LABOR-MANAGEMENT PROVISIONS AND THE EFFECT OF LABOR-MANAGEMENT AGREEMENTS ON SECTION 5 PROCEEDINGS UNDER THE INTERSTATE COMMERCE ACT

By
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INTRODUCTION

There is perhaps no area of interpretation and application of the federal labor statutes which has been the subject of more dramatic developments within the last few years than the case law relating to sales and acquisitions of businesses, or parts of businesses.

For years, an often all to simplistic approach was taken to the labor related problems involved in such sales and acquisitions. The tendency was to group all the labor-related problems involved in or caused by the transaction together. All such labor-related problems were then resolved by determining whether or not the purchaser was a "successor" for labor-related purposes. This simplified approach ignored the fact that the vast majority of sales and acquisitions of businesses and operations involve a wide myriad of often complex and highly involved legal obligations, liabilities and practical considerations, involving the employees and the unions which represent them.

The United States Supreme Court recently recognized the complexity of the issues involved in, and the danger of an over-simplified approach to, the wide range of problems which might arise in respect to such transactions. In its recent and strikingly important decision, *Howard Johnson,*[1] the court commented on the Circuit Court of Appeals' approaching labor problems involved in a sale of assets on the basis of whether or not the employer was a "successor employer".[2] Justice Marshall, writing for the Court stated the following:

> The Court of Appeals stated that "the first question we must face is whether Howard Johnson is a successor employer", . . . We do not believe that this artificial division between these questions is a helpful or appropriate way to approach these problems. The question whether Howard Johnson is a

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1. *Howard Johnson Co. v. Detroit Jt. Board*, 417 U.S. 249, 86 LRRM 2449 (1974).
2. *Howard Johnson Co. v. Detroit Jt. Board*, 482 F.2d 489, 83 LRRM 2804 (CA 6, 1973).

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"successor" is simply not meaningful in the abstract. Howard Johnson is of course a successor employer in the sense that it succeeded to operation of a restaurant and motor lodge formerly operated by the Grissoms. But the real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative. The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the Union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others. (Citations omitted)[3]

Accordingly, it should be apparent that there is a grave danger in oversimplifying or adopting a generalized approach to the labor problems involved in sales or acquisitions of businesses, operations or parts thereof. In analyzing one factor or set of factors and concluding that the purchaser is or is not a "successor" for all purposes, the practitioner may be exposing his client to liability in respect to factors which were not considered. Consequently, a cautious, wary and detailed approach must be taken to any sale or acquisition of a business. This is true whether or not any labor problems are initially visible.

In this paper, we will attempt to point out what those issues are which are involved in "successor" type relations, and some of the possible pitfalls which may be present in such transactions. We will also analyze the recent landmark decisions of the United States Supreme Court on "successor" type issues and the practical effects of such decisions.

THE DUTY OF THE PURCHASER TO BARGAIN WITH THE SELLER'S UNION OR TO ACCEPT THE SELLER'S COLLECTIVE BARGAINING AGREEMENT

In order to be able to evaluate the labor-related issues which may be present in a sale or acquisition of a business or assets of a business

3. *Howard Johnson Co. v. Detroit Jt. Board*, 417 U.S. 249, 86 LRRM at 2454 (1974).

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(in which category we include the sale of operating rights only), it is necessary first to examine the evolution and development of the National Labor Board and court case law in respect to such transactions.

EARLY LABOR BOARD CASE LAW

Litigation in respect to a change in ownership of a business or part thereof may arise in two basic ways. First, the issue may arise as a result of unfair labor practice proceedings or representation proceedings and charges filed with the National Labor Relations Board.

Very early in its administration of the National Labor Relations Act, as amended, the Board began issuing orders directed at remedying the unfair labor practices not only of the employer who had violated the Act, but also of his "successors and assigns". This practice of the Board was upheld by the United States Supreme Court in the *Regal Knitwear* case. In that case the Supreme Court set forth the principle that Board orders may be binding upon successors who operated merely as "a disguised continuance of the old employer".[4] This was the "alter ego" theory. Even before this 1945 Supreme Court case and the endorsement of the "alter ego" theory, the Board had held on a number of occasions that a successor employer was required to bargain with the bargaining agent of the employees following a nominal change in corporate organization which did not materially affect the nature of the business or the employees.[5]

After the *Regal Knitwear Co.* case, the Board ruled in several cases that the purchasing employer or successor was bound to the bargaining duty which had bound the seller or predecessor where there was no change in the essential attributes of the employment relationship.[6] In so doing the Board went beyond the "alter ego" theory and ruled in several cases that even a purchaser or transferee of a business operation which changed hands in an arms-length transaction was bound to the union certification of the seller.[7] In continuing to issue such bargaining orders and other remedial orders as a result of alleged unfair labor practice charges over the period of a number of years, the Board looked at several factors involved in the operation. In addition to looking to see if no essential attribute of the employment relationship was changed by the transfer, it more specifically looked at

4. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 15 LRRM 882, (1945).
5. *Charles Cushman Co.*, 15 NLRB 90, 5 LRRM 113 (1939).
6. *Stonewall Cotton Mills, Inc.*, 80 NLRB 325, 23 LRRM 1085 (1948).
7. *Simmons Engineering Co.*, 65 NLRB 1373, 17 LRRM 291, (1946).

whether the successor continued to produce the same product at the same location with the same equipment, whether it served the same customers, and whether the employees of the predecessor were retained by the successor.[8]

Although such Board decisions meant that an employer who succeeded to the business operation had to bargain with the union which had been certified or recognized by his predecessor, such decisions did not mean that the succeeding employer in all cases would be bound by the existing collective bargaining agreement between the union and the predecessor employer.[9]

However, the Board ruled that a purchaser which continued operations of a company without significant change in the personnel or method of the seller had to bargain before changing the terms and conditions of employment established by the seller's prior collective bargaining contract. In one case, the Board ruled that such an obligation to bargain existed, even though the agreement expired before the business was sold and the purchaser announced in advanance his unwillingness to conuinue the wages and working conditions established by the contract. The Board ruled that it had authority to order the purchaser to restore the prior wages and benefits provided by the expired contract and to make the employees whole for losses caused by the unilateral change in wages and conditions.[10] Such a remedy, set down at a time several months after the deal was consummated could be extremely costly and render the entire transaction a financial flop.

These principles we have discussed above and which were adopted by the National Labor Relations Board were upheld to a great extent by the various Circuit Courts of Appeals.[11]

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8. *Johnson Ready Mix Co.*, 142 NLRB 437, 53 LRRM 1068 (1963); *Stonewall Cotton Mills,* supra.

9. *Rohlik, Inc.*, 145 NLRB 1236, 55 LRRM 1130 (1964).

10. *Overnite Transportation Co.*, 157 NLRB 1185, 61 LRRM 1520, enforced 372 F.2d 765, 64 LRRM 2359, (*CA 4 1967*) *cert. denied*, 389 U.S. 838, 66 LRRM 2307 (1967).

11. See Morris, *The Developing Labor Law* (BNA, 1971) at p. 360 citing: *NLRB v. Lunder Shoe Corp.*, 211 F.2d 284, 33 LRRM 2695 (CA 1, 1954); *Overnite Transportation Co.*, 157 NLRB 1185, 61 LRRM 1520, enforced, 372 F.2d 765, 64 LRRM 2359 (CA 4, 1967), cert. denied, 389 U.S. 838, 66 LRRM 2307 (1967); *NLRB v. Auto Vent-Shade Inc.*, 276 F.2d 303, 45 LRRM 3010 (CA 5, 1960); *NLRB v. McFarland*, 306 F.2d 219, 50 LRRM 2707 (CA 10, 1962).

INITIAL COURT DECISION UNDER SECTION 301 OF TAFT HARTLEY

The second manner in which the issue of being bound to regognize the predecessor's union and to honor his collective bargaining agreement arises is as a result of actions filed under Section 301 of the Labor Management Relations Act. Section 301 provides a statutory cause of action for violations of a contract between an employer and a labor organization. The *Wiley*[12] case, which was the first Supreme Court decision dealing primarily with the issue of successorship in a Section 301 action, was an extension of the Supreme Court's reliance upon arbitration as a means of effectuating solutions to labor problems. No one, however, can deny the impact of this decision on subsequent decisions of the National Labor Relations Board, both in respect to the question of the surviving binding effect of a labor contract and that of a surviving bargaining duty.

The Supreme Court's *Wiley* case involved a merger of a company employing 80 employees into a larger company. Of the 80 employees of the merging company, Interscience, 40 were represented by the Union. The surviving company had about 300 employees who had not been organized by a union. John Wiley and Sons, the surviving company, took the position that they did not have to honor the collective bargaining agreement of Interscience and did not have to bargain with the Union. The surviving company also took the position that it did not have an obligation to arbitrate claims in respect to "vested" rights which had been asserted by the employees of Interscience represented by the Union. The Union subsequently brought an action under Section 301 of the Taft Hartly Act to compel arbitration under the collective bargaining agreement.

The Court stated that there was a continuity of operations and that the national labor policy favored arbitration as the substitute of industrial strife. The Court found that in such a merger situation, the rights accrued under the contract with Interscience could be enforced against the surviving corporation, Wiley, even though Wiley had not agreed to be bound by the terms of such an agreement.

AN EXTENSION OF WILEY'S PRINCIPLES

Two Circuit Court cases followed Wiley within a short time. In the one, *Wackenhut*,[13] the Ninth Circuit interpreted *Wiley* as imposing

12. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 55 LRRM 2769 (1964).
13. *Wackenhut Corp. v. International Union, United Plant Guard Workers of*

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upon a successor, even in an acquisition as opposed to a merger situation, the entire collective bargaining agreement of the predecessor. Along the same line, the Third Circuit in *Reliance*,[14] ruled that the arbitrator had the discretion as to which portions of a predecessor's union contract might be imposed upon the successor or not imposed upon the successor dependent upon the equities of the situation and changed circumstances.

It is clear that the Supreme Court's *Wiley* decision and the subsequent decisions by the Circuit Courts of Appeal greatly influenced the National Labor Relations Board in its treatment of successor-employer obligations. Although in *Wiley*, the Court indicated that it was not ruling on representation issues and the question of recognizing the bargaining agent, the National Labor Relations Board took an aggressively or liberal viewpoint in interpreting the successor issue, culminating in a combined decision on four cases by the Supreme Court in 1970. It is this combined decision which, together with three subsequent decisions, presently form the basis for the determination of the issues and liabilities involved in a sale or transfer.

THE BURNS CASE

The lead case of the four combined cases gave the case its name, *Burns*.[15] In its decision on *Burns*, the National Labor Relations Board a few years previous had made the sweeping ruling that when a business changed hands and no unusual circumstances were present, "the National Labor policy embodied in the Act requires the successor-employer to take over and honor a collective bargaining agreement negotiated on behalf of the employing enterprise by the predecessor."[16]

In the *Burns* case, the William J. Burns International Detective Agency became the successful bidder on a contract for protection of a Lockheed installation. This service had previously been performed by the Wackenhut Corporation who had a collective bargaining agreement with a certified bargaining agent, the United Plant Guard Workers of America. All bidders on the service were apprised of the

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America, 332 F.2d 954, 56 LRRM 2466 (CA 9, 1964).

14. *Reliance Universal, Inc. v. United Steelworkers*, 335 F.2d 891, 56 LRRM 2721 (CA 3, 1964).

15. *William J. Burns International Detective Agency*, Inc., 182 NLRB No. 50, 74 LRRM 1098 (1970).

16. *Id.*, 74 LRRM at 1100.

existence of the collective bargaining agreement between Wackenhut and the Plant Guards prior to the bidding. The Burns service was successful bidder and hired 27 former Wackenhut guards and transferred 15 of its own employees to the Lockheed installation. This resulted in a majority of the work force being made up of the prior guard service's employees.

After the Union demanded that Burns recognize it and honor the collective bargaining contract, Burns refused and refusal to bargain charges were filed with the National Labor Relations Board under Section 8(a) (5) of the Labor Management Relations Act.[17]

The National Labor Relations Board ruled that Burns was a successor employer to Wackenhut in respect to recognition of the union and as to the terms of the predecessor's collective bargaining agreement. In so doing, the Board relied upon the *Wiley* rationale, declared that the "employing industry" had remained essentially the same despite a change in ownership and that there was no reason to believe that the employees within the bargaining unit had changed their minds on representation merely because the employer's identity had changed.

This was an important and far reaching decision. If sustained, it would have gone beyond affirming that a purchaser of an operation had the duty to recognize the Union and to honor the collective bargaining agreement of a seller. It would also have meant that one who had not even purchased the business but rather had taken over the performance of the same work, and hired as new employees a majority of the seller's employees was bound to the predecessor's labor obligations just as if there had been continuity of operations and a purchase.

On appeal, the Second Circuit Court of Appeals refused to enforce that part of the Board order which required the successor company to abide by all terms of the collective bargaining agreement negotiated between the predecessor and the union representing the predecessor's employees.[18] The Court, however, did find that because Burns had hired a majority of the employees who had been represented by the Union, Burns was a successor as to the bargaining duty toward the Union. The Circuit Court thereby limited the operation of the Board's order and the employer's obligation to that of recogni-

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17. In addition, charges were also filed under other sections of the Act. However, those are not germane to the successor issue.

18. *William J. Burns International Detective Agency, Inc.*, v. NLRB, 441 F.2d 911, 77 LRRM 2081 (CA 2, 1971).

tion and the duty to bargain with the union. In a landmark decision which was probably the most widely discussed Supreme Court labor case that year, the Supreme Court upheld the Second Circuit's decision.

The Supreme Court agreed with the Board and the Circuit Court in *Burns* that Burns was obligated to recognize and bargain with the union. However, the Supreme Court also stated that it would have been a different case if Burns had not hired the majority of the employees already represented by a Union certified as bargaining agent. In fact, Justice White, writing for the Court stated in a footnote[19] the following:

> The Board has never held that the National Labor Relations Act itself requires that an employer who submits the winning bid for a service or who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be assumed by the employer. . . However an employer who declines to hire employees solely because they are members of the Union commits 8(a) (3) unfair labor practice. (Citations omitted)

The Court went on to state that it did not follow, however, from Burns' duty to bargain that it was bound to observe the substantive terms of the collective bargaining contract the union had negotiated with Wackenhut and to which Burns had in no way agreed. The Court further stated that the Board's decision was not in accord with prior Board decisions which had held that the success or employer was not bound by the substantive provisions of the collective bargaining contract negotiated by its predecessor. The Court distinguished *Wiley* on the basis that *Wiley* had arisen in the context of a suit under Section 301 of Labor Management Relations Act to compel arbitration while *Burns* had arisen in the context of a National Labor Relations Board proceeding wherein the Board was expressly limited by provisions of Section 8(d) of the Act. The Court went on to further distinguish *Wiley* by stating that *Wiley* was a narrow holding dealing with a merger occurring against a background of state law which embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation.[20] The Court pointed out that there was no merger, no sale of assets, no

19. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 80 LRRM at 2228 (1972).
20. *Id.*, 80 LRRM at 2230.

dealings whatsoever between Wackenhut and Burns in the *Burns* case.

In very significant language, the Court stated the following:

> A potential employer may be willing to take over a moribund business only if he can made changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.[21]

In an attempt to narrow its decision, however, the Court also stated:

> Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchased, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract.[22]

The Court further determined that Burns had not committed an unfair labor practice by changing the terms and conditions of employment which had existed under Wackenhut and establishing initial terms and conditions of employment as it saw fit. The Court stated that at the time Burns offered initial terms of employment, it was not clear whether Burns was going to hire a majority of the former employees, thereby incurring the duty to bargain with the union. As a result, at the time Burns offered the initial terms of employment, it had no duty to bargain. This duty matured later. Accordingly, Burns did not violate the Act by offering initial terms of employment, including wages at a lower level than were in existence under Wackenhut's contract. The implication of this latter holding is important.

What this in effect meant was that if an employer did not hire the employees of his predecessor, he was bound neither to recognize the predecessor's union as barbaining agent nor to honor the collective bargaining agreement which the predecessor had. A caveat should issue forth at this time, however. An employer cannot refuse to hire employees of a predecessor merely because such employees belong to a union or have engaged in concerted activity. Both pre-*Burns* and post-*Burns* cases make it clear that in hiring its full complement of employees, the successor employee violates the Act if it refuses to hire

21. *Id.*, 80 LRRM at 2231.
22. *Id.*, 80 LRRM at 2232.

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predecessor employees because of their union activities while in the employ of the predecessor.[23] In one case, a Circuit Court upheld a Board ruling that successor employer violated the Act by hiring only predecessor employees who indicated they were non-union.[24] Absence such discriminatory hiring practices, however, the successor ordinarily has no obligation to bargain until after the transfer and after the rehiring is substantially complete, and then only if he hires a majority of the former union-represented employees. Accordingly, the duty to bargain arises too late to allow the union to apply pressure and to bargain over job security or the hiring of the predecessor's employees.

IN THE WAKE OF BURNS

The *Burns* decision left many unanswered questions. In the wake of *Wiley* and *Burns*, the United States Court of Appeals in Philadelphia ruled that a union's collective bargaining contract with a certificated common carrier does not necessarily terminate upon a sale of all the company's captial stock to a purchaser who changed the company name without substantially altering its business operations or hauling activity.[25]

This case came before the Court on a motion for summary judgment by the Federal District Court for the Western District of Pennsylvania, and for purposes of its consideration of the case, the Court of Appeals considered all allegations in the union's complaint as being correct. In this case, the Court of Appeals accepted the facts presented by the union that the owner of a trucking company who had a labor agreement with a Teamsters' local sold his stock to another individual. The trucking company had in its name certificates of public convenience issued by the Pennsylvania Public Utility Commission. The day after the sale, the new owner of the corporation discharged the nine drivers who were represented by the union. The union subsequently brought a suit under Section 301 of the Labor Management Relations Act. The contention of the Union was that the contract with the employer survived the sale of stock and that the purchaser was bound under the contract. Accordingly ' the discharge of the drivers violated the labor agreement. The Court of Appeals distinguished the *Burns* decision on the basis that the *Burns* decision

23. *Greengate Mall, Inc.*, 209 NLRB No. 2, 85 LRRM 1303 (1974).

24. *NLRB v. Tragniew, Inc.*, 470 F.2d 669, 81 LRRM 2336 (CA 9, 1972). See also *Crotona Service Corp.*, 200 NLRB 738, 82 LRRM 1110, (1972).

25. *Teamsters, Local 249 v. Bill's Trucking, Inc.*— F.2d—, 85 LRRM 2713, (CA 3, 1974).

stated it was only applicable to Labor Board determinations in which Section 8(d) of the Act was applicable. Moreover, the transaction in the *Bill's Trucking* case was a purchase of stock rather than a substitution.

THE HOWARD JOHNSON CASE

Subsequently, in 1974, the Supreme Court issued another landmark decision which further extended the principles which it had set forth in *Burns*. This case, the *Howard Johnson* case[26] concerned the purchase of assets of a company. In the case, the Howard Johnson company was the bona fide purchaser of the assets of a restaurant and motor lodge. The union was the bargaining representative of the employees of the previous operator, and a collective bargaining agreement had existed with the predecessor. In commencing its operation of the restaurant, Howard Johnson conducted extensive interviews with prospective employees and ended up hiring only a small fraction of the predecessor's employees. Taking a page from the *Wiley* decision, the union attempted to require Howard Johnson to arbitrate under the arbitration provision of the collective bargaining agreement of its predecessor the extent of Howard Johnson's obligations to the predecessor's employees.

In its decision in *Howard Johnson*, the Supreme Court struck down this attempt. In so doing, the Supreme Court recognized that the decision in *Burns* was somewhat inconsistent with the decision in *Wiley*. The Supreme Court retracted its prior distinction of a difference between predecessor-successor issues in Labor Board proceedings as opposed to judicial proceedings under Section 301 of the Labor Management Relations Act. The Court stated that such a distinction is inconsistent. The Court did say that there was a difference in the form of the transaction. *Wiley* involved a merger, as a result of which the initial employing entity completely disappeared. Accordingly, the disappearance of the original employing entity in *Wiley* meant that unless the union were afforded some remedy against *Wiley*, it would have no means to enforce the obligations in its collective bargaining agreement. The Court stated that *Howard Johnson*, however, involved only a sale of some assets, and the initial employer remained in existence as a viable corporate entity, which the union could look to to satisfy any obligation under its labor agreement. The Court found that since there was plainly no substantial continuity of ident-

26. *Howard Johnson Co. v. Detroit Jt. Board*, 417 U.S. 249, 86 LRRM 2449 (1974).

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ity in the work force hired by Howard Johnson with that of the predecessor's work force, and no express or implied assumption of the agreement to arbitrate, the Circuit Court had erred in compelling the company to arbitrate the extent of its obligations to the predecessor employees.

The decision in *Howard Johnson* is important. Not only did it specifically rule that in a transaction involving the purchase of assets, the purchaser is not obligated to honor the collective bargaining agreement of the predecessor nor to arbitrate liabilities under that collective bargaining agreement, it also reaffirmed the Supreme Court's ruling on the lack of obligation to hire the predecessor's employees and the right of a purchaser or successor in interest to set unilateral terms and conditions of employment, providing such action is taken before a duty to bargain on the basis of hiring a majority of the predecessor's employees matures. Of course, it must again be emphasized that the Board and the Courts have scrutinized carefully the purchaser or successor company's failure to hire predecessor employees particularly when they were experienced or skilled and new-hirees were inexperienced or unskilled. If such hiring is done, however, pursuant to good personnel practices, as was the case in *Howard Johnson*, this problem can be overcome. However, proper planning and counseling is necessary in respect to the hiring problem, as well as to the problem of the setting of initial terms and conditions of employment and the determination of when the obligation to bargain matures in cases where a majority of the predecessor's employees are hired by the successor.

NATIONAL MASTER FREIGHT AGREEMENT PROVISIONS

Although many transactions which involve the sale of operating rights or an operation would not involve companies which are signatory to the National Master Freight Agreement with applicable local supplements, many will. Accordingly, it should prove beneficial at this point to consider briefly the successor or transfer language in that agreement. Much of what we say may be applicable to other jointly bargained labor agreements, such as Eastern Conference Tank Haul Agreement or other such agreements.

The successor provisions of the National Master Freight Agreement are perhaps the most sophisticated of any such clauses to be found in any collective bargaining agreement in the United States. The provisions affecting the parties to a sale of rights, to an operation or to a business are found in two sections of the Master Freight Agree-

ment. The first such provisions are found in Article 1 of the Agreement, attached hereto as Appendix 1. The other provisions, which impose detailed interpretations on seniority applications, depending on the nature of the transaction, are found in Article 5, attached hereto as Appendix 2.

Aside from Board or Court case law, an obligation may arise from the terms of a master agreement to which both parties to the transaction are party, through participation in either joint or multi-employer bargaining.

The first paragraph of ARTICLE 1. Section 3. of the National Master Freight Agreement contains a usual type of successor clause found in many labor agreements. However, in succeeding paragraphs the ingenuity of the Teamsters International is again recognized. That language found in succeeding paragraphs is broad enough to cover almost any type of transaction. In addition, recognizing the fact that a successor clause may not be binding upon a purchaser who is not otherwise signatory to the agreement, the second paragraph of Section 3 attempts to place a blanket liability to the seller's employees upon the seller, until the purchaser agrees to assume "the obligations" of the agreement.

Firmly binding other signatories to the Agreement who may purchase rights from a signator, paragraph 3 provides that such a signatory purchaser must accept the affected employees of the signatory seller in accordance with the seniority provisions of the Agreement applicable to sales or mergers, found in ARTICLE 5. Section 3. For some reason, probably pertaining to protection from a "hot-cargo" agreement charge, there is a provision that when rights are sold to a non-signator, and such purchaser is the sole bidder on such rights, the provisions of the National Master Freight Agreement shall not apply. This is an important exclusion which must be kept in mind by practitioners representing both signatory sellers and non-signatory purchasers alike.

The notice requirements are contained in the last paragraph of Section 3 and require that notice of the existence of the agreement shall be made in writing to the buyer at the time the seller executes the contract or transaction. A copy is to be sent to the Union. These

27. *Greengate Mall, Inc.*, Supra. See also *Foodway of El Paso*, 201 NLRB No. 140, 82 LRRM 1637 (1973); *Central American Airways*, 204 NLRB No. 25, 83 LRRM 1314 (1973); for prior cases see *K.B & J. Young's Supermarkets, Inc. v. NLRB*, 377 F.2d 463, 65 LRRM 2369 (CA 9, 1967), cert. denied 389 U.S. 841, 66 LRRM 2307 (1967); *NLRB v. New England Tank Industries*, Inc. 302 F.2d 273, 50 LRRM 2036 (CA 1, 1962), cert. denied, 371 U.S. 875, 51 LRRM 2297 (1962).

obligations are in addition to the obligations of the seller to bargain over either the sale or the effects of the sale, depending on the nature of the transaction, under the provisions of the Labor Management Relations Act. Such an obligation is discussed later in this paper.

Article 5 of the National Master Freight Agreement contains Section 3, dealing with seniority rights of employees in situations involving mergers, purchases, acquisitions, sales and so forth. Generally, the principle of dovetailing the seniority of the employees of the selling carrier with that of the purchasing carrier at the operation affected is followed. However, the provisions of Section 3 should be studied inasmuch as there are different provisions involving the acquisition of parallel, as opposed to non-parallel, operating rights. Moreover, where both parallel and non-parallel operating rights are involved, a combination of the guidelines are applied. Practitioners representing buyers especially, should be aware of sub-paragraph (5) of Section 3. That provision has to do with operations under temporary authority. The application of the paragraph is not entirely clear. However, the writer, in discussing the interpretation of this clause with employer-representatives on the employer's negotiating committee and with the employer secretary of one of the Conference grievance committees was informed that one possible interpretation could be that where permanent authority was disallowed, after operations had taken place under the temporary authority, a surviving company could face a possible liability and in the extreme, could be required to make those employees who suffered economic loss during the temporary authority operating period whole.

One possible way to determine what the seniority applications involved in a transaction will be before the closing date would be to make a timely submission to the Area Change of Operations Joint Committee. The danger in such a course of action, however, may be in prejudicing whatever right a purchaser may have to assert that it is not a successor as to any given location or terminal or in asserting that it does not face certain obligations in respect to a particular part of the transaction.

The practitioner handling an involved transaction wherein both the seller and buyer are signatories to the National Master Freight Agreement would do well both to analyze the contract and operations involved and to "sound out" local Motor Carrier Association Managers in the area, to benefit from their useful experience.

LIABILITY OF A SUCCESSOR FOR PREDECESSOR'S UNFAIR LABOR PRACTICES

In addition to the bargaining duty enforced by the National Labor Relations Board, and the question of contractual obligations and a possible 301 suit, an attorney representing a buyer must also evaluate possible liabilities involved in unfair labor practices committed by the employer. Generally, these involve violations of the Labor Management Relations Act which have occurred, but in respect to which either no charge has been filed, or no decision rendered. Such charges may run the gambit from unlawful discharges, to violations of rights to engage in concerted activity, to refusal to bargain charges.

ALTER EGO THEORY

One of the earliest positions taken by the National Labor Relations Board in respect to successors was in a case referred to earlier in this paper, the *Regal Knitwear* case.[28] The Supreme Court, in upholding the Board in *Regal Knitwear Co.* discussed in great length the question of identity of interest between employers. Partly as a result of this, the theory continued to be applied by the National Labor Relations Board that if a company is closely related in a number of factors to a predecessor, that company will be held responsible for the actions of that predecessor in committing unfair labor practices under the Labor Management Relations Act.[29] In the *Atlanta Paper Co.* case[30] the Board declared some of those factors to be:

1. Stockholders and officers.
2. Operations.
3. Assets.
4. Employees.
5. Supervisory force remain the same.

It is fairly certain that if the National Labor Relations Board finds a company to be the alter ego of a predecessor, it will hold the successor company liable for the unfair labor practices of the predecessor.[31]

In a case a little over a year ago, to the interest of those of us involved in the motor carrier field, the Labor Board found that a

28. *Regal Knitwear Co. v. NLRB*, supra.
29. *Ozark Hardwood Co.*, 119 NLRB 1130, 41 LRRM 1243 (1957), enforced in part, 282 F.2d 1, 46 LRRM 2823 (CA 8, 1960).
30. *Atlanta Paper Co.*, 121 NLRB 125, 42 LRRM 1309, (1958).
31. *Oilfield Maintenance Co., Inc.* 142 NLRB 1384, 53 LRRM 1235 (1963).

corporation engaged in the trucking and warehouse business was not the alter ego of a trucking company that had gone out of business after a union had negotiated a collective bargaining agreement with the company on behalf of its drivers and dock workers. Some of the factors we listed above were present in that case.[32] In that case, *Co-Op Trucking*, both corporations were owned by the same individual, who was the sole stockholder of each. The Board found, however, that the corporations were individual corporations engaged in different businesses. Although the new corporation took over 6 percent of the former corporation's business, the Board found that there did not appear to be a transfer of operations. Other dissimilarities in operating were also found by the Board. Also involved in the *Co-Op* case was a partnership composed of former officials of the trucking company that had gone out of business. In respect to such partnership, the Board pointed to the fact that the partnership only took over one-third of the company's former customers and there was some difference in operations. However, the *Co-Op* case came dangerously close in the game of brinksmanship. Do not be misled by it. If there is a substantial common identity of ownership in a transfer of operating rights transaction, the practitioner must be very careful to set up the transaction so that the alter ego principle is not applied.

ARMS-LENGTH TRANSACTIONS

The Labor Board has altered its position over the years several times in respect to whether a good faith purchaser is liable for the unfair labor practices of the seller. At one point, the Board went so far as to state that it had no authority to enforce remedial orders in unfair labor practices against any party other than that party which had actually engaged in the violation of the Act.[33]

The present Board law on this aspect was set down in the *Perma Vinyl* case.[34]

The key to the legal principles set forth in the *Perma Vinyl* case is *notice*. This writer does not feel that *Perma Vinyl* established that a purchaser must have *actual knowledge* of the unfair labor practice of the seller in order to be held liable. The actual holding in *Perma Vinyl* was that a purchaser which operates the business in a basically unchanged form under circumstances "which charge him with notice of

32. *Co-Op Trucking Co.*, 209 NLRB No. 138, 86 LRRM 1242 (1974).

33. *Symns Grocer Co.*, 109 NLRB 346, 34 LRRM 1326 (1954).

34. *Perma Vinyl Corp.*, 164 NLRB 968, 65 LRRM 1168 (1967) enforced, 398 F.2d 544, 68 LRRM 2913 (1968).

unfair labor practice charges against its predecessor", will be held responsible for remedying these violations of the law.

Following on the heels of the decision in *Burns*, the Supreme Court ruled on the issue of a seller's liability for the predecessor's unfair labor practices in 1973 in *Golden State Bottling Co.*[35] After some discussion as to actions being binding on defendants and those in "privity" with them the Supreme Court set forth that:

> We hold that a bona fide purchaser, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor for purposes of Rule 65(d).

In this case, the Court discusses "knowledge" as opposed to the test of being "charg(ed) . . . with notice of unfair labor practice charges against his predecessor'" which we had pointed out to be present in *Perma Vinyl.*

Accordingly, care must be exercised in any purchase transaction. The question of being charged with notice was not actually resolved in the *Golden State* case, and possible liability to a purchaser could remain in cases of "knew or should have known". We submit that it would be very easy for the Labor Board to find that a purchaser is charged with notice that an unfair labor practice existed, even if they cannot establish that he had actual knowledge of that unfair labor practice. The liabilities involved in such a finding could be great. Care must be exercised to insulate a client against such liability.

In fact, in justifying its application of the *Perma Vinyl* principles to a bona fide purchaser, the Supreme Court stated that the purchaser's liability for remedying the unfair labor practice may be reflected in the price he pays for the business, or he may secure an indemnification clause in the sales contract which will indemnify him for liabilities arising from the seller's possible prior unfair labor practices.

It would appear then that the courts would have little sympathy for a purchaser who acquired an operation or merely operating rights, was deemed to have operated under circumstances which charged him with notice of the unfair labor practice charges or possible charges against the seller, but had not obtained an indemnification clause from such seller.

In fact, even a release or agreement with the union to go along with such a sale would not relieve the purchaser from liability for an unfair labor practice as a result of charges filed by individual employees

under the Labor Management Relations Act.

One question which has not been answered by the courts, but which we submit is important, is the possible liability of a purchaser for the unfair labor practices of the seller in failing to discharge his duty to bargain with the union over the effects of the sale on seller's employees. This type of case has arisen frequently, but we know of no instance where the charging party attempted to hold the buyer liable. Quite frequently, however, a seller will have definite and sufficient information to charge him with notice that such a violation is occurring, and might even participate in the decision not to discharge the duty to bargain. Again, care in drafting must be taken to avoid what might be considerable liabilities under the *Perma Vinyl* and *Golden State Bottling Co.* principles.

LIABILITY OF PURCHASER FOR SELLER'S VIOLATIONS OF TITLE VII OF THE CIVIL RIGHTS ACT.

This area of the law is as of yet unsettled. The practitioner who handles the sale of an operation or of operating rights or of an entire business should keep in mind, however, a recent decision by the Sixth Circuit Court of Appeals. The issue in that case,[36] *MacMillan Bloedel Containers, Inc.*, is the same issue presented to the Supreme Court in *Golden State Bottling*, except in the context of Title VII of the Civil Rights Acts. In *MacMillan Bloedel Containers*, charges had been filed against the predecessor before MacMillan Bloedel Containers had taken over the operation. The Court divided this determination into two aspects. The first question presented was whether a company that acquired another company's facility could be liable under Title VII for the seller's unlawful employment practices. In answering this question, the Court of Appeals reviewed the various decisions of the United States Supreme Court regarding the successor issue. The court stated that interests of the employer and the discriminatee must be weighed in any successor case presented under Title VII. The Court pointed out that where the seller no longer had any assets, monetary relief as a result of a charge filed under Title VII would be precluded. Going further than the cases under the Taft Hartley Act, the Circuit Court charged that such a result could encourge evasion in the guise of corporate transfers of ownership. Addi-

35. *Golden State Bottling Co., Inc. et al., v. NLRB*, 94 S.Ct. 414 84 LRRM 2839 (1973).

36. *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 . F.2d 1086, 8 FEP Cases 897, (CA 6, 1974).

tionally, where the relief involved seniority, reinstatement, or hiring, only the successor company could satisfy any remedy. Accordingly, the Court of Appeals stated that it was borrowing from the administration of the Taft Hartley Act in finding that the purchaser could be liable for the Title VII violations of its predecessor.

The Second issue considered by the Court in *MacMillan Bloedel Containers, Inc.* was whether a new charge under Title VII had to be filed naming the purchaser before the EEOC or the discriminatee could proceed. The Court answered that no new charge had to be filed. MacMillan Bloedel Containers, Inc. had notice of the charge against the seller and had custody and control of all the related documents. Therefore, a second filing with the EEOC would serve no purpose other than a creation of an additional procedural legality.

Although the Court in *MacMillan Bloedel Containers, Inc.*, adopted the requirement set forth by the Supreme Court in *Golden State Bottling* as to knowledge by the purchaser of the claims against the predecessor, different problems are raised in the context of a proceeding under Title VII of the Civil Rights Act. Charges administered by the Regional Offices of the National Labor Relations Board under the Labor Management Relations Act are generally handled expeditiously, with a number of items of correspondence passing often within weeks of a charge being filed. Those who have experienced the administrative procedures of district offices of the Equal Employment Opportunity Commission will verify that charges are handled differently, and notice is not as definite or sure within the same time period.

Moreover, inasmuch as the Court of Appeals applied the principles set forth in the *Golden State Bottling* case, wherein actual knowledge was present, it would only be a logical extension to apply the wording in the *Perma Vinyl* case which talks about "circumstances which charge him with notice of unfair labor practice charges against his predecessor." Accordingly, until the law is more settled in respect to this issue, those drafting agreements for the sale of an operation, the sale of rights or the sale of a business should attempt to include some protection for the purchaser of liability under Title VII charges. Warranties that no charges under Title VII of the Civil Rights Act have been filed should accompany indemnification provisions in the agreement.

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MISCELLANEOUS LIABILITIES, PITFALLS AND PRATFALLS WHICH MAY FACE THE PURCHASER.

There are many miscellaneous pitfalls which face the unwary or the incautious in respect to the purchase of rights, an operation or a business. The presence or absence of many of these are controlled and determined by those principles set forth in the first section of this paper. It must first be determined whether the purchaser has the duty to bargain with the seller's union or to accept the seller's collective bargaining agreement. For the sake of this section of the paper, however, we will assume that the purchase does involve the type of transaction covered by the terms of the National Master Freight Agreement, to which both parties are signatories. Accordingly, under the concept of one multi-employer, multi-union bargaining group, the purchaser should be aware of miscellaneous liabilities it might face. The same might be said for any purchaser who assumes the bargaining agreement of the seller, or to a purchaser of the stock of a corporation or a survivor upon merger. These miscellaneous liabilities are in addition to those mentioned previously in the paper in respect to the National Master Freight Agreement and are set forth as follows:

First, it must be determined what vacation pay is owing the employees who either remain with the corporation in case of a sale of stock, or who are hired or retained by a purchaser pursuant to a collective bargaining agreement commitment or obligation. This is further complicated by the fact that vacation "year" periods vary from area to area and from collective bargaining agreement to collective bargaining agreement. If the purchase of a number of terminals with accompanying operating rights takes place, a purchaser may face several different determinations on vacation pay liability, depending on the area in which the terminal is located. Generally, the sales agreement should be drafted so that the seller remains liable for and provides a means for satisfying any vacation liability which has either become due or accrued prior to the effective date of the sale. The best arrangement is for such vacation pay liability to be escrowed at the time of the closing of the transaction. It is generally better for the parties to agree upon a means of prorating the vacation over the period of each vacation year to avoid double claims, or a claim against each employer based upon the employees possibly satisfying the eligibility requirements of what might be deemed as two separate employers for vacation pay purposes. The rate at which such vacation will be paid should be anticipated inasmuch as a wage increase might

occur prior to the money actually being paid out to the employee although at the time of the sale a lower wage rate was in effect. Indemnification clauses are generally not adequate to protect a buyer inasmuch as large sums of money are often involved in vacation pay liability. This is an issue which should be carefully thought through.

Second, most agreements for sale of operating authority or of an operation or business contain guarantees that all workmen's compensation payments, social security payments, withholding tax payments and any other payment due the state or federal goverment will be discharged prior to the closing of the transaction. Of course, the nature of the transaction would effect the liability of the purchaser. A sale of stock in an operation would certainly involve different liabilities from the sale of a small part of operating rights from a going concern. However, this is an issue which should be analyzed and reviewed prior to the drafting of the sale agreement and all liabilities in respect to this issue should be taken care of at or prior to the closing of the transaction.

Third, purchasers have occasionally incurred an unexpected liability in respect to pay for a holiday which may occur on the day before or on the effective date of a transaction. In one particular transaction involving both the sale of operating authority as well as equipment and the leasing of a terminal, the purchaser moved the new equipment to the shipper's loading yard the day before the effective date of the transaction; then he attempted to claim that the seller was liable for the holiday which occurred on the day of the effective date of the transaction. Several thousand dollars in vacation pay were involved. This is not an issue which will always be present in any negotiations for a sale but is something that practitioners should keep in mind during discussions on the transaction.

Fourth, if a purchaser takes over an operation and the employees involved, together with the collective bargaining agreement, it should be fully aware of any "barn" conditions or local working conditions which have attained the status of past practices or come under a "maintenance of standards" clause and which the union and employees expect the purchaser to live up to. Every "barn" or terminal has its unique practices in respect to dispatch and conditions of work. A purchaser should not go into such a situation with his eyes closed. In evaluating whether or not an operation will be profitable, it is important to keep in mind any conditions or practices which may be imposed on the employer which would result in higher costs of operation. Sometimes after analyzing such barn conditions and the next category we will discuss, the purchaser loses interest in a seemingly

profitable extension of his existing operation.

Fifth, if a buyer accepts the seller's collective bargaining agreement and employees, he should be prepared to accept any local agreements which might exist. Such local agreements are sometimes more dignified lists of barn conditions to which an employer is bound. Such local agreements may also take the form of a rider to the National Master Freight Agreement with local supplements or to another multi-employer, multi-union master collective bargaining agreement. Again, without being apprised of the greater costs and obligations that such local agreements pose, a purchaser may not fully realize the restriction under which he may operate and the resulting increased costs on his balance sheet.

Sixth, one of the most commonly present liabilities are delinquencies on the part of the seller to the union's welfare fund and to the union's pension fund. Often a seller is selling because he has a cash flow problem. Accordingly, it is a strong temptation not to make up-to-date payments to the funds once a sale is in sight. Again, whether the purchaser has an obligation to pay into the welfare and pension funds for delinquencies of the seller depends in large upon the nature of the transaction and the labor agreements to which the parties are bound. It would be naive to assume in any given situation, without further investigating the issue, that the buyer will definitely not be stuck with any liability by a grievance award or a Labor Board decision in respect to such payments.

EMPLOYEE SUITS

Among the miscellaneous pitfalls faced today by parties to a sales transaction is the specter of an employee's suit against either the seller or buyer. With the dawn of consummerism and the class action lawsuit, more and more direct suits are brought by employees against employers based on everything from age discrimination, to Title VII violations, to violations of the labor laws. Several transactions recently in the trucking field have fostered such suits. Accordingly, at this point we will review in depth the legal basis for such suits, and defenses available.

It is apparent from the discussions in this paper that either a seller or a purchaser may in some circumstances face liability if a suit is brought by the union under Section 301 of the Labor Management Relations Act. Certainly, it can safely be said that either the seller or the purchaser faces the *possiblity* of such a suit, whether meritorious or not. By the same token, under certain circumstances either

the seller or the purchaser can face a suit brought directly by a group of employees or former employees under Section 301. Generally, such suits are barred unless the individual employees have first exhausted their remedies under the collective bargaining agreement and if the union is named also, under intra-union procedures. This rule was set forth by the United States Supreme Court in the *Republic Steel* case[37] in which the Court stated:

> As a general rule in cases to which Federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. See *Humphrey v. Moore*, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed. 2d 370; *National Labor Relations Board v. Miranda Fuel Co.*, 2 Cir., 326 F.2d 172.

However, the Supreme Court has also ruled that where a union breaches its duty of fair representation towards employees, they may bring an action under Section 301 of the Labor Management Relations Act against the employer for breach of a collective bargaining agreement. Such actions are quite common today and are brought through private counsel independent of the union. Generally, if the employees do not attempt to pursue the grievance procedure, the Court will rule against them at the summary judgment state of the proceedings based upon the principles set forth in *Republic Steel Corp.* and *Vaca v. Sipes*.[38]

In order for the employee to have a right to bring the suit independent of the union under Section 301, as stated above, breach of the duty to fairly represent on behalf of the union must be alleged and proven. Generally the courts insist upon malice or bad faith being involved in such a breach by the union.[39] Similarly, if the union is also named as a party defendant in the suit, exhaustion of intra-union grievance procedures is generally a condition precedent to a suit against the union. However, where attempts to exhaust intra-union procedures would be fruitless, the employees need not pursue those remedies before instituting direct court action against the union and

37. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 651-653, 85 S.Ct. 614, 616, 13 L.Ed. 2d 580 (1965).
38. *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967).
39. See for example: *Tedford v. Peabody Coal Co.*, 383 F.Supp. 787 (1974).

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the employer.[40]

If the employee seniority question involved in the transaction is resolved by agreement with the union and the union agreement is in good faith and is without malice, the courts generally will hold that such agreement does not violate the union's duty of fair representation or cause an action to arise against the employer under Section 301 of the Act. A 1964 Supreme Court decision upheld such an agreement to dovetail seniority lists of two merging companies.[41]

The Labor Board in one dovetailing seniority case in the motor carrier field held that a clause providing for dovetailing of seniority upon merger of two companies within a multi-employer unit was not a per se breach of the duty of fair representation even though the multi-employer agreement was not to be applied in a merger not involving companies outside of the multi-employer unit. The Labor Board ruled the interest of transferability of seniority within the multi-employer unit was of sufficient importance to support the application of the clause. However, although there was not a per se breach of the duty, actual and unlawful motiviation in the application of the clause was proven in the case.[42] In a Third Circuit Court of Appeals dovetailing case, *Price v. Teamsters*,[43] the Court found no breach of fair representation in a situation where the union negotiated an agreement for dovetailing of seniority at a new facility to which certain employees were transferred. Such a finding was made even though the union had previously told employees that they would have to transfer to the new terminal at the bottom of the seniority list, and some employees had transferred pursuant to that advice. In fact, in *Price* the Court again ruled that the existence of a contract clause which might be interpreted as prohibiting dovetailing did not prevent the union from agreeing to dovetail.

Although most courts have agreed that mere negligence on the part of the union is such a situation does not establish a breach of the duty of fair representation,[44] at least one of these same Circuit Courts has

40. *Petersen v. Rath Packing Co.,* 461 F.2d 312, 80 LRRM 2833 (Ca 3). *Vaca v. Sipes*, supra, also provides that where the union has breached its duty of fair representation and the employer has breached its contract, it is the duty of the court to fashion appropriate remedies in regard to the union and employer. Those appropriate remedies are obtained by apportioning the amount of damages to the extent that each party was responsible for such damages, according to the decision in *Vaca.*

41. *Humphrey v. Moore*, 375 U.S. 335, 55 LRRM 2031 (1964).

42. *Teamsters, Local 17 (Colorado Transfer & Storage, Inc.,)* 198 NLRB No. 42, 80 LRRM 1682 (1972).

43. *Price v. Teamsters*, 457 F.2d 605, 79 LRRM 2865 (CA 3, 1972).

44. *Walden v. Teamsters, Local 71*, 468 F.2d 196, 81 LRRM 2608 (CA 4, 1972).

come very close to recognizing negligence as a breach of the duty of fair representation.[45]

Generally, however, both the courts and the Labor Board require that the employees must demonstrate abritrary, bad faith, fraudulent or discriminatory conduct on the part of the union to sustain that the union has breached its duty of fair representation, thereby allowing an action against both the union and the employer.[46] Although in one case where the court found that the union was taking a realistic and prudent position by remaining neutral in its dispute between some of its members and the employer[47] and in another where the court found that the union membership itself was sharply divided over the handling of grievances, that no breach of the duty of fair representation took place,[48] the Labor Board in another case found that where a union established its intent only to represent a part of the unit, employees violated the provisions of the National Labor Relations Act.[49]

The observation one may draw from an analysis of the cases involving action by the employees directly against the employer or the employer and the union under Section 301 is that such suits are very frequent although rarely successful. However, the practitioner should keep in mind that such suits are a possibility, and any indemnification clause should be broad enough to cover any liability and legal fees resulting from such an action. If union agreement can be obtained on such subjects as retention or placement of the employees of the predecessor, the risk of considerable liabilities as a result of lawsuits by the seller's employees can be minimized.

Any discussion of miscellaneous liabilities which may exist in a sale of operating rights, an operation or a business must also include a reference to a section of the National Master Freight Agreement which was referred to above. That is ARTICLE 5. Section 3.(5). That is the provision that sets forth that where only temporary authority is granted, the company which is to survive will assume the obligations of both collective bargaining agreements during the period of temporary authority. If both the seller and the purchaser are signatories to the National Master Freight Agreement, or if only one party

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45. *Griffin v. Automobile Workers*, 469 F.2d 181, 81 LRRM 2485 (CA 4, 1972).

46. *Trueblood v. Pilot Freight Carriers, Inc.*, 78 LRRM 2715 (DC NC, 1971); *Bowlin v. UAW*, 77 LRRM 2909 (DC Tenn., 1971).

47. *Morris v. Werner-Continental, Inc.*, 78 LRRM 2654 (DC Ohio, 1971).

48. *Dean v. Roadway Express, Inc.*, 78 LRRM 2160 (DC NC, 1971).

49. *Teamsters Local 671 (Airborne Freight Corp.)*, 199 NLRB No. 167, 81 LRRM 1454 (1972).

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is and that party is your client, the clause provides added inducement for attempting to obtain union agreement as to the handling of the seniority question.

The above "shopping-list" of miscellaneous liabilities have not been set forth to create undue alarm or to paint a too-black picture of liabilities which may exist in any given sale. Most of them present problems that can be dealt with. In nine out of ten sales, none of them may ever arise. However, when one of these problems does arise and that problem has not been anticipated, a promising acquisition or purchase may become an expensive nightmare. Careful analysis and investigation into possible liabilities or possible labor related pitfalls is essential for full protection of the client involved in the purchase. This is especially true when the seller may have taken his money and disappeared or may have sunk deeper into a judgment proof condition.

SPECIAL PROBLEMS OF A SELLER—THE DUTY TO BARGAIN UNDER THE LABOR MANAGEMENT RELATIONS ACT

Whether or not a duty exists to bargain with the union over a sale of operating rights or an operation or a business depends on the nature of the transaction. If the transaction is the sale of an employing enterprise, the decision to sell is a managerial decision over which the employer does not have to bargain with the union. In such a case, however, the employer must bargain with the union over the *effects* of the sale on the employees.[50] In other words, no pre-sale bargaining of the decision is necessary, but once the sale decision in respect to the sale is made, the employer has the duty to discuss and bargain over the effect of such sale on his employees.

The above principle applies only to transactions where an entire enterprise is sold. The National Labor Relations Board has fairly consistently held that if an employer operates two or more plants or operations, the employer must bargain with respect to any decision to close one of these operations[51] or to sell a part of the business. In one case, however, the NLRB found that the sale of one operation was in effect the sale of an independent business, even though partly related to the business the employer retained. Justifying its decision, the NLRB stated that the employer's decision to divest itself of one

50. *General Motors Corp.*, 191 NLRB No. 149, 77 LRRM 1537 (1971), Rev. denied, (CA DC, 1972), 81 LRRM 2439.

51. *Ozark Trailers*, 161 NLRB No. 49, 63 LRRM 1264 (1966); *Royal Typewriter Co.*, 209 NLRB No. 174, 85 LRRM 1501 (1974).

operation was a basic management decision entailing a substantial withdrawal of investment capital.[52]

At least one Court of Appeals, also, has ruled that an employer is not required to bargain with the union over a decision to merge with another employer. Such a decision to merge is managerial by nature and is the heart of entrepreneurial control. While such a transaction might involve job security, such an effect cannot be avoided and can be bargained about later. The Court acknowledged that merger negotiations require secrecy, flexibility, and timeliness.[53]

Accordingly, any transaction involving sale of rights or an operation must be fully evaluated to determine whether or not it is of such a nature that a duty arises to bargain with the union over the decision to sell. Even if there is no duty to bargain over the decision, which would entail notification at the commencement of negotiations over the sale, the obligation will exist in most cases to bargain over the effect of the sale on the employees. The exception to this would appear to be where the employees were assumed by the successor along with the collective bargaining agreement and all terms and conditions of employment. Therefore, the sale would have little if no impact on the employees. It is important, however, for the seller's counsel to plan this aspect of the transaction very carefully. In at least one case, the National Labor Relations Board ordered a remedy of full back pay for the employees involved until a genuine impasse was reached in negotiations.[54] This could be a very costly result.

DUTY IMPOSED BY A COLLECTIVE BARGAINING AGREEMENT

As referred to above, the National Master Freight Agreement, and by the same token many independent agreements, contain a notification provision and an assumption of contract provision operating on the seller. The typical notice requirement usually provides that the selling employer shall give notice of the existence of the labor agreement to any purchaser. It is also provided that such notice shall be in writing with a copy to the local union. More important, the National Master Freight Agreement imposes an obligation on the employer in respect to requiring assumption of the labor agreement. In an apparent and intelligent recognition by the Teamsters Interna-

52. *Kingwood Mining Co.*, 210 NLRB No. 139, 86 LRRM 1203 (1974).

53. *Machinists, District 147 v. Northeast Airlines, Inc.*, (CA 1, 1972) 80 LRRM 2197, cert. denied, 409 U.S. 845, 81 LRRM 2390.

54. *Royal Plating & Polishing Co., Inc.*, 160 NLRB No. 72, 63 LRRM 1045 (1966).

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tional that a successor clause in a collective bargaining agreement of a seller will not automatically make the purchaser a successor, the Master Freight Agreement provides that in the event the selling employer fails to require the purchaser to assume the obligations of the collective bargaining agreement (one can assume due to the seniority clause that this includes the employees and the committee-type grievance procedure), the employer shall be liable to the local union and to the employees for all damages sustained thereby. Keeping in mind that the *Howard Johnson* decision reestablished the obligation of the seller to arbitrate disputes under this contract even after the sale is completed and he is no longer the owner of the operation, the above referred-to provision could be a very important provision. If an obligation to submit grievances through the grievance machinery continues to exist, the employer may have the clause strictly enforced and face innumerable liabilities as a result of such application. Although there may be a serious question whether the clause is enforceable due to the fact that it requires imposition of the union security provisions in the collective bargaining agreement as well as the economic conditions, it still remains a dangerous provision to an unwary seller.

INJUNCTIVE ENFORCEMENT OF THE SUCCESSOR CLAUSE ON THE SELLER

Even prior to the *Howard Johnson* decision, unions had filed actions in Federal Court asking that the seller be restrained from completing a sale without including a clause in the sales agreement which would bind the purchaser to the collective bargaining agreement. In one such case, *Meat Cutters, Local 590 v. National Tea Co.*,[55] the District Court left the question of inclusion of the clause in the sales agreement to an arbitrator but granted the injunction against (1) terminating or laying off any of the company's employees pending the arbitration and (2) consummating a sale prior to the arbitration award without including a clause binding a purchaser to the collective bargaining agreement. The decision in *Howard Johnson* has left the door open to additional decisions along this line. In a footnote in that case, Justice Marshall wrote the following:

> The Union apparently did not explore another remedy which might have been available to it prior to the sale, i.e., moving to

55. *Meat Cutters, Local 590 v. National Tea Co.*, (DC Pa., 1972), 81 LRRM 2027, 346 F.Supp. 875.

enjoin the sale to Howard Johnson on the ground that this was a breach by the Grissoms of the successorship clauses in the collective-bargaining agreement. (Citations omitted).

In addition, as pointed out above, a seller might well face suits by individual employees alleging both a violation of the collective bargainging agreement and a failure of the union to discharge its duty to fairly represent the employees.

SECTION 5(2) AND PROTECTIVE CONDITIONS

This article is not intended to discuss fully the background and history of the Interstate Commerce Commission's rulings on Section 5(2) and protective labor conditions. That subject has been dealt with exhaustively in other articles in other years.[56] We will deal with the subject briefly, however, as it effects the drafting of the application to be submitted to the Commission.

Although the motor carrier industry does not come under a specific provision imposing a definite mandate for the protection of interests of affected employees, such as is applicable to railroad mergers or acquistitions,[57] the Commission is required to give weight to "the interest of the carrier employees affected" in any transaction under §5(2).[58]

As a result, the Commission has attempted to determine in transactions under §5(2) whether the carrier's employees would be adversely affected by the proposed action.[59] In so doing, the Commission frequently refers to and relies upon the representations made in the §5 application regarding the anticipated effect of the transaction upon carrier employees. Such statements are part of the record and have been accepted as evidence by the Commission and the courts.[60] Accordingly, care must be exercised in drafting that part of the application.

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56. See for example a paper presented by John A. Vuono, Esq., at the Continuing Legal Education Seminar sponsored by the Motor Carrier Lawyers Association and University of Denver College of Law, *Employee Interests and Labor*, August 18-22, 1969.

57. 49 U.S.C. §5(2)(f).

58. 49 U.S.C. §5(2)(c).

59. The Commission was upheld in this respect in *American Buslines, Inc. v. United States*, 253 F.Supp. 481 (D.D.C., 1966), aff'd, *Amalgamated Transit Union, AFL-CIO v. United States*, 385 U.S.,38, 87 S.Ct. 240.

60. *Baggett Transp. Co.—Purchase—Hunt Freight Lines, Inc.*, 87 M.C.C. 235 (1961), aff'd, *Baggett Transportation Company v. United States*, 206 F.Supp. 835 (N.D.Ala. 1961).

The Commission will generally impose protective labor conditions only if the employees are represented before the Commission and specifically request such relief.[61]

However, where such relief is requested the Commission may either retain jurisdiction to evaluate the impact of the transaction on the carriers' employees at a later date, or may impose conditions on the transfer, such as severance pay to affected employees.[62]

Such protective conditions have been applied to both the seller and purchaser. Therefore, once again the draftsman of the sales contract must make allowance for this and provide either for indemnification or an escape clause in case this renders the transaction undesirable. This is futher complicated, however, by the fact that the Commission will not impose such protective conditions during a period of operations under temporary authority. In one case, however, where the vendee refused to consummate a transaction that contained a reservation of jurisdiction and the only employees who could be adversely affected were the vendors, the Commission limited the condition to the vendor and its employees.[63]

CONCLUSION

The labor-related problems connected with a Section 5 transaction, or any such transaction, have become increasingly complex. As this complexity grows, so do the demands on the draftsman of the written instrument upon which the transaction is based. In respect to the first draft of the instrument, the draftsman should attempt to protect his client from all possible exposure. As negotiations for the sale proceed, and depending upon the bargaining power and "leverage" of each party, certain protections may be bargained away. Such deletions in the original clauses can only take place, however, after the risks are reviewed and the client fully advised of his possible exposure. At that point he must weigh how hard to insist upon inclusion of the suggested provision protecting him and weigh the prospects of the benefits of closing the transaction against any possible exposure which

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61. *Bi-State Development Agency—Purchase—Vandalia Bus Line*, 93 M.C.C. 579, 593 (1964).

62. *Overnite Transportation Co.—Purchase—Rutherford Freight Lines*, 97 M.C.C. 568, (1964), aff'd, *American Buslines, Inc. v. United States*, 253 F.Supp. 481, (D.D.C., 1966), aff'd *Amalgamated Transit Union, AFL-CIO v. United States*, 385 U.S. 38, 87 S.Ct. 240.

63. *Hudson Bus Lines, Inc.—Purchase—Boston & Maine Transportation Co.*, 58 M.C.C. 133 (1951).

may occur. Again, the nature of the transaction may greatly affect the labor relations liabilities which flow therefrom. Accordingly, advantages of, for example, a stock purchase or purchase of total assets must be considered in light of the various court and administrative body decisions set forth above, and the advantages weighed against possible disadvantages and liabilities. To achieve this, the draftsman and the "closer" of any transaction should be fully knowledgeable in all aspects of the possible labor-related problems which may arise.

APPENDIX 1

NATIONAL MASTER FREIGHT AGREEMENT

ARTICLE 1.

Parties to the Agreement

Section 1.

Employers Covered

The Employer consists of Associations, members of Associations who have given their authorization to the Associations to represent them in the negotiation and/or execution of this Agreement and Supplemental Agreements, and individual Employers who become signatory to this Agreement and Supplemental Agreements as hereinafter set forth. The signatory Associations enter into this Agreement and Supplemental Agreements as hereinafter set forth. The signatory Associations enter into this Agreement and Supplemental Agreements on behalf of their members under and as limited by their authorizations.

Section 2.

Unions Covered

The union consists of any Local Union which may become a party to this Agreement and any Supplemental Agreement as hereinafter set forth. Such Local Unions are hereinafter designated as "Local Union." In addition to such Local Unions, the Teamsters National Freight Industry Negotiating Committee of the International Brotherhood of Teamsters, hereinafter referred to as the "National Union Committee," is also a party to this Agreement and the agreements supplemental hereto.

Section 3.

Transfer of Company Title or Interest

This Agreement and the Supplemental Agreements hereto, hereinafter referred to collectively as "Agreement," shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation, or rights only, are sold, leased, transferred to taken over by sale, transfer, lease, assign-

ment, receivership or bankruptcy proceedings, such operation or use of such rights shall continue to be subject to the terms and conditions of this Agreement for the life thereof.

On the sale, transfer or lease of an individual run or runs, or rights only, the specific provisions of this Agreement, excluding riders or other conditons, shall prevail. It is understood by this Section that the parties hereto shall not use any leasing device to a third party to evade this Agreement. In the event the Employer fails to require the purchaser, transferee, or lessee to assume the obligations of this Agreememt, the Employer (including partners thereof) shall be liable to the Local Union and to the employees covered for all damages sustained as a result of such failure to require assumption of the terms of this Agreement, but shall not be liable after the purchaser, the transferee or lessee has agreed to assume the obligations of this Agreement.

When a signator to this Agreement purchases rights from another signator, the purchaser must accept the affected employees of the seller, in accordance with the provisions of Article 5, Section 3 before hiring any new employees. The applicable lay-off provisions of this Agreement shall apply. When rights are sold to a non-signator to this Agreement, and such purchaser is the sole bidder, the provisions of this Agreement shall not apply. However, in the event of multiple bids, one or more of such bidders being signator to this Agreement, and the seller elects to sell to a non-signator, then all of the provisions of Article 1, Section 3, shall apply.

The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, lessee, assignee, etc., of the operation covered by this Agreement or any part thereof, including rights only. Such notice shall be in writing with a copy to the Local Union, at the time the seller, transferor, or lessor executes a contract or transaction as herein described. The Local Union shall also be advised of the exact nature of the transaction, not including financial details.

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APPENDIX 2

ARTICLE 5.

Section 1.

Seniority Rights

Seniority rights for employees shall prevail under this Agreement and all Agreements supplemental hereto. Seniority shall be broken by discharge, voluntary quit, more than a three (3) year layoff, or for such greater period than three (3) years as a change of operations committee may direct during the third year as provided in Article 8, Section 6 herein, or as provided in any applicable provisions of the Supplemental Agreements. The extent to which seniority shall be applied and accrued as well as the methods and procedures of such application shall be clearly set forth in each of the Supplemental Agreements.

Section 2. The Employer shall not require, as a condition of continued employment, that an employee purchase truck, tractor and/or tractor and trailer or other vehicular equipment, or that any employee purchase or assume any proprietary interest or other obligation in the business.

Section 3. (a) In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved.

In the application of this provision, the following general rules shall apply when operations or terminals are merged, subject however to the provisions of Section 7 of this Article:

(1) The active seniority roster (excluding those employees on letter of layoff) of employees involved in the merger of terminals or operations are to be "dovetailed" by appropriate classification (i.e., road, city,) in the order of the last date of Company employment in such classification In addition, the inactive seniority rosters (employees who are on letter of layoff) shall be similarly "dovetailed" by appropriate classification. The active merged

seniority roster shall be utilized first to provide employment at the merged terminal or operation. If and when additional employees are required at the merged facility, they shall be recalled from the merged inactive roster and after recall such employees shall be "dovetailed" into the active roster with full seniority. Seniority rosters previously combining job classifications shall be continued unless agreed otherwise.

In the application of this rule, it is immaterial whether the transaction is called a merger, purchase, acquisition, sale, etc. It is also immaterial whether the transaction involves merely the purchase of stock of one corporation by another, with two separate corporations continuing in existence, and it is immaterial whether separate terminals of the Companies are physically merged or not, subject, however, to rules 2, 3, and or operation.

(2) If the transaction involved constitutes merely a purchase of permits or rights only by one carrier from another carrier, without the purchase or acquisition of equipment or terminals, the employees of the company selling the permits shall have the right to follow their jobs with dovetail seniority as provided herein.

(3) If the merger, purchase, acquisition, sale, etc. involves two Companies which do not have parallel operating rights then separate seniority lists will be maintained for the separate non-parallel operations. However, there will be one master seniority list for the purpose of fringe benefits, etc., and for the protection of employees laid off on one seniority board when work opportunities are available on the other seniority board and all eligible employees on such other seniority board are employed.

(4) Where the transaction involves both parallel and non-parallel rights then rule 1 above will apply to the parallel rights, and rule 3 will apply to non-parallel rights.

(5) Where only temporary authority is granted in connection with any of the transactions described above, then separate seniority lists shall continue only when terminals or operations are not merged, unless otherwise agreed. The Company which is to survive will assume the obligations of both collective bargaining agreements during the period of the temporary authority.

(6) If in connection with the transactions described in these rules the successor Company determines to discontinue the use of a Local Cartage Company, the employees of that Local Cartage Company who have worked exlusively on the pick-up and delivery service which is retained by the successor Company shall be given opportunity to continue to perform such service as an employee of such successor Company, and shall have their seniority "dovetailed" as described in the above rules.

(7) Area and/or State Committees created pursuant to Local Supplements which have previously established rules of seniority, not contrary to the provisions of such Supplements, and approved by the Joint Area Committee, may continue to apply such rules if such rules are reduced to writing.

(b) If the minimum wage, hour and working conditions in the company absorbed differ from those minimums set forth in this Agreement and Supplements thereto, the higher of the two shall remain in effect for the men so absorbed.

Section 4. The Union reserves the right to cut the road seniority board when the average weekly earnings fall to $200.00 or less. This is not to be construed as imposing a limitation on earnings. After the Union notifies the Employer verbally to cut the board and the Employer refuses to do

so, the Union shall immediately submit its request again in writing to the Employer. If the Employer still refuses to cut the board after receiving the written request, then his refusal to do so shall be considered a grievance to be handled in accordance with the grievance procedure set forth in this Agreement. After the Joint State Committee or the Joint Area Committee renders a decision favorable to the Union, if the Employer still refuses to cut the board then in such case the Union shall have the right to strike notwithstanding any provisions in this Agreement to the contrary, and the Employer shall be obligated to pay all employees under this Agreement for all time lost.

In determining whether average weekly earnings will fall to $200.00 or less, only the earnings of the lower twenty-five per cent (25%) of the drivers on the seniority board, counting from the bottom up, shall be considered. The average shall be calculated for the thirty (30) day period preceding the Union's original request. After such calculation is made, the average earnings of the drivers for the seniority board must also average the top seventy-five per cent (75%) of more than $200.00 per week, or layoff shall be made in accordance with seniority. The above provisions shall also apply to extra board for sleeper drivers exclusively.

Section 5. (a) Opening of new branches, terminals, divisions or operations.

New Branches, etc.

(1) When a new branch, terminal, division or operation is opened (except as a replacement for existing operations or as a new division in a locality where there are existing operations), the Employer shall offer the opportunity to transfer to regular positions in the new branch, terminal, division, or operation in the order of their company or classification seniority, to employees in those branches, terminals, divisions or operations which are affected in whole or in part by the opening of the new branch, terminal, division or operation.

This provision is not intended to cover situations where there is replacement of an existing operation or where a new division is

opened in a locality where there is an existing terminal. In these latter situations laid-off or extra employees in the existing facilities shall have first opportunity for employment at the new operation in accordance with their seniority. If all regular full-time positions are not filled in this manner, then the provisions of the above paragraph shall apply.

(2) Any employee redomiciled by an approved change of operations or voluntary transfer to another point shall upon reporting to his new domicile be deemed to have relinquished his right to return, with seniority, to the domicile from which he was transferred, except under another approved change of operations. Employees who avail themselves of the transfer privileges because they are on layoff at their original terminal may exercise their seniority rights if work becomes available at the original terminal during the three year layoff period allowed them at their original terminal.

Closing of Branches, etc.

(b) Closing of branches, terminals, divisions or operations.

(1) When a branch, terminal, division or operation is closed and the work of the branch, terminal, division or operation is eliminated, an employee who was formerly employed at another branch, terminal, division or operation shall have the right to transfer back to such former branch, terminal, division or operation and exercise his seniority based on the date of hire at the branch, terminal, division or operation into which he is transferring provided he has not been away from such original terminal for more than three years.

(2) When a branch, terminal, division or operation is closed or partially closed and the work of the branch, terminal, division or operation is transferred to another branch, terminal, division or operation in whole or in part, employees at the closed or partially closed down branch, terminal, division or operation shall

have the right to transfer to the branch, terminal, division or operation into which the work was transferred prior to the recall of laid off employees at that location. Such employees transferring as a result of an approved change of operations, shall be dovetailed with their full classification seniority (city or road) into the active seniority roster at the point of redomicile, excluding those employees on letter of layoff. If and when additional employees are required at the point of redomicile, employees on layoff status at that location shall be recalled. When recalled, such laid off employees shall be dovetailed with their full seniority.

(c) When a branch, terminal, division or operation is closed and the work of the branch, terminal, division or operation is eliminated, employees who are laid off thereby shall be given first opportunity for available regular employment at any other branch, terminal, division or operation of the Employer within the Area of the Supplemental Agreement under which employed. The obligation to offer such employment shall continue for a period of three years from the date of closing. However, the Employer shall not be required to make more than one offer during this period. Any employee accepting such offer shall pay his own moving expenses. If hired, he shall go to the bottom of the seniority board but shall have company seniority for fringe benefits only.

Qualifications (d) In all transfers referred to in Section 5(a), (b) and (c) above the employee must be qualified to perform the job by experience in the classification.
If a driver test is required, such test shall be given by a qualified driver-supervisor or driver.

Section 6. The Union shall be entitled to a seniority list each six months upon request. The Employer shall post a seniority list at least once every twelve (12) months. Employees shall make written complaint to the Company and Union within 30 days afer such posting. Any such complaint not settled between the Company and Union shall be submitted to the grievance procedure.

Transportation Law Journal, Vol. 7 [1975], Iss. 1, Art. 2

Section 7. The parties acknowledge that the above rules are intended solely as general standards and further that many factual situations are presented to Committees which necessitate modification or amendment. Accordingly, the Employers and Unions acknowledge that questions of accrual, interpretation or application of seniority rights may arise which require different treatment and it is understood that the Employers and Unions jointly involved, and/or the respective gievance committees may mutually agree to such disposition of questions of seniority which in their judgment is appropriate under the circumstances. The Change of Operations Committee provided in the National Master Freight Agreement or the Supplemental Agreements shall have the authority to determine the establishment and application of seniority in those situations presented to them. In all cases the seniority decisions of the Joint Committees, including the Change of Operations Committees and Subcommittees established by the National Master Freight Agreement and the respective Supplemental Agreements shall be final and binding.