACY: An arbitrator has wide authority to make an appropriate award and in that case, I submit, he could award money damages without question.

QUESTION: I see.

MR. TRACY: I think that is his authority.

So, in this case, we come to the issue: should this employer be bound to arbitrate under that contract with the Grissoms?

Now, the standpoint of that is: Is the employer a successor?

And the difference between this case and almost

every case involving the definition of successor, which has ever come up, is that this employer did not employ more than a few of the employees of the predecessor. And the question becomes: Is the employment of at least a sufficient number of employees to constitute a majority of the --

QUESTION: I suppose the issue would have been here, then, even if Howard Johnson had employed none, instead of nine?

MR. TRACY: In one of the two situations, Mr. Justice Brennan, there was none.

QUESTION: Right. Yes, that's in the motel side.

MR. TRACY: That is correct.

QUESTION: Yes.

MR. TRACY: There's a footnote in the union brief which -- I think it's page 22 -- which seems to indicate that maybe the petitioner has stated the court order in this case too broadly, and that maybe all the District Court ordered was that there be arbitration as to the effect on the employees the union represents, is what it says, of the action that took place here.

We think it's clear that the union has sought broad arbitration, and that, indeed, it seeks to apply the entire contract. Although both the District Court and Court of Appeals have said the difference between this case and Burns is that, unlike the Labor Board -- this is Court of

Appeals language -- the arbitrator could be selective in his application of the contract. He need not adopt an all-or-nothing approach.

Now, we submit that that is not possible. The arbitrator, as this Court has frequently recognized, is a product of a contract. Arbitration is a voluntary contractual thing.

Mr. Justice Powell, in the recent case of Alexander vs. Gardner-Denver, noted limitation on the arbitrator, and in Gateway Coal he noted that arbitration exists only when there is a contract to arbitrate.

Now, the contract which is applicable in this case has a clause in it that says the arbitrator cannot add to nor subtract from nor modify the contract. And no issue as to removal or extension of the contract is subject to arbitration.

We submit that the courts below have ignored that contract provision in suggesting that an arbitrator could somehow not take an all-or-nothing approach to the contract, that he could, some way or another, decide that some provisions to the contract should apply but not others.

And we submit also that such an approach would leave an arbitrator completely contrary to the Burns decision of this Court.

Now, again, the arbitrator doesn't have authority

to make a new contract for the parties. His authority is to interpret a contract which the parties have made. But he cannot pick and choose among the provisions of the contract and say this will apply to this new employer, but this will not.

And again Mr. Justice Powell noted, in the Gardner-Denver case that the arbitrator cannot go outside the contract. He wanted out in that case, the arbitrator really cannot even go to application of the Civil Rights laws. He is limited to the application of the contract.

Now, what actually would occur here, of course, if the arbitrator is bound to accept the entire contract, and clearly he accepts the seniority provisions in the contract, and his first ruling is that the petitioner should have taken all these employees of the predecessor as its employees, because they had some rights, seniority rights with the predecessor under this contract.

Now, if that is so, of course, there's also a union recognition clause and a union bargaining status clause in the contract; and presumably the union has now become the sole bargaining representative of the employees of petitioner.

QUESTION: I take it, Mr. Tracy, this is in effect to say, although Burns said you didn't have to hire anybody, if the Court of Appeals is right he might be compelled to hire everybody.

MR. TRACY: There's no question about it, Your Honor.

QUESTION: So that's through the door of arbitration.

MR. TRACY: And that does away with the issue that -- the second issue that this Court considered in Burns, the question of whether the union is the majority representative; if in fact we are bound to take all these employees, of course the union is then representative, and we then do have the union with recognitional status.

So the things that were decided in Burns just wouldn't occur in this case.

Now, should that be because this case came up in the context of a suit by the union under Section 301, whereas Burns came up as an appeal from a National Labor Relations Board decision.

And the Court of Appeals faced that squarely. They said there can be a dichotomy, there can be two different rules. It's a contract in 301, but it's not a contract in the Board.

We submit this Court cannot let that ruling stand.

QUESTION: Of course in Burns the only connection between Wackenhut and Burns was that the employees had been taken over. There was no acquisition of assets or assumption of any liability. And here you've got more of the latter,

don't you?

MR. TRACY: No question, Mr. Justice Rehnquist. We have here many of the criteria of successorship. The question is, however, do we have the freedom to select our own labor force.

If we do, and if that is a crucial factor in determining whether an employer is a successor, then we have not become a successor. And most of the statements of the criteria of successorship include the composition of the work force and the composition of the supervisory force.

Now, we don't have those.

I would like to conclude this portion of my argument and reserve the remainder of my time for rebuttal, but I submit that this Court should go back to the decision in Lincoln Mills as a starting point in the approach to this case.

Lincoln Mills said that under Section 301 the Federal Courts are to apply a body of federal law developed from the intent of the federal labor laws.

The intent of the federal labor law is clear. There must be majority status in order for the union to gain recognition.

There cannot be a contract in a court proceeding, but no contract in a Board proceeding.

That is completely contrary to the spirt of Lincoln

Mills.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Analytically there are two issues in this type of case which, for convenience, we refer to throughout our brief as a Wiley type case, since that is the leading authority in the field.

The first is whether the second employer is a successor, as that term has been used in the section 301 law; in the second case -- the second question --

QUESTION: Well, that isn't found in the statute, that's a Board construct, I guess, isn't it?

MR. GOLD: The successorship concept, Mr. Justice White?

There was Board law on the concept of successorship before this Court decided Wiley.

QUESTION: I understand that, but I mean it's a Board, it's an NLRB construction of -- that came about in applying the Act.

MR. GOLD: Well, what I was trying to do in answering your question was to say that there are antecedents

in the Board law to the successorship concept.

But it is our view that the section 301 law of successorship is not the same as the Board law. And that the law as declared in Wiley is not the same as the law which had developed in the Board, either in terms of the test of successorship or in terms of the consequence of a finding of successorship.

QUESTION: But there's nothing in the labor law expressly dealing with successorship, is there?

MR. GOLD: Nothing, there are no words in 301 to which we look for guidance.

QUESTION: So the successorship concept is used as a vehicle to apply certain sections of the labor law?

MR. GOLD: Yes.

QUESTION: Such as the duty to bargain.

MR. GOLD: Right. One is the duty to bargain, and --

QUESTION: And whether you're bound by a contract.

MR. GOLD: Right.

And it's our view that --

QUESTION: And the provision that says you're not bound by a contract unless you agree to it is subject to -- the Board has held before Burns, anyway, that it was subject to an exception that the successor is bound, if he's a successor, as defined by the Board.

MR. GOLD: Well, the Board law preceded in -- by stating different rules at different times. The Board law at the time Wiley was decided was that a successor, as the Board used that term, was not bound by the agreement.

QUESTION: Yes.

MR. GOLD: They reversed themselves in Burns.

QUESTION: In Burns, yes.

MR. GOLD: Right. But this Court held that in a 301 case the successor is bound by his predecessor's duty to arbitrate. That was the holding in Wiley.

QUESTION: I understand.

MR. GOLD: And in Burns, you again dealt with the Board law, which was the duty-to-bargain law.

Now, I'm really not sure that I've been at all responsive to the question.

QUESTION: That's all right. Well, nothing in Wiley suggested what the arbitrator would have open for decision, and what would be the signpost for him to proceed under?

MR. GOLD: No. It did not map it out for him.

QUESTION: The arbitrator might have open only whether or not the buyer or the surviving corporation promised, made some promises along the way that might bind them.

MR. GOLD: No, there was specific arbitration issues

which had been posed in Wiley.

QUESTION: I understand that, but what would be open for the arbitrator to decide?

MR. GOLD: You mean in deciding any of those specific issues?

QUESTION: Yes.

MR. GOLD: My understanding of the direction in Wiley is that what's open for the arbitrator to decide is whether those portions of the agreement continue to be -- to create the substantive rules of the continuing business enterprise, and it's our view, as stated in the briefs, that in doing that job he is to look to change circumstances in the equity of the situation. That what we have here is not something which is sui generis, but, rather, a type of arbitration which was contemplated in the Steelworkers trilogy.

In the Steelworkers trilogy, the Court emphasized the fact that the arbitrator is to take into account changed circumstances.

Even in a situation in which there are not sufficient changed circumstances, so that the second employer is not a successor and not bound by the arbitration clause there may be factors which it is to meet and incumbent upon the arbitrator to take into account in determining the successor's obligations.

And that's what we think Wiley directed the arbitrators to do, and that is what they have been doing.

QUESTION: But you don't know what Wiley would have said if the successor corporation -- if that had been a purchase of assets case, and if the buyer had hired none of the employees of the predecessor.

MR. GOLD: Well, --

QUESTION: You have no idea what Wiley would have said?

MR. GOLD: -- we know certain things about what Wiley would have said. First of all, --

QUESTION: But you don't know whether it would have ordered arbitration?

MR. GOLD: First of all, we know that in the view of the Wiley court the merger situation was considered a less likely one than the assets acquisition situation for application of the successorship doctrine.

Because that's what the Court said.

QUESTION: Yes. Well -- but you don't know what it would have said in view of -- if there hadn't been any employees taken over?

MR. GOLD: No, we don't know precisely what it would have said, but we do know what the general proposition that it --

QUESTION: That is one of the elements of deciding

successorship in the first place, isn't it?

MR. GOLD: We do not believe so.

QUESTION: Well, it used to be, didn't it?

MR. GOLD: It has never been, so far as we know, an element in the section 301 law successorship.

QUESTION: Well, that's just your -- that's the route -- that originated with Wiley, I take it?

MR. GOLD: Yes. Section 301 --

QUESTION: Well, you don't know what Wiley would have said if there hadn't -- if there had been a situation where there weren't any former employees involved?

MR. GOLD: Well, we don't know, in the sense that in that case we -- in that case the employer, although not originally of a mind to, eventually did hire the employees.

But we do know that there are certain basic principles.

First of all, we know that in Wiley the successorship test was stated to be whether there are any substantial indicia of continuity. And that it used the fact that the second employer hired the employees as saying that that was evidence of continuity, not that it was a necessary condition.

And we do know that the general rule stated in Wiley is that it would be inconsistent with our holding that the obligation to arbitrate survived the merger, where we to hold that the fact of the merger, without more, removed

claims otherwise plainly arbitrable from the scope of the arbitration clause.

That's at page 554 of 376 U.S.

Where the complaints --

MR. CHIEF JUSTICE BURGER: We'll resume there at ten o'clock in the morning.

[Whereupon, at 3:00 o'clock, p.m., the Court recessed, to reconvene at 10:00 o'clock, a.m., Wednesday, March 20, 1974.]

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IN THE SUPREME COURT OF THE UNITED STATES

HOWARD JOHNSON CO., INC., Petitioner,	:	
v.	:	No. 73-631
DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO, Respondent.	:	

Washington, D. C.,

Wednesday, March 20, 1974.

The above-entitled matter was resumed for argument at 10:04 o'clock, a.m.

BEFORE:

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

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Gold, I think you have about 22 minutes remaining.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF THE RESPONDENT [Resumed]

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

To briefly put the matter back in focus, this is a section 301 suit, to compel arbitration. The problem it raises is whether the duty to arbitrate survives over a change in the identity of owners, where that change takes place against the background of a collective agreement in force, and is brought about by negotiations between the first employer and the purchaser.

At the afternoon recess yesterday, I was endeavoring to respond to Mr. Justice White's questions concerning the scope of Wiley vs. Livingston, which was also a section 301 case presenting the same issue.

Naturally, Wiley, like every other precedent, leaves certain leeways in the law. But it is a reasoned decision and I hope we'll be able to demonstrate that it's rooted in basic precepts of the national labor policy and is not simply a decision which can be read to settle the particular facts there before the Court.

To understand its lessons, we believe it's necessary to analyze its basic rationale.

Firstly, --

QUESTION: I think someone asked you yesterday, and I don't have your answer precisely in mind, Mr. Gold: What is the scope of the arbitration agreement, assuming an arbitration is compelled?

MR. GOLD: There are two aspects to that, Mr. Chief Justice. First, we look at the scope of the arbitration agreement, if one means what are the substantive obligations which the second employer is bound by, to be essentially equivalent to the process of arbitration mapped out in the Steelworkers trilogy. Namely, that in the arbitration the arbitrator is bound by the agreement, but he is to take into account changed circumstances and the different equities of the parties, and to fulfill his role as the expositor of the contractual law set out in the agreement.

Naturally, the assumption is that there will be more need for a creative and sensitive application of the agreement, where there is a new employer, because he brings different insights, different presuppositions, and he may make certain changes within his permitted scope under the managerial prerogatives clause, which this agreement has, which may substantially change the situation.

QUESTION: Mr. Gold, does that subsume that the agreement itself then survives the sale?

MR. GOLD: It survives to the extent that the

arbitrator finds it to be -- to comport with the changed situation. It's the framework, the duty to arbitrate survives and the arbitrator is to determine the substantive obligations that survive.

QUESTION: Well, in other words, obligations upon the successor to the business.

MR. GOLD: Yes, Your Honor.

QUESTION: Well, if the arbitrator isn't bound by the contract, what framework does he use to determine what obligations survive?

MR. GOLD: The answer that I was attempting to give is that my understanding is that he is bound by the framework of the contract. He cannot toss it over his shoulder and act as a -- someone who is making law, but he can take into account reasoned arguments from the second employer that changed circumstances or different equities make specific provisions inapplicable.

It seems to us that that is the role that Wiley envisages, and that's what, in essence, the arbitrators have been doing in --

QUESTION: You read Wiley, then, to say not only there's a duty to arbitrate but the framework of the arbitration is the existing contract?

MR. GOLD: Yes. Because if that were not true, then we would have to agree with the company that the task

would not be a principled one. But we do think that the task is a principled one, and we do think that the flexibility is there in the sense that the arbitrator just as he can under the Steelworkers trilogy can take into account changed situations and changed equities.

QUESTION: Now, one of the clauses in the contract is recognition of the union, is it not?

MR. GOLD: That is the type of clause, depending on the situation, which may not survive. Obviously, if the clause is contrary to law.

Let's take the Wiley situation. In Wiley, the unit of Interscience employees -- that was the entity that was merged into Wiley -- was 40 people. And it became -- those 40 people were transferred into a unit which already had 300. Then there would be no duty to recognize; and, obviously, to the extent that you have any other such clauses that don't survive the change because of that type of changed circumstances --

QUESTION: Well, Mr. Gold, what about the steps that precede arbitration, that the contract probably requires?

MR. GOLD: You mean grievance --

QUESTION: Yes.

MR. GOLD: -- filing grievances and so on?

QUESTION: Yes.

MR. GOLD: We would assume that the process would

continue --

QUESTION: That is that the successor then has to negotiate, whatever the grievance may be, or attempt to negotiate its settlement -- with the union representatives? And exhaust that before they go on?

MR. GOLD: Yes. The union representatives for the people --

QUESTION: Well, isn't that recognition?

MR. GOLD: No. Because, it seems to us, that the very point of your decision in Lion Dry Goods was that there can be situations in which the employer treats on a members-only representative basis. And in a situation in which the union doesn't have a majority, that would be the result of a Wiley --

QUESTION: I mean, realistically, what we're talking about here, I gather, is the grievance of the separation of these, what is it, 41 employees.

MR. GOLD: Well, --

QUESTION: And that now -- that we say that the employer is free when it purchases this business not to continue the employment of anybody in the unit. He did, in this instance, employ nine, but the 41 say, well, you couldn't have separated us and that becomes a grievance, and this all has to go through the grievance procedure before they get to arbitration?

MR. GOLD: Well, Your Honor, --

QUESTION: Well, isn't part of your submission is that the arbitrator could decide to put all 41 back to work?

MR. GOLD: Yes, Your Honor.

QUESTION: Which means that the successor does not have the right not to hire, that he must perhaps take over the old employees?

MR. GOLD: Yes, Your Honor.

QUESTION: Yes.

MR. GOLD: In Golden State --

QUESTION: And you say that's because of successorship?

MR. GOLD: Yes, Your Honor.

In Golden State, Mr. Justice Brennan pointed out that -- I'm reading the reproduction of this passage from the Golden State opinion, which is the most recent successorship case, although again one rising in a different context. And it's our view that each of these areas are discreet, but they throw a cross-right on each other. This is on page 28 of our brief, the blue brief:

"For example, because the purchaser is not obligated by the Act to hire any of the predecessor's employees, see Burns, the purchaser, if it does not hire any or a majority of those employees, will not be bound by an outstanding order to bargain issued by the Board against the

predecessor nor by any order tied to the continuance of the bargaining agent in the unit involved."

And that is a position which we understand and accept. The Act does not require an employer to hire anyone, and that is what this says. An employer, as long as he doesn't act for anti-union reasons, has the right to --

QUESTION: Yes, but as a practical matter, Mr. Gold, your submission is, but if there's an arbitration clause under 301, while he has no obligation to hire, the arbitrator may order him to re-employ all 41.

MR. GOLD: Yes, Your Honor. What I'm trying to say is that there is no statutory obligation to hire, but there may be a contractual obligation to hire. Contracts are -- the contractual obligations are not equal to statutory obligations.

There are different concepts of successorship here that --

QUESTION: Well, one of the difficulties for me is that if it's true that, to this extent, the contract is binding on the successor, then I have difficulty seeing why it isn't binding on the successor in all respects, including recognition.

MR. GOLD: Well, it may or may not be. There are situations in which --

QUESTION: Well, if they put all 41 back to work,

there certainly is going to be a duty to bargain, because it's going to be all the employees in the unit.

MR. GOLD: Well, there's no duty to bargain in the sense that those under the scheme of duty to bargain in the sense to negotiate, under the scheme there is a negotiation during the time, there may be a duty to recognize depending on the situation, depending on the composition of the work force.

But to say that because in this case if the employer has to hire the predecessor's employees there's a duty to recognize, there will always be is incorrect; and I think the Wiley situation indicates it. There may be mergers which also merge a small unit of employees into a larger one. In that case there wouldn't be the duty to recognize.

But where there is a duty to hire, then the duty to recognize may follow with it as being a part of the agreement that still fits.

QUESTION: How about those newly employed by Howard Johnson, would they have any claim under the old contract?

MR. GOLD: I wouldn't -- would not think so. The very theory of -- they may have, to the extent that they survive the first arbitration and choose to be represented by the employees. But at the present time, Howard Johnson has hired them under the common-law system under which he can

discharge them at will. The only people who the union is seeking to represent are those who have authorized it to represent them; namely, the predecessor's employees. And the policy of Wiley is to cushion the shock of the change on those predecessor's employees, and to carry forward the contractual obligations.

If the employer discharged them wrongly, then they deserve to be protected.

QUESTION: So that if the arbitrator declined to require the rehiring of the 41, basically it's only the nine that would have the right to --

MR. GOLD: The nine or any others who chose to ask the union to represent them.

QUESTION: Any new people.

MR. GOLD: Right. Any new people who would choose to represent them. Because then you would be in a situation where you had a members-only agreement.

But the point that I was trying to make in terms of the statutory obligation and the contractual obligation, I think is simply illustrated by the case where you have only one employer and an employee is discharged because he gets on the wrong side of his foreman.

If he goes to the National Labor Relations Board, he doesn't get any relief, because the Board has no plenary authority to redress unjust discharges.

On the other hand, if he's under an agreement and he goes to an arbitrator, he can get relief.

So the fact that there isn't a statutory obligation on an employer, which is what Burns holds, there is no statutory obligation which we can extrapolate from 8(a)(5) to recognize an agreement, or to hire employees, doesn't mean that there is no contractual obligation.

QUESTION: Yes, but the Act says that an employer isn't obligated to honor a contract that he hasn't agreed to, that the Act doesn't impose a contract on him. And he must agree to it.

Now, you're saying that a union and employer X, by signing an agreement that says this contract binds successors --

MR. GOLD: That's right, and --

QUESTION: -- automatically will bind successors in spite of the fact that the successor writes a letter and says, "I'm not going to be bound" and doesn't intend to be bound, and relies on the Act's provision that "I'm not bound unless I agree."

MR. GOLD: Well, the -- that helps me get back to where I was starting from, because I think that that's really the question of what Wiley says. And what Wiley says, in the theory of it, is that the point of collective agreements, and here I quote the House Report, or paraphrase the House

Report on the Wagner Act, the point of collective bargaining is not to start a process which is a means in itself, but it's a means to an end. And the end is collective agreements which stabilize the terms and conditions of the employment for a certain period of time.

And the practice of collective bargaining, as this Court has recognized in Warrior & Gulf, is to attempt to erect a system of self -- industrial self government, which controls a specific business enterprise. It sets the terms on which the employees deal with each other, on which they deal with the employer, and it binds employees who come into the unit after the fact, it binds those who would not have supported the union in the first place, and, indeed, the push for stability is so great that if the employees change their mind during the term, they can't get a Board election in which to express that. That's the contract bar rules.

And because of all that, in one of the early leading cases, this Court said that the collective agreement is analogous to a tariff or to government utility rates, which bind all those who come within its terms.

The theory upon which the parties operate is that so long as the business enterprise continues, these rules, which have set up, will continue.

And what Mr. Justice Harlan said for the Court --

QUESTION: Well, that may be that the rules continue,

but the basic question here is: to what employees do they apply?

MR. GOLD: Well, it's beyond that. It seems to me --

QUESTION: And that may be --

MR. GOLD: -- it's when does a change in the identity of the employer change those rules. And the answer --

QUESTION: Well, this isn't going to be changing the rules, it's just to -- even if you said that the same rules apply to the successor, you still say that he may bring his own employees along.

MR. GOLD: Well, no, one of the rules is that the just cause and seniority provisions of the agreement apply. That is probably the most important aspect of the bargain from the union and the employees' standpoint. And if --

QUESTION: You certainly are taking quite a bite out of Burns, I suppose, in these cases, --

MR. GOLD: I do not --

QUESTION: -- in your argument.

MR. GOLD: -- believe so. It's our feeling that the cases stand together. After all, in your opinion you distinguish Wiley.

QUESTION: I understand that.

MR. GOLD: Our view is that there is a difference

between the statutory obligation which can be drawn from section 8(a)(5) and the contractual obligation which can be implied as a matter of law, just as the basic duty to arbitrate is implied, and just as a no-strike agreement can be implied, as this Court did in Lucas Flour.

The very theory of contractual enforcement is that these duties can be implied by the courts. And what Burns says is that the Board has a more limited authority. But that doesn't seem to us to undercut the Board's authority. Indeed, in the AFL-CIO brief, the rust-colored brief, we quoted from C & C Plywood, a decision by Mr. Justice Stewart, in which he draws the point that when Congress made its decision to give the courts the authority to enforce agreements, it rejected giving that authority to the Board -- this is on page 6 -- because that would be government compulsion of the terms and conditions of employment.

But that authority given to the courts isn't the same, because the courts are not deriving their -- the obligations they state from the statute, they are deriving them from the contract. The contract is interpreted in the normal way courts interpret contracts.

And I just want to conclude by saying that there are three basic choices open in Wiley. Either the continuity of the business enterprise, the test drawn from the understanding of collective agreements, would apply; or else the

employer would be able to choose or not choose whether to be bound. And if he were able to choose or not choose whether to be bound, that would create an extraordinary disparity, because the employees would be at the second employer's mercy. The value of their bargain would depend on whether or not he thought it was a good bargain.

If he thinks it's a good bargain, he can say, "I accept it". If he thinks it's a bad bargain, he cay say, "I reject it."

On the other hand, the employees have to take whichever way he jumps. And that seems to us to be completely inconsistent --

QUESTION: Well, on your approach, the successor employer, whether he thinks it's bad or good, is bound by the contract.

MR. GOLD: Yes, Your Honor. If he is the successor to --

QUESTION: It's a contract that he never negotiated.

MR. GOLD: But Wiley says that by buying the business, knowing of the agreement, and continuing the business so that it is a continuity, he steps into the shoes of his predecessor.

QUESTION: It's like the contract runs with the business --

MR. GOLD: That's right, it's --

QUESTION: -- like something else runs with the land.

MR. GOLD: Exactly, Your Honor.

QUESTION: There's a lot of difference.

MR. GOLD: But Wiley --

QUESTION: There's a lot of difference. Normally contracts don't run with the business.

MR. GOLD: Well, some contracts do. I mean, the common-law rule is not the only rule, as Mr. Justice Rehnquist pointed out in his opinion in Burns, there are obligations which are imposed on successors or people who take over business as a matter of law.

And I want to make --

QUESTION: My only problem is that it doesn't do it in and of itself. I thought you said the contract in and of itself went with the business, despite what the man said. It's not just in and of itself.

MR. GOLD: No, it's the contract read in terms of the national labor policy and the presumptions and its meaning.

And I just wanted to note that in this case those are successorship clauses. If the predecessor -- if the only remedy is against the predecessor, we have a situation which we think is extremely -- which is analogous to that in Boys Markets. All you can get is damages, but that isn't the

purpose of the labor law. The labor law is opposed to the law of commercial contracts, specific performance is what is sought when you have an arbitration or its corollary no-strike provision. And the only way you can have that is the method employed by Wiley, which is to say that this situation is not the same as one in which there is no contract. There is a contract, and the successor steps into it.

Now, I want to point out how close the continuity is in this case. Howard Johnson had a voice in this business before the change. It was its franchisee. Before and after the change there was a Howard Johnson's Motel selling basically the same things to the same class of customers. Before and after the change there was a discreet unit of 55 people who were working for that employer. There was a one-minute hiatus, as both Mr. Justice Stewart and the Chief Justice pointed out yesterday.

If this employer isn't a successor, we don't know who is. And if he is a successor, then there was never a break in the contractual obligation, and those contractual obligations were his just as they were his predecessor's.

QUESTION: But that's self-defining, almost. You say the man is a successor and therefore there never was a break in his contractual obligations. You've still got to make the case for the successorship.

MR. GOLD: Well, that's right. I think our first

duty is to show that there is a continuity of the business enterprise which makes it proper to say that the second employer is a successor.

Where there isn't a continuity, then he is not a successor and he is not bound by the arbitration clause or any of the other potential obligations which are in the agreement.

QUESTION: But in deciding successorship, I take it you put aside the fact that he may not have hired any of the old employees?

MR. GOLD: Yes, Your Honor, because --

QUESTION: Yes.

MR. GOLD: -- we think that the background of the law is different, that if that is the test, then the very issue to be argued -- he could control whether or not there's to be an arbitration --

QUESTION: I understand.

MR. GOLD: -- by disregarding the potential obligation. And therefore that the situation is different from the situation under 8(a)(5).

Under section 8(a)(5), first of all, there's no obligation; and, secondly, you look to the employee complement, because you're asking whether or not there should be negotiations for a new agreement. Whether there's a duty to recognize. And the duty to recognize stems from the

employee free choice. Employee free choice is subordinated to stability during the term of the agreement, and that's why you don't look to the employer-employee complement in a contract case, but rather as Mr. Justice Rehnquist pointed out, and certainly what he said is applicable in this case, you look to continuity on the employer side, continuity in the business enterprise.

And if that is there, then the duty to arbitrate does follow. That is the theory which we are arguing.

We are saying that we have to show the successorship. We have to show a lack of discontinuity. We think we have all sorts of continuity here. And once we have that, then the duty to arbitration does flow as the conclusion.

That is our position.

QUESTION: Well, you would agree, then, that by your test of successorship, there wasn't successorship between Wackenhut and Burns?

MR. GOLD: In the contractual sense, --

QUESTION: In the contractual sense.

MR. GOLD: -- I would think that that's a different case.

QUESTION: Yes.

MR. GOLD: Now, there have been developments since you wrote your opinion which may have some effect on that case, the Service Contract Act amendments, which are quoted

in the AFL-CIO brief.

But as a matter of basic first impression in contract law, if there is not continuity on the employer side we do agree that there isn't a 301 obligation.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Tracy?

REBUTTAL ARGUMENT OF JAMES D. TRACY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. TRACY: Yes, thank you, Mr. Chief Justice.

QUESTION: May I just ask, Mr. Tracy, I gather, in your submission, had Howard Johnson taken on all of its predecessor's employees, Howard Johnson still would not be bound by the contract?

MR. TRACY: Your Honor, we believe that is what this Court said in Burns.

QUESTION: But you might have had a duty to bargain; right?

MR. TRACY: No doubt, Your Honor; no question whatever.

QUESTION: But you would not be bound at all by the agreement?

MR. TRACY: Your Honor, it so happens that I was the attorney for an employer in a case which was a companion to the Burns case at the Board, and my client desired that the contract continue in effect. The union did not.

The company had been bought by a larger company, the union saw an opportunity to negotiate a better contract.

The Board, as you know in Burns, said the contract did continue. The case in which I was involved was never appealed.

I submit that if it had been appealed, with Burns, the result would have been the same with Burns.

The continuation of the contract is a two-party affair. The contract does not run with the business, as Mr. Justice Marshall says.

It is something which is a matter of consent, and both the company and the union must consent for the contract to continue in effect, and this Court pointed out in Burns the policy considerations which require that. The Court pointed out that there could be considerations on both sides of the bargain.

Now, the duty, the contractual consensual duty to be bound by that contract and to arbitrate in accordance with the contract is inevitably intertwined with the status of successor, and the questions which the Court has put to Mr. Gold demonstrate the difference between this case and Wiley, and indeed the difference between this case and a case like Lion Dry Goods.

In Wiley, the employees who brought grievances had attained employment status with the employer, and there-

after had grievances arise, differences with their employer; and this Court, in Wiley, held that those grievances which arose after the employment relationship existed were subject to arbitration under the contract of the prior employer.

Now, there is certainly a serious question whether even that can stand today in view of the Court's unanimous ruling that the contract does not survive. The question becomes: What is the parameters for the arbitrator? What is the basis on which he can make a decision?

But, in any event, the contract cannot be a vehicle with which the persons who claim grievances under this contract can attain employment status with the new employer.

QUESTION: Mr. Tracy, in most situations where someone buys a company, buys the assets and continues to run the business, surely that purchaser must take account of other kinds of contracts, other kinds of obligations that the buyer has. In my State if you bought a business and didn't take account of some of the debts that your seller owed, and that if you didn't go through certain procedures and give them a chance to come in and make a claim, you were going to be in trouble.

MR. TRACY: Your Honor, that is true. That is a matter of statute.

QUESTION: Yes, I agree with that. I agree with that. Bulk sales acts, and things like that.

Now, I take it, the union and the employees are saying: we're the ones, we're the only obligees of the seller that aren't taken care of in some way.

MR. TRACY: Your Honor, I agree, but --

QUESTION: Your client bought the business, he knew he had a contract that says it bound the successor. And you wrote a letter and said, "We won't be bound, but I will buy nevertheless."

Now, the suggestion is that the national labor law says that you can't avoid that successorship clause like that.

MR. TRACY: Well, Your Honor, I submit that there certainly is no statutory requirement that we honor the contract. And, incidentally, you asked that question yesterday and you didn't get a very clear answer, --

QUESTION: Yes.

MR. TRACY: -- but we know that successorship is not a statutory doctrine, it's a Board and court doctrine.

Now, there are some contracts which, perhaps, by bulk sales act or other statutory enactment, may become an obligation of a purchaser. But there are many others which will not.

QUESTION: Do you think Congress would enact legislation which would make this contract binding on successors such as your client?

MR. TRACY: Yes, Your Honor, I believe that Congress could.

QUESTION: Apparently that's the approach in this new Service Contract Act.

MR. TRACY: Exactly. Exactly, Your Honor, I believe that the fact that they enacted an Act of that kind indicates that if they desire to go further and cover the kind of situation that is here today, they could well have done so by legislation.

QUESTION: Well, so far the most relevant provision is the provision that says that an employer isn't bound until he agrees with the contract. That you can't impose a provision of a contract on an employer through the process of collective bargaining.

MR. TRACY: Your Honor, that is section 9(d) of the Act. That's the holding of this Court in H. K. Porter. And the argument that somehow or another it might be different, the 9(d), which is a statement in the National Labor Relations Act, somehow doesn't apply in an enforcement of contract situation, just cannot stand. This Court has recognized there must be one body of law.

I referred yesterday to the Lincoln Mills decision, counsel this morning referred to the Lucas Flour decision of this Court. And in Lucas Flour this Court said: the possibility that individual contract terms might have differ-

ent meanings under State and Federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.

Now, if it can't have different meanings under State and Federal law, it cannot have different meanings in a Board case as compared with a court case.

We submit that clearly it cannot.

And returning, Mr. Chief Justice, to the question you raised yesterday relative to the short hiatus, certainly that is an aspect to be considered in determining whether there is a continuity of the business. That there are many factors, there again going to Mr. Justice White's questions, there are many factors which determine the successorship status. And this Court has carefully considered them. Mr. Justice Rehnquist was concerned with them in the Burns case.

QUESTION: But in Wiley, as we pointed out yesterday, the Court did not go on and discuss what the scope of the arbitration was. Now, I assume that you would concede that some successors might expressly want to assume the contract, as your client -- as an old client of yours did.

MR. TRACY: That's right.

QUESTION: And that maybe nothing was said in the purchase or the sale about it. And there may be an issue, especially if the successor takes over a majority of employees,

there may be an issue as to whether there was an assumption or not, or whether -- or what the agreement was.

And that kind of an issue submitted to an arbitrator, I would think would be wholly proper.

MR. TRACY: I agree with Your Honor, and I believe that is the real meaning of the Wiley decision, and that's the full meaning of the Wiley decision.

You cannot bootstrap the successorship doctrine without retention of employees or hiring of employees by the new employer into a requirement that he must take the employees and therefore must recognize the union, unless you are really going to say, as Mr. Justice White said, that you're going to take a very large bite out of Burns.

There is, in Burns, a decision which was unanimous as to the effect of the contract, and that decision is not consistent with the position of respondent in this case, or the position of the court below. It is consistent with the petitioner's position.

We request, therefore, that the Court reverse the decision below.

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

Thank you, Mr. Gold.

The case is submitted.

[Whereupon, at 10:38 o'clock, a.m., the case was submitted.]