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On three occasions since 1964 the Supreme Court has grappled with the problem of the applicability of a collective bargaining agreement, that was negotiated with a predecessor employer, to a successor employer.1 Substantial commentary has been directed at the Court's opinions in general and at the viability of arbitration clauses in particular.2 The focus of most of this discussion has been on the issue of the successor's duty to arbitrate; the effect of an order to arbitrate has not been the subject of inquiry by either courts or commentators. Although the order to arbitrate in most cases may lead directly to resolution either through direct negotiation or arbitration,3 the scope of the arbitrator's authority and the appropriate standard of judicial review for his decision can ultimately have as substantial an impact on the

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1. See John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272 (1972); Howard Johnson Co. v. Detroit Local, Hotel Employees, 417 U.S. 249 (1974). Although the term "successor" has been used to indicate a legal conclusion that rights and obligations have attached, the Court in Howard Johnson indicated that this use is not meaningful. The relevant focus is on the specific rights and obligations acquired by the new employer. 417 U.S. at 262 n.9. As used herein, "successor" refers to any employer alleged by a union to be obligated to abide by some or all of the provisions of a previous employer's collective bargaining agreement which the new employer had not contracted to assume. The successor may have secured its position through merger, stock acquisition, reorganization, or purchase of existing assets of a business entity, unless the means of acquisition is otherwise indicated.


3. As a practical matter the order to arbitrate particular grievances has seldom resulted in an eventual arbitral award. Generally, such an order spurs a negotiated settlement. See Goldberg, supra note 2, at 764; Slicker, supra note 2, at 1085–86.

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rights and duties of the successor as the initial decision mandating arbitration. Moreover, the same policy considerations applicable to determining whether there should be arbitration apply to the arbitration process itself and the judicial review thereof.

In *United Steelworkers v. United States Gypsum Co.* the Court of Appeals for the Fifth Circuit reviewed an arbitral award against a successor employer. In so doing, the court applied the doctrine which traditionally has governed arbitration awards against parties who have contracted to arbitrate. This note will examine the arbitral process in *Gypsum* against the background of the successor’s duty to arbitrate and the standards evolved to govern this arbitration process. It concludes that the special circumstances under which the successor employer faces arbitration require imposition of cognizable limits on the authority of the arbitrator, subject to the review of the courts. Finally, two such standards will be posited to delineate limits of the arbitrator’s power and to establish parameters for judicial review of arbitral awards.

I. THE BACKGROUND OF GYPSUM

In 1964 the United Cement Company and the United Steelworkers of America renewed for three years a collective bargaining agreement covering the production and maintenance workers on the Company’s lime plant in Montevallo, Alabama. The agreement included a provision for the arbitration of disputes relating to the interpretation or application of the contract. With two years of the agreement remain-

4. 492 F.2d 713 (5th Cir.), cert. denied, 419 U.S. 998 (1974) (*Gypsum II*).
5. *See* text accompanying note 44 *infra*.
6. The applicable provision in the collective bargaining agreement provided:

    Should differences arise between Company and the Union, or its [sic] members employed by the Company, as to the meaning and application of the provisions of this Agreement, or should any local dispute of any kind arise under the contract, there shall be no suspension of work or slowdown by the employees on account of such differences, nor any lockout by the Company, but an earnest effort shall be made to settle the differences.

    If the difference or differences are not satisfactorily adjusted . . . the matter may be referred to arbitration by the Union by notifying the Company in writing . . . .

    The arbitrator shall only have jurisdiction and authority to interpret, apply, or determine compliance with the provisions of this agreement. The arbitrator shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of this contract. The decision of the arbitrator shall be final and binding upon both parties.

*See Gypsum II, 492 F.2d at 730 n.32.*
ing, the owner closed the plant and sold its physical assets to an unrelat-
ated company. One week later the successor company, United States Gypsum, reopened the plant and rehired all but three of United Cen-
tement’s employees on substantially the same terms of employment.

Subsequently, Gypsum refused to recognize the validity of the collec-
tive bargaining agreement, and the union filed suit in federal court under Section 301 of the Labor Management Relations Act (LMRA) to compel arbitration of its grievances. Gypsum in turn challenged the union’s majority status by filing a representation peti-
tion with the National Labor Relations Board (the Board) seeking to have the union decertified. Before the election, the district court or-
dered Gypsum to submit the question of the extent of its obligations under the collective bargaining agreement to arbitration. While Gypsum’s appeal of that decision was pending, the Board ordered a representation election in which the union lost and thereafter was de-
certified. The Court of Appeals subsequently upheld the order to arbitrate.

7. The sales purchase agreement sought to exclude from the contract the bargain-
ing agreement between the predecessor and the union. United States Gypsum Co. v. United Steelworkers, 384 F.2d 38, 41 (5th Cir. 1967). cert. denied, 389 U.S. 1042
(1968) (Gypsum 1).

8. The terms of employment were the same under the successor except for the failure to check off union dues, determination of seniority as of the date of rehiring, and implementation of a new health insurance plan. In addition, the physical operation of the enterprise was similar—Gypsum utilized the same work force, same plant, same process, same supervisors, and manufactured the same product albeit under a different trade name. See Gypsum 1, 384 F.2d at 41.

9. Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1970), pro-
vides that:
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chap-
ter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
It is significant that Congress rejected a proposal to make violation of a collective bar-
gaining agreement an unfair labor practice to be remedied by the National Labor Re-
lations Board. See note 31 infra.

10. The district court’s opinion is unpublished.

11. The Board rejected Gypsum’s first representation petition, ruling that a new employer seeking an election must demonstrate reasonable grounds for the good faith belief that a previously certified union had lost its majority status. Gypsum had not presented evidence that would furnish a reasonable basis for such a belief. United States Gypsum Co. v. United Steelworkers, 157 N.L.R.B. 652 (1966). Gypsum subsequently refiled, and the Board, holding an administrative determination of a prima facie showing sufficient, ordered a representation election. United States Gypsum Co. v. Local 5674. United Steelworkers, 161 N.L.R.B. 601 (1966). The union lost the election by a vote of 32 to 5 (42 employees having been eligible to vote) and was decertified on Dec. 2, 1966. See United States Gypsum Co. v. United Steelworkers. 56 Lab. Arb. 363, 370 (1971).

12. The court in Gypsum 1 held: “[C]ompelling this limited post-decertification
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After this protracted litigation in the courts and before the Board, the union's grievances were submitted to arbitration. The arbitrator held that the collective bargaining agreement bound the successor and that it had breached two of the contract provisions: a dues check off clause, whereby the prior employer had agreed to withhold union dues from members’ paychecks if so authorized, and a provision for reopening wage negotiations at the start of the agreement's third year. For breach of the dues check off clause, the arbitrator awarded the union compensation for the period before its decertification. For breach of the wage reopener clause, he awarded the employees compensation based on an estimated wage increase from the date of the reopener to which he concluded the employer would have agreed.

In an action by the union seeking to enforce the arbitrator’s award, the federal district court held that the arbitrator correctly concluded that the predecessor’s collective bargaining agreement could govern the successor, but that the remedies awarded were inappropriate. On recognition by the employer of the repudiated representative is consistent with the policies sought to be achieved by the Act. United States Gypsum Co. v. United Steelworkers, 363, 385-89 (1971). The arbitrator concluded, however, that the proof did not establish alleged wrongful employee discharges or violations of the seniority provisions of the agreement. Id. at 391-92.

13. United States Gypsum Co. v. United Steelworkers, 363, 385-89 (1971). The arbitrator concluded, however, that the proof did not establish alleged wrongful employee discharges or violations of the seniority provisions of the agreement. Id. at 391-92.

14. Id. at 389-91. The arbitrator directed the company to pay to the union, without deduction from employee wages, a sum of money equivalent to the total of all dues payments which would have been made by employees to the union had the dues check off provision been in effect during the 20 month period from April 1, 1965 (the date of sale of the plant) to December 2, 1966 (the date of the union's decertification), plus dues for the full month of December, and 6% interest.

15. Id. at 392-94. The company had put into effect a 6 cents per hour wage increase October 20, 1966. The arbitrator concluded from comparison with regional norms that a 10 cents per hour increase would have been granted had negotiations occurred at the reopener date of March 30, 1966. Therefore, he ordered the company to pay to the union for transmittal to the employees a sum equivalent to the increase in wages they would have received had that rate been in effect since the reopener date, i.e., 10 cents per hour for all hours worked or paid for from March 30, 1966 through October 19, 1966 and 4 cents per hour from October 20, 1966 through the date on which payment was made, plus 6% interest. The arbitrator also directed the company and union to search diligently for employees who left the company between March 30, 1966 and February 28, 1971, the date of the arbitrator's decision. If such persons or their heirs could not be found and paid, the money allocated to them would be returned to the company. The union was permitted to enclose with the payments to employees a letter regarding the history of the dispute and award.

16. United Steelworkers v. United States Gypsum Co., 359 F. Supp. 302 (N.D. Ala. 1972). The district court assumed that the arbitrator could properly find Gypsum bound to observe the entire United Cement Co. contract. But the court held that the award for breach of the wage reopener provision was precluded by the policies of § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) (1970), as interpreted in H.K. Porter Co. v. NLRB, 397 U.S. 99, 102 (1970) (NLRB held not empowered to remedy an employer's failure to bargain in good faith in refusing
appeal by both parties, the Court of Appeals for the Fifth Circuit enforced the original arbitral awards. The court held: (1) the dues check off and wage reopener provisions of the collective bargaining agreement were within the authority of the arbitrator to enforce against the successor, and (2) the arbitral awards for breach of the substantive provisions found to bind the unconsenting successor should be enforced because they were logically related to the provisions and within the scope of the arbitrator's power granted by the signatory parties in the arbitration clause.

In order to understand the significance of this holding, it is necessary to examine the duties which have been imposed on a successor, and the role of the arbitrator in applying the general language of the collective bargaining agreement to the parties' specific grievances.

II. ARBITRATION AND THE SUCCESSOR EMPLOYER

A. The Duty to Arbitrate

The duty of signatory parties to arbitrate disputes in accordance with their collective bargaining agreement has become an integral part of American labor law. Yet this duty represents a substantial departure from the common law under which courts treated collective bargaining agreements as other contracts and generally refused to grant specific enforcement or damages for breach of agreements to arbitrate. In Textile Workers Union v. Lincoln Mills, however, the
Supreme Court interpreted Section 301 of the LMRA not only as a grant of jurisdiction to hear suits between employers and unions for violation of collective bargaining agreements, but also as an authorization for federal courts to develop a specific federal common law for the enforcement of labor agreements.\(^\text{20}\) The Court further held that the policy of the Act favoring resolution of employer and union disputes by arbitration as a substitute for industrial strife required an arbitration provision to be specifically enforceable against the parties to a collective bargaining agreement.\(^\text{21}\)

In *John Wiley & Sons, Inc. v. Livingston*\(^\text{22}\) the Supreme Court addressed the issue of employees' rights against a successor employer by virtue of its predecessor's agreement to arbitrate disputes. In *Wiley* the successor corporation merged with the predecessor publishing concern and thereafter continued to run the plant, retaining most of the previous employer's personnel. The Court held that such a successor, maintaining "substantial continuity in the identity of the enterprise," is bound under Section 301 of the LMRA by its predecessor's agreement to arbitrate disputes arising under the substantive provisions of the contract.\(^\text{23}\) The Court emphasized that the purpose of imposing such obligations on the successor was to ease the transition for employees from one enterprise into another.\(^\text{24}\) The applicability of particular

\(^{20}\) Id. at 456–57.

\(^{21}\) Id. at 453–56.

\(^{22}\) 376 U.S. 543 (1964).

\(^{23}\) Id. at 551. In speaking of the required substantial continuity the arbitrator, selected by the parties in *Wiley* after the Supreme Court remand, stated: Although the Wiley merger was effective on October 2, 1961, the former Interscience employees continued to perform the same work on the same products under the same management at the same work place as before the change in corporate employer. Interscience Encyclopedia, Inc., 55 Lab. Arb. 210, 218 (1970). *But cf.* United Steelworkers v. Reliance Universal, Inc., 227 F. Supp. 843 (W.D. Pa. 1964), in which the court utilized traditional contract analysis to conclude that the successor was not bound by the predecessor employer's collective bargaining agreement. The decision was reversed on appeal after *Wiley* was decided. United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964).

\(^{24}\) Justice Harlan, speaking for the Court, stated: The negotiations [for the sale of an enterprise] will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and in-
The substantive provisions to the successor was left to the determination of the arbitrator.\textsuperscript{25} The Court prescribed no guiding principles for the exercise of the arbitrator's jurisdiction other than the pronouncement that merger itself will not remove a claim from the scope of the arbitration clause.\textsuperscript{26} This single limit to the Court's holding was consistent with earlier labor arbitration decisions involving signatory parties: courts have ordered arbitration when the clause has been susceptible of an interpretation covering the asserted claim, leaving to the arbitrator the question of his contractual jurisdiction to resolve the dispute.\textsuperscript{27} Thus, \textit{Wiley} represented an affirmative statement by the Court of the role of arbitration in settling labor disputes.

The \textit{Wiley} decision also represented an extraordinary break with prior law. The Supreme Court in \textit{Lincoln Mills} had interpreted Section 301 of the LMRA as authorizing federal courts to enforce arbitration of substantive rights created by consensual relations between signatory parties. \textit{Wiley} was interpreted, however, to hold that the status quo ante in employee rights regarding claims submitted to arbitration should be maintained against a successor who had not assumed the predecessor's contract but who continued to run the predecessor's shop as before.\textsuperscript{28} At the same time, courts recognized the arbitrator's power to find inapplicable provisions relevant to former shop practices if circumstances accompanying the change in ownership made them impractical to impose on the parties.\textsuperscript{29} Thus, the arbitrator's power to find inapplicable provisions relevant to former shop practices if circumstances accompanying the change in ownership made them impractical to impose on the parties.\textsuperscript{29} Thus, the
employees' substantive rights against the successor were not defined by agreement with it or by their contract with its predecessor. Rather, they were initiated, limited, and terminated by operation of law.

Eight years after *Wiley*, the Supreme Court again examined the obligations of a successor employer under its predecessor's collective bargaining agreement. In *NLRB v. Burns Security Services, Inc.*, the Court held that a successor employer's obligation to bargain collectively did not include its predecessor's duty to bargain as a prerequisite to changing the terms and conditions of employment. The new employer, however, was required to recognize and bargain with the incumbent labor representative. In *Burns* the successor had hired a majority of his predecessor's employees when it replaced the latter as contractor for guard services at an aircraft plant. In an unfair labor practice action brought by the previously certified bargaining representatives, where a majority of the new unit was composed of retained employees, the NLRB required the successor to recognize and bargain collectively and to abide by the predecessor's agreement. In *while it endured the merger, terminated when the successor closed the old plant and transferred the predecessor's employees to a new, nonunion plant. He concluded that the union's grievances involving seniority rights, pension contributions, job security and grievance procedures, and severance and vacation pay were valid under the collective bargaining agreement, but that they created no "vested" rights which continued past the termination of the contract resulting from the move. As to the early termination date, the arbitrator stated:

To the extent that the contract would extend beyond January 12, 1962 [date of employee shift to new plant], it would be inequitable and unreal to continue the Interscience Agreement ... solely for the benefit of the former Interscience employees. But there would not be this inequality between October 2, 1961 [merger date] and January 12, 1962 when the former Interscience employees remained as a separate and practicable, identifiable bargaining unit, divisible from the parent Company's operations. ... Wiley as the unconsenting successor to the contracting employer was bound to its obligations until January 12, 1962 under the present law of collective bargaining agreements.


31. William J. Burns Int'l Detective Agency, Inc., 182 N.L.R.B. 348 (1970). In *Burns* the union representing the employees under the predecessor collective bargaining unit filed the charges against the successor when it refused to honor the contract insisting that another union was the authorized representative. The Board adopted the trial examiner's findings which concluded that the successor had committed unfair labor practices. Specifically, it found that Burns had violated § 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1) (1970) (prohibiting employer interference with the right of employees to engage in protected activity), and NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970) (requiring an employer to bargain collectively with the authorized representative of his employees), by refusing to recognize the proper bargaining representative of his employees and failing to bargain before changing terms of employment. In addition the Board found that Burns had violated NLRA § 8(a)(2), 29

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viewing the action to enforce the Board's order, the Supreme Court sustained the determination that the successor was required to bargain with the union, 32 but it denied enforcement of the order that bound the successor to adhere to the predecessor's agreement. 33

In reaching this conclusion, the Court focused on the interests of the successor employer and distinguished Wiley on a number of grounds. Justice White, writing for the Court, emphasized that a rule binding the successor to the contract of its predecessor would preclude "changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision and inhibit the transfer of capital." 34 Moreover, Wiley was found not controlling for three reasons. First, the Court noted that Wiley had arisen as a suit to

U.S.C. § 158(a)(2) (1970), by assisting in organizing employees and by recognizing another union which did not represent a majority of employees. 182 N.L.R.B. at 348-51. With respect to the successor's obligation the Board concluded:

The question before us thus narrows to whether 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. We hold that, absent unusual circumstances, the Act imposes such an obligation.

Id. at 350. In a companion case the NLRB had imposed a corresponding obligation on the union to abide by the predecessor contract at the insistence of the employer. Kota Div. of Dura Corp., 182 N.L.R.B. 360 (1970).

It is significant to note that Congress rejected a proposal providing that violation of a collective bargaining agreement per se constitutes an unfair labor practice. The Conference Committee which worked on the Labor Management Relations Act of 1947 excised a provision from the bill which had originally passed both Houses that would have incorporated such a change. The Conference Report stated: "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H.R. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947).

32. 406 U.S. at 277-81. The Court affirmed the order to bargain by a 5-4 vote. While this conclusion is not central to the discussion herein, it does represent the first express approval by the Supreme Court of the holding that a mere change in ownership in an enterprise does not automatically defeat the validity of a prior union certification by the Board. See The Supreme Court, 1971 Term, 86 Harv. L. Rev. 50, 250 (1972).

33. 406 U.S. at 285-91. The vote with respect to the order to honor the prior agreement was unanimous. The Court noted, however, that the Board could find that the successor had in fact assumed the obligations under the old contract. Id. at 291. See Oilfield Maintenance Co., 142 N.L.R.B. 1384 (1963), in which the Board found the successor bound because it was the alter ego of the predecessor.

34. 406 U.S. at 287-88. A buyer will purchase a plant only if he anticipates a positive net present value of revenues from its operation or resale, less associated costs including the cost of capital employed. The buyer will profit only if: (1) the assets purchased will be incorporated into another existing plant or production process having greater returns to scale; or, (2) the purchaser's cost of employing the capital required is less than the seller's; or, (3) the buyer expects a reduction of manufacturing costs in producing one of his own products, or an increase in its sales by reason of the complementary nature of the seller's product; or, (4) the buyer is purchasing the seller's enterprise as a tax bargain because it has a tax-loss carryforward which the
compel enforcement of a collective bargaining agreement under Section 301 of the LMRA while *Burns* was a proceeding brought before the Board charging breach of a duty to bargain.\(^{35}\) Second, the Court emphasized that the *Wiley* holding applied to the process of arbitration for which there is a national labor policy preference.\(^{36}\) Finally, *Wiley* involved a merger for which there was a body of controlling state law binding the successor corporation to the obligations of the disappearing corporation; in *Burns* no such corporate amalgamation occurred.\(^{37}\) Having found that *Wiley* was not controlling, the Court concluded that, in the absence of a showing that the successor in fact assumed his predecessor's contract, the Board could not imply the obligation in law.\(^{38}\)

Numerous commentators have attacked these distinctions and have concluded that the holdings of *Wiley* and *Burns* are not readily recon-

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seller cannot utilize or, (5) the plant can be run more efficiently by the buyer. See Alberts, *The Profitability of Growth by Merger*, in *The Corporate Merger* 235–87 (W. Alberts & J. Segall eds. 1974).

In case (1), the plant will be closed or radically reorganized so that the collective bargaining agreement will probably be terminated for lack of the requisite "continuity of identity." In cases (2), (3), and (4) the plant may be run basically as before. If this is the case, the collective bargaining agreement could be applied. The *Burns* Court's concern focused on case (5). In this situation, where changes in the operation of the plant are made to reduce costs or increase production, the provisions of the collective bargaining agreement should not be allowed to impose greater costs on the successor. Imposition of fixed costs would "discourage and inhibit the transfer of capital." 406 U.S. at 288. For a discussion of this consideration as a factor in imposing external limits on arbitral authority in order to allow the continuation of some contract provisions, see Part III *infra*.

35. 406 U.S. at 285. As an unfair labor practice proceeding, the Board's power was circumscribed by § 8(d) of the NLRA, 29 U.S.C. § 158(d) (1970), which provides that the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." The *Burns* Court noted that legislative and judicial deference to the collective bargaining process precluded the Board from imposing substantive contract obligations on the successor. 406 U.S. at 287. The *Burns* Court's focus on the limits of the Board's power suggested the anomalous result that the employees' substantive contract rights may depend on the forum in which the union chooses to initiate its complaint. See *The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 50, 255–56 (1972); Christensen, *supra* note 2. The Court addressed this problem in *Howard Johnson v. Detroit Local, Hotel Employees*, 417 U.S. 249, 256 (1974), concluding that policies applicable to the unfair labor practice context must be applied in § 301 actions.

36. 406 U.S. at 286.

37. *Id.* at 286. The Court's language may imply that the successor's obligations depend upon privity between the old and new employers. See *The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 50, 257–59 (1972). This conclusion, however, does not adequately consider the policy considerations underlying *Burns*. See Note, *Contractual Successorship: The Impact of Burns*, *supra* note 2.

38. 406 U.S. at 291.
The thrust of much of this criticism was that \textit{Wiley} had been de facto overturned. The Court recently made it clear, however, that while \textit{Burns} has significantly circumscribed the scope of the \textit{Wiley} holding, the latter decision has not been overruled. In \textit{Howard Johnson Co. v. Detroit Local, Hotel Employees}, the Court reiterated its concern for balancing the needs of the employees during the transition from one organization to another against the rights of a successor to develop a revitalized enterprise. The Court held that a union in a Section 301 action could not base a claim that the successor must rehire his predecessor's employees on the preexisting collective bargaining agreement. Having reached this conclusion, however, the Court found that \textit{Wiley} did not require arbitration under the \textit{Howard Johnson} facts because the "continuity in the identity of the enterprise" was destroyed by the successor's failure to rehire a majority of the predecessor's employees.


\textsuperscript{40} 417 U.S. 249 (1974). \textit{Howard Johnson} involved the bona fide purchase of an enterprise and the subsequent rehiring of nine of forty-five employees by the successor. The case was decided prior to the decision of the Court of Appeals for the Fifth Circuit in \textit{Gypsum II}. In a per curiam opinion accompanying its denial of a rehearing, the court noted that the \textit{Howard Johnson} holding related only to the specific issue of the requisite continuity necessary to compel arbitration. The Court stated that Gypsum Co. had met the required test. 498 F.2d 334 (5th Cir. 1974).

\textsuperscript{41} Speaking for the Court in \textit{Howard Johnson}, Justice Marshall stated: Clearly, \textit{Burns} establishes that Howard Johnson had the right not to hire any of the Grissom [predecessor] employees, if it so desired. The union's effort to circumvent this holding by asserting its claims in a § 301 suit to compel arbitration rather than in an unfair labor practice context cannot be permitted. 417 U.S. at 255-56 (footnote omitted). In reaching this conclusion, the Court specifically addressed the choice of forum criticism which had been raised following \textit{Burns}. \textit{See} note 35 and accompanying text \textit{supra}. The Court also noted that the employer would commit an unfair labor practice under NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), if it refused to hire employees of the predecessor solely because they were union members to avoid having to recognize the union. 417 U.S. at 262 n.8. \textit{See also} NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272, 280 n.5 (1972).

The Court in \textit{Howard Johnson} also pointed out that there were alternative remedies for the unhired employees of the predecessor. Because the collective bargaining agreement of the predecessor provided that successors or assigns would be bound by its provisions, the union could assert a contractual right to restrain the predecessor from completing any sale in which the successor did not assume the agreement. 417 U.S. at 257-58. \textit{See} Amalgamated Food Employees Union v. National Tea Co., 346 F. Supp. 875 (W.D. Pa. 1972), \textit{remanded without opinion}, 474 F.2d 1338 (3d Cir. 1972), in which the court issued a preliminary injunction restraining both the termination or laying off of employees, and the culmination of the sale, pending arbitration as to the effect of a provision in the collective bargaining agreement binding successors.

\textsuperscript{42} 417 U.S. at 263. Despite the characterization of the \textit{Wiley} approach as "prop-
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The *Howard Johnson* decision indicates that the Court is continuing to grapple with the issue of successor obligations in light of the underlying policies seeking to minimize labor unrest without impeding the creation of a new viable relationship between labor and management in the successor enterprise. The language of *Howard Johnson* suggests that the *Burns* Court’s emphasis on the employer’s freedom to restructure its business and to negotiate its own terms with labor outweighs the employees’ interest in stability through the transition period. As Justice Douglas, dissenting in *Howard Johnson*, pointed out, however, this results in a weakening of the role of arbitration in the settlement of labor disputes. As will be suggested, an alternative approach to the problem of successor obligations can balance the underlying policy considerations without minimizing the role of arbitration.

B. Judicial Review of the Arbitral Award

As the duty to arbitrate emerged as a significant vehicle for the resolution of labor disputes, courts gave corresponding deference to the arbitrator’s decision. In the *Steelworkers Trilogy*, the Supreme Court in 1960 recognized both a broad scope of interpretation and a narrow scope of judicial review for the arbitrator’s award. On both of these issues, the Court deferred to the arbitration process because it was the method chosen by the parties and because the arbitrator was considered to be most familiar with the functions of the collective bargaining agreement, the operation of the plant, and past practices in the parties’ bargaining relationship.

The Court clearly indicated that the duty to arbitrate can be specif-

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43. *Id.* at 265–69 (Douglas, J., dissenting). Justice Douglas argued that the factors articulated in *Burns* to distinguish *Wiley* called for affirmation of the order to arbitrate in the present context. Focusing on the number of retained employees to determine the continuity of interests in the enterprise, he maintained, permitted a bootstrap argument by which the successor escaped the obligation to arbitrate merely by refusing to rehire his predecessor’s personnel.

ically enforced when the contract does not explicitly exclude the grievance from arbitral resolution. Thus, the arbitrator delineates the limits of his authority from the usually vague indicia of the contract language. The governing criteria for the arbitrator’s interpretation of the agreement once he determines that he has contractual authority to resolve the grievance “are not judge-made principles of common law but the practices, assumptions, understandings, and aspirations of the going industrial concern.” The Court also recognized the arbitrator’s broad power to award a remedy which “draws its essence” from the provisions found to have been breached, even in the absence of explicit authorization in the collective bargaining agreement. Thus, if the parties agree to submit a grievance to arbitration they impliedly empower the arbitrator to frame a remedy.

The Court correspondingly circumscribed judicial review of the arbitrator’s decision. Writing for the Court in *United Steelworkers v. Enterprise Wheel & Car Corp.*, Justice Douglas stated:

The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merit of the awards.

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45. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584–85 (1960). In *Warrior & Gulf* the employer had agreed to arbitrate issues involving contract interpretation or application except those “strictly a function of management.” *Id.* at 576. The Court held that determining whether a particular issue was excluded from arbitration by the management function exception involved examining the merits of the controversy. It emphasized that this was the duty of the arbitrator. *Id.* at 585. This rule is applicable even where a court concludes that the grievance is frivolous and baseless. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568–69 (1960).


47. *Id.* at 1500. Thus, the Court in *Warrior & Gulf* recognized dual sources of arbitral authority:

The labor arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.

363 U.S. at 581–82.

48. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). In this case, an arbitrator’s award of reinstatement and back pay for discharged employees after the collective bargaining agreement had expired was held enforcable although the agreement did not specifically authorize any award having effect after its termination.

49. See *Cox*, supra note 46, at 1494.

50. 363 U.S. at 596.
The Court concluded that an arbitral award can be overturned only when the decision "manifests an infidelity" to the contract.\textsuperscript{51}

Thus, the Supreme Court emphasized in the \textit{Steelworkers Trilogy} that the agreement between the union and an employer to arbitrate disputes invests substantial power in the arbitrator and correspondingly reduces the role of the courts. The lack of such a consensual basis when the parties required to arbitrate have not agreed to a contract, however, militates against investing similar powers in the arbitrator in cases involving successor employers.

III. LIMITS ON ARBITRAL POWER VIS-À-VIS SUCCESSOR EMPLOYERS

The \textit{Gypsum} court failed to define either appropriate limits on the power of the arbitrator or appropriate standards of review for the resultant arbitral rulings against a successor employer. Because the duty of a successor to arbitrate is established by law rather than by his agreement with the union seeking arbitration, the law should establish the limits of the substantive obligations the arbitrator may impose. The imposition of such limits can reconcile the need for continuity in plant labor relations and the significant role of arbitration recognized in \textit{Wiley}, with the policy of the National Labor Relations Act (NLRA) as interpreted by \textit{Burns} to preclude the extension of a party's contract obligations to its unconsenting successor.

The usual latitude accorded the arbitrator is inappropriate in actions involving the successor employer. In arbitration involving signatory parties the arbitrator does not rely on legal precedent in interpreting contractual obligations of the parties because they contracted for an independent interpretation of their relations in view of the law of the shop, \textit{i.e.}, the history of custom and practices in their particular industrial community.\textsuperscript{52} In the case of the successor, however, application of limits to the arbitral award is appropriate for a number of reasons. First, there is not a "law of the shop" because circumstances in the industrial community may have changed as a result of a change in plant ownership and because the union and successor did not contract to be governed by the arbitrator's interpretation of such circum-

\textsuperscript{51} \textit{Id. at 597.}

\textsuperscript{52} \textit{See note 47 and accompanying text supra.}
stances. Second, unless specifically negotiated in the contract between the successor and the predecessor, the latter's labor agreement is not incorporated into the transfer of the enterprise. Thus, the customary sources of the arbitrator's power do not exist in an action involving the successor employer.

Appropriate standards should define parameters for the exercise of an arbitrator's power in cases involving successor employers by providing criteria for limited judicial review of the arbitral award. The application of such external standards would preclude certain arbitral awards without inquiry into the arbitrator's construction of the contract or his findings as to the facts and damages. Such external limits to the arbitrator's authority would not substantially restrain his flexibility to construe the document in light of conditions existing in the industrial community and would permit the continued use of the arbitral process to effectuate the rights recognized in Wiley. At the same time, these standards would minimize the resulting impairment of the owner's ability to transfer his capital and the successor's ability to restructure plant operations and to negotiate freely with the union for new contract terms.

A. Proposed External Limits

Courts should impose two external limits on arbitral awards against

53. This would answer the criticism of Justice Douglas, dissenting in Howard Johnson. See note 43 and accompanying text supra. The approach here urged authorizes the courts to allow arbitration of grievances against the union or successor where "substantial continuity of identity in the business enterprise" [417 U.S. at 263] is found, while at the same time permitting the party against which enforcement is sought to avoid arbitral awards unnecessary to the rights sought to be protected in Wiley. Because all arbitral awards consistent with the contract and not otherwise arbitrary or capricious must be upheld by the courts [492 F.2d at 730], the only method presently available to a court to assure protection of a successor from the imposition of obligations inconsistent with policies of the National Labor Relations Act is to narrow the definition of "substantial continuity." Where substantial continuity is not found, arbitration is not required. See 417 U.S. at 262–63. Such an approach forces the court to choose between the limited options of compelling arbitration and retaining only the limited powers of review enumerated in the Steelworkers Trilogy, or relieving the successor of all potential duties under the predecessor's contract, however appropriate to its relations with its retained employees. It is suggested courts could still protect the successor after ordering it to arbitrate if appropriate standards, reviewable by the court, were placed on the arbitrator's power.

54. These were precisely the concerns which the Burns Court sought to protect. See NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272, 287–88 (1972). Thus, the approach suggested herein seeks to reconcile Wiley and Burns by utilizing the flexibility of the arbitral process itself rather than by focusing on the determination of the appropriateness of submitting issues to arbitration.
successor employers. The first limit precludes recognition of rights or obligations under the predecessor's collective bargaining agreement in excess of those actually in existence at the time of the ownership change. Thus, either the successor or the labor representative should be permitted to avoid an arbitral award which it demonstrates is founded upon a right or obligation not previously in effect between the union and the predecessor-employer. Such an award would be avoided regardless of the contracting parties' intentions as to future rights and obligations under the agreement. This standard reflects the Wiley Court's recognition of the employee representative's right to arbitrate against a successor in order to protect against sudden unfavorable changes in employment conditions during the hiatus between the transfer of ownership and the negotiation of a new contract.55 At the same time, however, the limit recognizes that the union should not gain more favorable terms and thereby delay the establishment of stable employment conditions under the successor. Moreover, a rule which allowed either party to insist on a favorable change in terms which had been conceded by a preceding employer, but which could not be sustained in bargaining between union and successor, would not be consistent with the premise of the NLRA that industrial strife will be minimized if the terms of employment reflect the economic pressure which parties can bring to bear upon one another in the course of collective bargaining.56

On the other hand, the proposed rule would be consistent with the Board's bargaining requirement that an employer cannot unilaterally change previously established terms and conditions of employment in the period between contracts.57

The second limit precludes carryover of rights or obligations which restrict the successor in restructuring the use of assets and mode of

55. See note 24 and accompanying text supra.
56. The Burns Court recognized this consideration in stating:
    The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.
406 U.S. at 288.
57. See Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615 (3d Cir. 1963). In the interim period between collective bargaining agreements, certain obligations continue not because of the contract, but because of the employer's obligation under NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), to bargain collectively as to the mandatory subjects specified in id. subsection (d). After negotiations have begun, the new employer cannot change the terms of employment prior to impasse. See NLRB v. Katz, 369 U.S. 736 (1962).
operations of the enterprise. Thus, even where the agreement of the contracting parties has limited the predecessor's freedom to restructure the use of its assets or the mode of operation of its plant, the successor should be permitted to avoid any award shown to be based upon such a restriction. This limit emerges from the Burns Court's concern that a purchaser of a moribund enterprise not be saddled with the same contract provisions which caused it to fail in the hands of the predecessor.\textsuperscript{58} Moreover, the implementation of such a limit would not only be consistent with Burns, but would also recognize the explicit purpose of Wiley to ease, not impede, the process of transition between employers.

These two external constraints on the arbitrator's authority against a successor would be implemented by permitting a court limited review of the merits of the arbitral award. The arbitrator's findings of fact regarding the events giving rise to the grievances would continue to be immune from review.\textsuperscript{59} If, however, the appellant could demonstrate that a right or obligation imposed in the arbitral award either was not previously in effect under the contract or would prevent a change in the mode of the business operation, the court would refuse to enforce the order. Thus, if an award allegedly exceeds an external limit, the court would presume the correctness of the arbitrator's conclusions, but would examine the merits to determine whether the limit had been exceeded.

\textbf{B. Application of the External Limits}

The court's affirmance of the arbitral awards in Gypsum reflects the traditional deference of the Steelworkers decisions to the arbitrator's authority, a deference not appropriate in cases involving new employers who have not agreed to arbitration. Acceptance of conventional notions of the arbitrator's power and the usual standards of judicial review do not adequately reflect the underlying policy considerations which emerge from Wiley, Burns, and Howard Johnson. Application of the proposed external standards, however, can reconcile the policy considerations which concerned the Court in those cases and still permit arbitration between the incumbent union and the successor.

\textsuperscript{58} 406 U.S. at 287-88.
\textsuperscript{59} See text accompanying notes 50-51 supra.
The *Gypsum* arbitral award of a wage increase for the successor's failure to reopen wage negotiations was inconsistent with the first of the proposed external standards. In enforcing this award, the court created a new obligation for the successor which it had neither bargained for nor incorporated into the purchase contract with its predecessor. This result could impede establishing the equilibrium sought by the *Wiley* Court. If an arbitrator can compel the successor or union to adhere to an automatic formula for long term wage adjustments, the party who will gain the most by that arrangement will procrastinate in bargaining for a new contract. Granting compensation for failure to adhere to the wage reopener mechanism has the same effect. In both situations, the disadvantaged party is compelled to accept a new level of compensation which its predecessor accepted in the context of different revenue and cost expectations in a different enterprise. Furthermore, in the case of compensation for the wage reopener violation, the arbitrator imposes his judgment as to the appropriate adjustment, thus undermining the policy articulated in *Burns* that the new contract between successor and union be formulated under the balance created by bargaining pressures.

The *Gypsum* court's award of compensation to the union for the successor's failure to abide by the dues check off provision was appropriate under the first external standard. In order to maintain the status quo ante in employer-employee relations, the union must be allowed to continue to protect the rights of its members, and this presupposes that its means of support not be interrupted. Other union rights such as provisions providing access to plants by union representatives, election and immunity of stewards, and representation of aggrieved employees by union officers should be preserved against the successor employer. Similarly, mechanisms provided for the resolution of disputes regarding working conditions, safety requirements, employee-company relations, avenues of promotion, and the classification of newly created jobs should also carry over. Such provisions imbue the contract with the requisite flexibility to regulate the continuing relationship between employer and employee through the transition period.

Application of the first external limit does not insulate the incumbent union from challenge, however. The preservation of appropriate

60. See note 24 and accompanying text supra.
61. See note 56 and accompanying text supra.
contract provisions does not preclude the change of bargaining representative or negotiation of a new contract. Moreover, some union activity would be circumscribed by application of this limit. For example, a union security clause should not be given effect to compel newly hired employees to join or even to pay equivalent dues to the union because it is unnecessary to the preservation of the status quo ante for employees and interferes with the process of bargaining for a new contract. Although the union must be permitted to protect the established rights of its members as safeguarded in Wiley, the preexisting contract should not function to avoid the usual obstacles to recruitment and retention of majority status.62

The second external limit applies only to those employee rights established in the collective bargaining agreement which restrict the employer's freedom to restructure plant operations. The arbitrated grievances in Gypsum did not involve such rights. Under the proposed limit, employer obligations would not be carried over if they bar contracting out specific work, limit the employer's right to lay off employees to meet production changes, prevent alteration of time schedules to meet changed production schedules, or otherwise inhibit the legitimate reorganizing of the enterprise. Application of this limit would not, however, preclude modification of obligations by the arbitrator that adapt the contract's provisions to changed procedures implemented by the successor as long as the resultant changes do not inhibit the restructuring of the enterprise. Provisions subject to such modification might include those providing that a specified number of employees operate a particular piece of equipment where the equipment has been modified or replaced to require fewer operators, or those providing that break periods be taken at a specified time where altered production schedules make the prescribed time inappropriate. In making such determinations, the arbitrator would retain his broad power to frame a remedy achieving a practical application of the contract; a court would deny enforcement to the award only upon demonstration that an external limit had been exceeded.

62. If the successor retains a majority of his predecessor's employees and if the bargaining unit remains appropriate, there is a presumption that the union retains its majority status. See NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. at 277–81; NLRB v. Daneker Clock Co., 516 F.2d 315 (4th Cir. 1975). The old contract, however, cannot be made the basis for claims that the successor is obligated to hire his predecessor's employees. See note 41 and accompanying text supra.
IV. CONCLUSION

In adopting the broad *Steelworkers* standard of review, the *Gypsum* court failed to recognize that the arbitrator's authority against the successor, although grounded in the predecessor's collective bargaining agreement, is derived by operation of law from the policies underlying the NLRA. On the one hand, these policies seek to protect retained employees and to adapt their conditions of employment to the successor's new operation, while on the other hand, they attempt to insure that the successor possesses the capability to reorganize the enterprise. These policies can be reconciled in the inherent flexibility of the arbitral process by limiting arbitral authority and by modifying the standard of review applicable to successors.

The application of the proposed external limits to the arbitration process would preserve fundamental rights necessary for employee stabilization without impeding the introduction of new procedures or the reallocation of productive assets. Permissible arbitral awards under these standards would include carryover of existing wages and benefits, and of rights regarding shift preferences, transfers and relocation, including the accumulation of seniority. These are precisely the bread-and-butter interests of employees for which the *Wiley* Court sought stability. Under these proposed standards the objectives of the *Wiley* Court can be attained without interfering with the process of negotiating a new agreement or impairing the successor's ability to reorganize its enterprise, both concerns of the Court in *Burns* and *Howard Johnson*.

*Eric Richter*