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Labor Law—Rights and Duties of Successor Unions—General Dynamics Corp.

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CASE NOTES

Labor Law—Rights and Duties of Successor Unions—*General Dynamics Corp.*[1]—General Dynamics Corporation and the Engineers and Architects Association (EAA), which was certified by the National Labor Relations Board in 1963, entered into a collective bargaining agreement effective from November, 1965 to December, 1970. Prior to the end of the third year of the agreement, the Teamsters Union filed a representation petition in an attempt to displace the EAA as the employee representative. The Teamsters' counsel and the Board of Governors of EAA had held previous meetings at which the EAA indicated that they wanted to affiliate with the Teamsters. The Teamsters rejected affiliation with the EAA, stating that it was not interested in any contract other than the one it alone would negotiate, and began an organization campaign.

The Board found that the filing of the petition by the Teamsters was timely, since it was filed during the 60 to 90 day period preceding the third anniversary of the signing of the EAA contract,[2] and that an election was not prevented by the three-year contract-bar rule, which prohibited elections during the first three years of a collective bargaining agreement. The Board ruled that a question affecting commerce existed within the meaning of Sections 9(c)(1)[3], 2(6) and 2(7)[4] of the National Labor Relations Act and ordered the election.[5] The Teamsters' election campaign centered on the promise that they, unlike the EAA, would not be bound by the existing agreement but would nullify it and negotiate a new agreement containing better wages and benefits. The foregoing promise, coupled with the fact that the leadership of the incumbent EAA aided the Teamsters' campaign for a change in representation, resulted in an election victory for the Teamsters. General Dyamics objected to the election results on the basis of the Teamsters' campaign promise that they would abrogate the existing collective bargaining agreement and negotiate a better one. The Regional Director overruled this objection on the ground that the Teamsters' representation of its ability to void the agreement was proper, as it was not bound thereby. General Dynamics has petitioned the Board for a review of the Regional Director's ruling.[6]

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[1] General Dynamics Corp., 175 N.L.R.B. No. 154 (1969).

[2] Representation petitions are timely when filed not less than 60, nor more than 90 days before the terminal date of an existing bargaining agreement. Leonard Wholesale Meats, Inc., 136 N.L.R.B. 1000, 1001 (1962).

[3] National Labor Relations Act [hereinafter cited as N.L.R.A.] § 9(c)(1), 29 U.S.C. § 159(c)(1) (1964).

[4] N.L.R.A. § 2(6)-(7), 29 U.S.C. § 152(6)-(7) (1964). The Act defines "affecting commerce" as burdening the free flow of commerce, or tending to lead to a labor dispute obstructing commerce. Commerce is defined as the trade, traffic or communication among the states, or between a state or foreign country, territory, or District of Columbia.

[5] General Dynamics Corp., 175 N.L.R.B. No. 154 (1969).

[6] Not reported in Board decisions.

The Board is faced with a previously undecided issue by this appeal. It must determine whether a union, granted an election petition by the Board after the contract-bar period expires, may campaign for election on the basis of its ability to void the bargaining agreement. Thus the Board must determine whether a successor union may void a collective bargaining agreement after the three-year contract-bar period has expired. It is submitted that for the same policy reasons underlying the contract-bar doctrine, the Board should in this situation decide that the successfully challenging union may negotiate a new contract, thus making contracts for more than three years voidable by a certified successor union. This casenote will examine this solution to the successor union problem on the basis of the Supreme Court's guidelines for successor employers and the Board's contract-bar doctrine.

The National Labor Relations Act (N.L.R.A.)[7] grants to employees the right to organize and bargain collectively through representatives of their own choosing.[8] The representatives selected by a majority of the employees in a unit constitute the "exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ."[9] The Act further allows, however, a group of employees or a labor organization acting in their behalf to file a petition alleging that a substantial number of employees no longer desire to be represented by the labor organization currently recognized by the employer as their collective bargaining agent.[10] After a hearing, if the N.L.R.B. finds that a question of representation affecting commerce exists, it will generally direct an election and certify the results thereof.[11] After being certified, the new representative can enter into contract negotiations with the employer who, if he refuses to bargain collectively with the new representative of his employees, commits an unfair labor practice.[12]

The Board's enunciation of a series of rules known as the contract-bar doctrine, however, makes the employer's position under this mandate to bargain uncertain in situations where a valid collective bargaining agreement exists, but a new union is certified. The contract-bar doctrine defines those circumstances under which an existing agreement between management and employees will prevent a rival union from filing an election petition in an attempt to gain recognition as the lawful representative of the employees. Fixed-term contracts of up to three years will bar an election for their entire period under the contract-bar doctrine. Longer fixed-term contracts will preclude an election only for the initial three years.[13] The Board has never decided

[7] N.L.R.A., 29 U.S.C. § 151 et seq. (1964).
[8] N.L.R.A. § 7, 29 U.S.C. § 157 (1964).
[9] N.L.R.A. § 9(a), 29 U.S.C. § 159(a) (1964).
[10] N.L.R.A. § 9(c)(1), 29 U.S.C. § 159(c)(1) (1964).
[11] Id.
[12] N.L.R.A. § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964).
[13] General Cable Corp., 139 N.L.R.B. 1123, 1125 (1962).

the effect of the certification of a new union after the expiration of the three-year contract-bar period on the continuing validity of an existing labor agreement for a fixed period of more than three years negotiated by a predecessor union.

The Board and courts have, however, considered the issue of the effect of a collective bargaining agreement on a successor employer. In *John Wiley & Sons, Inc. v. Livingston*,[14] the Supreme Court held that once a corporate employer enters into a collective bargaining agreement with a union, the employer's disappearance by merger "does not automatically terminate all rights of the employees covered by the agreement, and that . . . the successor employer may be required to arbitrate with the union under the agreement."[15] Since *Wiley* has been much discussed,[16] only those portions of that decision relating to the successor union problem will be analysed. In *Wiley*, Interscience Publishers, Inc. negotiated a collective bargaining agreement with the Retail, Wholesale and Department Store Union. The contract did not contain an express provision making it binding on the successors of Interscience. Interscience merged with the larger publishing firm of John Wiley & Sons, Inc. None of Wiley's employees were represented by a union, and it refused to bargain with the Retailers Union contending that the merger had completely terminated the collective bargaining agreement. Rather than derogate from "[t]he federal policy of settling labor disputes by arbitration,"[17] however, the Court found that Wiley had indeed inherited, and was bound by, at least the arbitration clause of the agreement it did not sign. Thus Wiley was required to arbitrate matters typically covered by collective bargaining agreements such as seniority status, severance pay, and pension fund payments.

After the *Wiley* decision some courts attempted to extend this ruling to encompass terms contained in the agreement other than the arbitration clause, and in some cases courts have indicated that the successor employer should inherit the complete collective bargaining agreement. In *Wackenhut Corp. v. Union Plant Guard Workers*,[18] two unions brought an action to enforce the arbitration provision of a labor agreement which had been entered into by General Plant Protection Co., whose business and assets Wackenhut purchased without expressly assuming General Plant's existing labor agreements. The court applied what it interpreted to be the *Wiley* rule, and held that where a

[14] 376 U.S. 543 (1964).

[15] Id. at 548. The Court went on to state that arbitration would be required when there was substantial continuity of identity of the business enterprise. Id. at 551.

[16] See Goldberg, The Labor Law Obligations of a Successor Employer, 63 Nw. U.L. Rev. 735 (1969); Note, The Duties of Successor Employers Under John Wiley & Sons v. Livingston and Its Progeny, 43 N.Y.U.L. Rev. 498 (1968); Note, The Contractual Obligations of a Successor Employer Under the Collective Bargaining Agreement of a Predecessor, 113 U. Pa. L. Rev. 914 (1965).

[17] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

[18] 332 F.2d 954 (9th Cir. 1964).

substantial continuity of identity is found before and after the change of ownership of a business, a collective bargaining agreement containing an arbitration clause negotiated by the predecessor employer is completely binding on his successor.[19]

A similar extension occurred in *United Steelworkers v. Reliance Universal, Inc.*[20] There, the respondent purchased a concrete pipe manufacturing plant from Martin Marietta in 1963. Petitioner had an exclusive bargaining agreement with Martin Marietta "to continue in effect until Midnight, July 21, 1964." The purchase and sale agreement attempted to exclude this collective bargaining agreement from the purchase. When Reliance refused to honor the agreement, the union struck the plant and sought a declaratory judgement under Section 301 of the Labor Management Relations Act[21] for a ruling that the agreement was binding on Reliance and for an order directing arbitration of alleged violations of that agreement. After finding that plant operations continued substantially unchanged, the court interpreted *Wiley* as requiring inheritance of the complete agreement: "The 1962 collective bargaining agreement, as embodiment of the law of the shop, remained the basic charter of labor relations at the . . . plant after the change of ownership."[22]

On the basis of these decisions, the NLRB in *General Dynamics* could reason that an employer's inheritance of its predecessor's collective bargaining agreement is analogous to a superseding union's inheritance of its predecessor's agreement. If so, the Board may, on the theory of mutuality of obligations, reason that a succeeding union's rights and obligations should be consistent with those of the succeeding employer, and hold that the new union is bound under the predecessor's agreement. That is, the court must determine whether the *Wiley* rationale that a duty to arbitrate is not obviated by a change in the corporate structure of a business enterprise[23] should be applied to bind a union which becomes the bargaining agent of an identical group of employees during the term of an agreement between the former employee representative and the employer.

If the merger of two unions is the voluntary act of both, and the replacement of a defunct union is the voluntary act of the successor union, consistent with the decisions in *Wiley, Wackenhut and Reliance*, the successor union in these instances should inherit its predecessor's collective bargaining agreement. Two cases dealing with

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19 Id. at 958.

20 335 F.2d 891 (3rd Cir. 1964).

21 29 U.S.C. § 185 (1964).

22 335 F.2d at 895. The court, however, limited the applicability of the old contract by noting that "the arbitrator may find that equities inherent in changed circumstances require an award in a particular controversy at variance with some term or terms of that contract." Id. Contra, Bath Iron Works Corp. v. Bath Marine Draftsmen's Ass'n, 393 F.2d 407, 410 n.3 (1st Cir. 1968), suggesting that the extension of *Wiley* in *Reliance*, which applied the whole agreement to the successor employer, was unwarranted.

23 376 U.S. at 549-51.

predecessor unions provide authority to this effect. In a representation election the employees of Union Carbide & Carbon Corporation selected, and the NLRB certified, the United Gas, Coke and Chemical Workers as their exclusive bargaining agent. One month later, after the Gas workers had merged with another union to become the Oil, Chemical and Atomic Workers (OCAW), the employer refused to bargain with them on the ground that the Board's determination of the bargaining unit was erroneous. The court in *Union Carbide & Carbon Corp. v. NLRB*[24] affirmed the Board's conclusion that "OCAW, as the consolidated organization and a continuance of the Gas Workers, has succeeded to the status of that organization as the duly designated bargaining representative of the Respondent's employees . . . and that the same duty devolves upon the Respondent to bargain collectively with OCAW. . . ."[25]

A similar result was reached in *Carpinteria Lemon Ass'n v. NLRB*.[26] There, after being certified, various United Fresh Fruit and Vegetable Grower locals changed their status from a union chartered by the National CIO, to a union chartered by the United Packinghouse Workers. The petitioner refused to bargain with the Packinghouse local, claiming that it was a different union from the originally selected bargaining agent. The court held the new union to be essentially a continuation of the old, and since it was not substantially different from the Fruit and Vegetable Union, the employer was obliged to bargain collectively with the successor union under the terms of the original certification.[27] Thus, it may be concluded that if the successor union inherits the rights of the originally certified union to bargain collectively with the employer, it should also succeed to any collective bargaining agreement negotiated by its predecessors.

When, however, an incumbent union is a party to a collective bargaining agreement having a fixed duration of greater than three years and is involuntarily ousted by a rival union, the analogy of voluntary accession to the burdens and benefits of the collective bargaining agreement does not apply. In this situation the successor union should not be inhibited in its representative capacity by the agreement which the employees repudiated through the representation election. Thus, if the Teamsters election victory can be termed an involuntary ouster of EAA, then the collective bargaining agreement should be voidable.

The Board examined the nature of the relationship between the Teamsters and EAA prior to ordering the election, and decided that the Teamsters was a rival union and not a "fronting legal successor" to EAA.[28] The Board relied on the fact that the Teamsters is a large

24 244 F.2d 672 (6th Cir. 1957).
25 Id. at 673.
26 240 F.2d 554 (9th Cir. 1957).
27 Id. at 557.
28 General Dynamics Corp., 174 N.L.R.B. No. 154 (1969).

national union, and that it had expressly rejected any affiliation requests by EAA. Furthermore, since EAA maintained its own offices, paid its own expenses from its dues, and processed its own grievances, it could not be considered a defunct union or a facade for the Teamsters. Although eleven of the thirteen members of the Teamsters Organizing Committee at General Dynamics were officers or representatives of EAA, the Board determined that an election should be ordered since the Teamsters could not be considered a "straw" union or a facade for EAA's attempt to change wages, hours and conditions of employment.[29]

It is submitted that in *General Dynamics*, the new representative should not be bound by the existing agreement for the remainder of its term. Rather, the certification of the new union should terminate the agreement because, unlike the employer in *Wiley*, the new union did not assume the rights and duties of the old union with respect to the agreement. The Teamsters campaign and election were necessarily based on dissatisfaction with the existing agreement. The conflict between the new bargaining agent and the former representative dispels any theory of voluntary successorship.[30] Nor would the newly certified union succeed to the collective bargaining agreement if the pact stated that it bound "successors and assigns." Not only is there no true successorship, but neither is there a valid common law assignment of the rights and obligations of the contract since there is no acceptance of the agreement by the unconsenting successor. Unlike the successor employer cases noted above, the new union did not merge with a portion of the old union or utilize some of the components or facilities of the previous union. Thus, no true analogy exists between a successor employer and a successor union in the *General Dynamics* situation, since the former involves an envelopment and continuance of the old corporation, while the latter represents a complete break with the previous union.

The rationale that the Teamsters should not be bound by the existing agreement is also supported by an examination of the contract-bar doctrine, because the new union is the result of an exercise by the employees of the right of reprieve afforded by the doctrine. The purpose of the contract-bar doctrine is to present an opportunity for the termination, not inheritance, of the old agreement. The Board has, however, interpreted the doctrine so as to avoid frequent terminations of collective bargaining agreements by the contracting parties. In *Montgomery Ward & Co.*,[31] an employer who was a party to a five-year contract with a union, petitioned after three years for a representation election for a unit of employees. When the Board issued a Decision and Direction of Election, the incumbent union petitioned the Board to

[29] Id.

[30] Petrowitz, The Effect of a Change of a Bargaining Representative, 10 Lab. L.J. 845, 858 (1959).

[31] 137 N.L.R.B. 346 (1962).

reconsider its decision. The Board granted the petition for reconsideration and held: "where . . . the incumbent union is the certified bargaining representative, a current contract *should* constitute a bar to a petition by *either of the contracting parties* during the entire term of that contract."[32] [Emphasis added.] Thus the Board limited the application of the contract-bar doctrine to situations where a consenting union is seeking certification. By adopting this procedure the Board avoided the injustice which would have resulted had it interpreted its contract-bar rules as allowing employers or unions to take advantage of the benefits accruing under the contract while avoiding their contractual obligations by petitioning the Board for an election following the initial three years of the agreement.[33] The *Montgomery Ward* rule, as necessarily applied in the Teamsters' petition for election, assures that the Teamsters and EAA were not collaborating to undermine the purpose of the contract-bar doctrine.

The NLRB's formulation of the contract-bar doctrine reflects its recognition of the necessity for a balance between the frequently conflicting right of employees to select a bargaining representative at reasonable intervals, and a sustained adherence to that bargaining agent once chosen. The most recent enunciation of the contract-bar rules came in *General Cable Corp.*,[34] where the Board held that "[c]ontracts of definite duration for terms up to three years will bar an election for their entire period; contracts having longer fixed terms will be treated for bar purposes as 3-year agreements and will preclude an election for only their initial 3 years."[35]

The general purpose of the contract-bar doctrine is to protect the employees' exercise of the freedom to organize and designate representatives to bargain collectively with the employer. At the same time the doctrine helps to insure the stability of labor contracts so that the employer may establish production quotas and fixed-price contracts, and budget his costs. The bar also prevents employees and labor organizations from "[d]isrupting normal contractual relations by seeking frequent representation elections . . . ."[36] Furthermore, by insuring predictable intervals when representation petitions may be filed, an uninterrupted three-year period of stability is afforded the manage-

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[32] Id. at 347.

[33] Id. at 348-9.

[34] 139 N.L.R.B. 1123 (1962).

[35] Id. at 1125. The present 3-year rule has evolved from earlier Board decisions. In Columbia Broadcasting Sys., 8 N.L.R.B. 508 (1938), the Board ordered an election after 1 year of a 5-year contract, holding that a contract which had been in effect for more than 1 year could not foreclose an election. In 1947 the Board decided that the stability of industrial relations outweighed the right of employees to change their representation and adopted a 2-year contract-bar rule whereby a 2-year collective bargaining agreement would foreclose a representation election until just prior to its termination. Reed Roller Bit Co., 72 N.L.R.B. 927, 930 (1947). See also Association of Pulp & Paper Mfrs., 121 N.L.R.B. 990, 992 (1958).

[36] Petrowitz, supra note 30, at 847.

ment-labor relationship, while at the same time a reasonable opportunity is provided the employee to reappraise his bargaining agent. Since the doctrine tends to reduce employer and employee dissatisfaction, "industrial strife and unrest" are avoided commensurate with national labor policy.[37]

An examination of the interrelationship between the contract-bar rationale and the Board's decision in *American Seating Co.*[38] suggests a solution regarding the effect of a successor union's certification after the third year of a five-year contract negotiated by the superseded union. In *American Seating* the petitioner-employer executed a three-year collective bargaining agreement with the United Auto Workers (UAW) covering all employees in the certified unit. Just prior to the expiration of the initial two years of the agreement, The Pattern Makers Union sought to sever a craft unit of patternmakers from the UAW. The Board directed an election, holding that the UAW contract was not a bar because under the contract-bar doctrine then in effect the requisite bar period was two years. The Pattern Makers won the election and Board certification followed. The employer refused to consider a collective bargaining agreement submitted by the Pattern Makers, stating that it recognized the new union as the bargaining representative for the pattern makers, but that the existing contract with the UAW was binding on all employees until its July, 1953 expiration date. In evaluating the effect of a new union's election and certification on the collective bargaining agreement of its predecessor, the Board held:

> [F]or the reasons which led the Board to adopt the rule that a contract of unreasonable duration is not a bar to a new determination of representatives, such a contract may not bar *full statutory collective bargaining, including the reduction to writing of any agreement reached*, as to any group of employees in an appropriate unit covered by such contract, upon the certification of a new collective-bargaining representative for them.[39] [Emphasis added.]

The Board rejected the employer's contentions that the certification of the new union merely resulted in the substitution of a new bargaining agent and that the employees were bound to the substantive provisions of the existing contracts since the acquisition of a new agent does not revoke the acts of a previous agent. The Board stated that common law rules of agency were not applicable since the employee-union relationship is "unique" under the NLRA. The Board further noted the futility of directing an election if the new bargain-

37 N.L.R.A. § 1, 29 U.S.C. § 151 (1964).

38 106 N.L.R.B. 250 (1953).

39 Id. at 255.

ing agent is powerless to fulfill his duties of negotiation for the remainder of the term of the existing agreement.[40]

The ruling in *American Seating* should be applied in the *General Dynamics* situation. Since the unions in both cases complied with the requirements of the contract-bar doctrine prior to their election, they were certified by the Board as representatives of a unit of employees. As the designated bargaining agent, their duty was to negotiate wages, hours and other conditions of employment for the employees.[41] Although *American Seating* involved a craft severance, this is not a material distinction since both cases involved the Board-sanctioned electoral choice of a new bargaining agent. Thus, compliance with the contract-bar doctrine should make the remaining term of any existing agreement voidable.

The *Fender Musical Instruments*[42] ruling supports the theory that the contract is voidable by the successor union. In *Fender* the employer and union entered into a collective bargaining agreement which was to terminate on April 13, 1968. A new union was certified on April 1, 1968. On April 5, pursuant to the terms of the collective bargaining agreement negotiated by the old union, the employer deducted the April union dues for the decertified union from all employees who had executed check-off authorizations. The decertified union demanded that the employer remit these dues to it. The union contended that by deducting the dues after the election and certification of a new union the employer discriminated against the employees in violation of section 8(a)(3),[43] and interfered with the section 7 rights of its employees in violation of section 8(a)(1).[44] The Board dismissed the union's complaint, ruling that although the union had been supplanted as exclusive bargaining representative by a new union, the employer was required to continue the check-off of dues to the succeeded organization until the expiration of the agreement.[45]

This is not a withdrawal from the *American Seating* doctrine. In *Fender* the check-off dues in issue were deducted only during the last two weeks before the legal termination of the agreement. During these two weeks subsequent to the election, the newly certified union did not have time to utilize its negotiating machinery, nor did it challenge the unexpired term of the ruling pact. In fact, in dismissing the complaint, the Board, citing *American Seating*, stated: "Our decision herein in no way affects the right of the newly selected representative to bargain for new terms and conditions of employment;

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40 Id.

41 N.L.R.A. § 9(a), 29 U.S.C. § 159(a) (1964).

42 175 N.L.R.B. No. 144 (1969).

43 29 U.S.C. § 158(a)(3) (1964). The union further urged that this dues collection violated § 8(a)(2), 29 U.S.C. § 158(a)(2), by constituting unlawful assistance and support to the newly certified union.

44 29 U.S.C. § 158(a)(1) (1964).

45 175 N.L.R.B. No. 144 (1969).

nor does it relieve the employer of the duty so to bargain."[46] The result in *Fender*, therefore, supports the contention that the existing agreement is voidable upon the certification of the new bargaining agent.

Allowing a successor union to void the agreement is consistent with the policy considerations underlying the contract-bar doctrine. While under the NLRA the parties to a labor agreement may contract for a termination date of their own choosing, this freedom is tempered by the contract-bar doctrine which has been "written into the statute."[47] Thus, while the Board cannot terminate a collective bargaining agreement under the NLRA, it has enunciated the doctrine to prevent existing agreements from impeding full exercise of the employees' statutory bargaining rights. The employees' selection of a new union usually indicates dissatisfaction with the agreement negotiated by their prior representative. Having selected a new representative, and having been bound by the original agreement for a reasonable time, the remainder of its term should be voidable at the discretion of the newly designated union.

The projected ruling of the Board in *General Dynamics Corp.* would permit a union to void the collective bargaining agreement of its predecessor only after the Board allows a new election and the incumbent union is defeated. As a result of the contract-bar doctrine, a balance is achieved between the right of labor to reappraise their representatives at reasonable intervals, and the right of management to function for a reasonable time under a stable bargaining agreement. Furthermore, the rule of *Montgomery Ward* prevents the contracting parties from petitioning for a new election less than 60 or more than 90 days before the termination of the agreement. Thus, a union cannot merely change its name, or use a "straw" union as successor to avoid its contractual obligations.

If the successor union desires to negotiate a new agreement, the general provisions of the old agreement regarding wages, hours and conditions of employment would, consistent with *Fender*, be effective until the new agreement is executed. Until the effective date of the new agreement, the successor union would assume the responsibility for the administration and enforcement of the previous agreement. Allowing the Teamsters to void the agreement is the only proper result in *General Dynamics*. The contract-bar doctrine was established to prevent contracts of unreasonable duration from interfering with employee rights. Once the Board has directed and certified an election, shackling the new representative with its predecessor's agreement would undermine the purpose of the contract-bar doctrine.

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[46] Id.

[47] Fay v. Douds, 172 F.2d 720, 724 (2d Cir. 1949).