

Volume 5 | Issue 1

1953

The Effect of Relocation or Sale of Industry upon Labor--Management Relations

Harold I. Ticktin

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Harold I. Ticktin, *The Effect of Relocation or Sale of Industry upon Labor--Management Relations*, 5 W. Res. L. Rev. 84 (1953)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol5/iss1/8>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

In discussing whether the obstruction was reasonably discernible, the court in the *McFadden* case did not limit itself to a consideration of whether the obstruction was "substantial."³⁹ Instead, the court indicated that the issue of reasonable discernibility is to be determined on whether, after considering all the circumstances of the case, the object with which the collision occurred was of such a nature that the driver should have become aware of an obstruction in his path at a sufficient distance ahead to enable him to stop and avoid the collision.⁴⁰ The court in the *McFadden* case appears to have recognized that from the driver's point of view there is no difference between an object which suddenly enters his path from the side, cutting down his assured clear distance ahead, and an object which, although in his path as all times, first becomes recognizable as an obstruction at a distance ahead much shorter than what he reasonably believed to be the assured clear distance ahead, and that there is no logic in drawing a distinction between the two situations.

Thus, it would seem that before a collision with an object on the highway can be offered as conclusive evidence of a violation of the assured clear distance ahead rule it must be shown that a reasonably prudent driver would have become aware of the presence of the obstruction at a sufficient distance ahead so that in the exercise of ordinary care he could have stopped in time to avoid the collision.

MURRAY CARL LERTZMAN

The Effect of Relocation or Sale of Industry Upon Labor—Management Relations

IN THE LAST few years unions have become increasingly interested in the relocation and sale of the physical plant in which their membership works.

³⁹ In at least one Ohio case the court of appeals seemed to stress this idea of substantiality to an extreme. *Schroff v. Foley Construction Co.*, 87 Ohio App. 277, 94 N.E.2d 641 (1950). The court stated that one who drives an automobile into a visible static object upon the highway is negligent per se and the plaintiff was held to have violated the assured clear distance ahead rule when he collided with the boom of a power shovel although such boom was suspended above the range of his headlights on a foggy night. Furthermore, the plaintiff had stopped his automobile just short of the boom and even after emerging from his automobile was unable to see the danger ahead.

⁴⁰ The evidence considered by the court was in regard to the distance ahead at which the obstruction became discernible rather than whether the object with which collision occurred was substantial. The court cited with approval *Colonial Trust Co. v. Elmer C. Breuer, Inc.*, 363 Pa. 101, 69 A.2d 126 (1949), where it was held that it would be wholly unjust to hold the operator of an automobile negligent because he did not slow down when confronted by an obstruction on the highway so camouflaged as to prevent even a reasonably careful driver from realizing its presence.

This interest conflicts with the understandable desire of employers to buy and sell property without being subject to union interference. The passage of the National Labor Relations Act¹ has effected this struggle. The National Labor Relations Board, which was created to administer the NLRA,² and the courts must often decide when the Act's provisions apply to restrict what would otherwise be a normal management prerogative. This note will consider the effect of the NLRA upon an employer who relocates his business in an effort to evade the Act and the effect of a transfer and sale of the business upon the statutory and contractual duties of an employer who buys a unionized business.

COMMON LAW BACKGROUND

Relocating a business in order to evade a union contract obligation was a tactic utilized by some employers before the passage of the NLRA. Better known as the "runaway shop," this device was held enjoined where the relocation was in violation of an express clause not to move the shop out of a certain locality.³ Since at common law there were no statutory duties between unions and employers, courts had jurisdiction only over cases that involved a breach of contractual duties.

Another method of evading union contracts was to form a new company. Where the defendant formed a new company in order to escape a closed shop provision in its contract with a union, a Massachusetts court held that the old company did not break its contract by going out of business. The new company was not liable because it had never contracted with the union, nor did it assume the old company's contract.⁴ This case illustrates the injustice of applying commercial principles mechanically and without regard for economic reality.⁵ Fortunately not all courts took such a narrow

¹ 49 Stat. 449 *et seq.*, 29 U.S.C. § 151 *et seq.* (1935) as amended; 61 Stat. 136, 29 U.S.C. § 151 (1947).

² 49 Stat. 451, 29 U.S.C. § 153 (1935) as amended; 61 Stat. 139, 29 U.S.C. § 153 (1947).

³ *Dubinsky v. Blue Dale Dress Co.*, 162 Misc. 177, 292 N. Y. Supp. 898 (1936); *accord*, *Farulla v. Feundlich*, 155 Misc. 262, 279 N.Y. Supp. 288 (1935); *cf.* *Goldman v. Wile Importing Co.*, 10 Law & Labor 207 (N.Y. 1928) (employer given choice of moving back to original location or rehiring workers at new location).

⁴ *Berry v. Old South Engraving Co.*, 283 Mass. 441, 186 N.E. 601 (1933).

⁵ If the union be considered a creditor under the contract, the case is wrong even on commercial law principles. Although generally a buyer of assets is not bound by his predecessor's obligations, where the transaction is fraudulent the courts will look through the corporate fiction and allow the creditor to recover against the "new corporation." *Stanford Hotel Co. v. Schwind Co.*, 180 Cal. 348, 181 Pac. 780 (1919); *Kellogg v. Douglas Co. Bank*, 58 Kan. 43, 48 Pac. 587 (1897); Note, 47 HARV. L. REV. 135 (1933) The Massachusetts court precluded itself from so holding by simply stating that the sale was not fraudulent because the motive was not important. *Berry v. Old South Engraving Co.*, 283 Mass. 441, 186 N.E. 601 (1933) The inconsistency of the court's view is made clear by a later case which held that a

view. A New York court came to a contrary conclusion where it was shown that three owners of a business had procured independent persons to form another corporation in order that the three might evade a union contract.⁶

Although the common law decisions were scanty, it does seem clear that the courts, if left to themselves, would not be able to cope with the twin problems of fraudulent business relocation and sale, adequately. By the passage of the NLRA Congress abrogated what little body of decisions that existed on the subject. Today the question must be determined in the light of the requirements of the NLRA.⁷

PASSAGE OF THE NLRA

I. *Relocation of Business—The "Runaway Shop"*⁸

Industries with a low ratio of capital to cost of production have a great deal of mobility. Clothing and textile manufacturers can relocate with more ease and less cost than can a heavier industry.⁹ Often this ostensibly normal management function is used for the real purpose of evading statutory or contractual duties to a union. If this fact is established, the transfer violates the Act and is subject to remedial action.

1. Establishing the discriminatory removal—

In order to label a shop as a "runaway" two things must be shown. First, the employer must have the intent to remove the plant discriminatorily. The removal may violate the act in a variety of ways. It may constitute interference with the organization of a union,¹⁰ refusal to bargain¹¹ or discrimination as to hiring and tenure.¹² Secondly, he must actually move the plant.¹³ In determining the intent of the employer, if a business

corporation formed under approximately the same circumstances could get an injunction against a union for acts done against the old company. *Samuel Hertzig Co. v. Gibbs*, 295 Mass. 229, 3 N.E.2d 831 (1936)

⁶ *Goldman v. Rosenzweig*, 10 Law & Labor 207 (N.Y. 1928)

⁷ What was merely anti-union behavior before the Act has now become an unfair labor practice. 49 Stat. 452 *et seq.* 158 U.S.C. § 158 (1935) as amended; 61 Stat. 140, 29 U.S.C. 158(a) (1947)

⁸ For a discussion of the "runaway shop" before the passage of the NLRA see Note, 36 COL. L. REV. 776 (1936)

⁹ This fact is illustrated by the postwar removal of much of the northern textile industry to the south.

¹⁰ *Rome Products Co.*, 77 N.L.R.B. 1217 (1948)

¹¹ *Gerity-Whitaker Co.*, 33 N.L.R.B. 393 (1942), *enforcement granted*, 137 F.2d 198 (6th Cir. 1942)

¹² *J. Klotz & Co.*, 13 N.L.R.B. 746 (1939)

¹³ *NLRB v. Hopwood Retinning Co.*, 104 F.2d 302 (2d Cir. 1938). Threats to remove a plant are also violative of the Act and may be subject to a cease and desist order. *Jasper Blackburn Products Co.*, 21 N.L.R.B. 5 (1940); *Friedman-Harry Marks Clothing Co.*, 1 N.L.R.B. 411, *enforcement granted*, 301 U.S. 58, 67 Sup. Ct. 645 (1937) See Note, 41 COL. L. REV. 329 (1941)

motive for moving appears as likely as a discriminatory motive, but the true reason lies exclusively within the knowledge of the employer a presumption arises that the plant was removed for a discriminatory purpose.¹⁴ However, if the removal is for a bona fide economic reason, it is held privileged by the NLRB and not an unfair labor practice.¹⁵ Where the evidence showed that the company was obligated under a contract to a customer to produce or furnish goods which could be done more easily in a new location, no intent to violate the Act was found.¹⁶

Some of the decisions of the Board are difficult to reconcile. In one case the Board held that evidence of anti-union statements at the beginning of a unionizing drive followed by removal and the organization of a new company whose structure was the same as that of the old company, showed a discriminatory intent.¹⁷ Yet in a case where the anti-union statements were equally, if not more caustic, the removal was held to be privileged because the statements were followed by a short period of bargaining which produced no results.¹⁸ Despite the apparent conflict the general rule is that a history of overt anti-union behavior, including threats to remove followed by an actual removal will be enough to establish a "runaway shop."¹⁹

In the early days of the Board it was held that if the removal was bona fide the employer need not inform the union of the move.²⁰ Today it appears that the Board has modified this rule and that an employer must notify the union concerning a future relocation.²¹

2. The Remedy—

When it has been determined that a particular removal was for the purposes of evading the Act or a contract with the union, the Board must choose the remedy that will best restore the status quo as it existed before the removal. In so choosing the Board is fully empowered to order the company

¹⁴ NLRB v. Remington Rand, Inc., 94 F.2d 862 (2d Cir. 1938).

¹⁵ Trenton Garment Co., 4 N.L.R.B. 1186 (1938) (company held to have moved in order to reduce rental costs, despite attitude of opposition to the union). If a company believes itself contractually bound to a union in the new location, there is no discrimination. Auto Stove Works, 81 N.L.R.B. 1203 (1949).

¹⁶ Brown-McClaren Mfg. Co., 34 N.L.R.B. 984 (1941). There was, however, a vigorous dissent by one Board member. "I believe that an employer as part of his duty to bargain collectively under the Act, is required to disclose fully to the statutory representative of his employees any steps which the employer proposes to take which will effect existing employment relations or conditions under an outstanding collective bargaining agreement." *Id.* at 1022.

¹⁷ Rome Products Co., 77 N.L.R.B. 196 (1948).

¹⁸ Joseph Levy, 24 N.L.R.B. 786 (1940).

¹⁹ Schieber Millinery Co., 26 N.L.R.B. 937 (1940); J. Klotz & Co., 13 N.L.R.B. 476 (1939); S & K Knee Pants Co., 2 N.L.R.B. 940 (1937).

²⁰ See note 16 *supra*.

²¹ Auto Stove Works, 81 N.L.R.B. 1203 (1949); Rome Products Co., 77 N.L.R.B. 1217 (1948).

to return to its original location.²² This of course may involve harsh consequences and may be too great a hardship on the employer. In another connection the United States Supreme Court has cautioned the Board that it may not inflict penalties.²³ The Board will therefore issue its order in the alternative at the unions request.²⁴ The order usually commands the company to either return to its original location or to reinstate and give back pay to workers discriminated against, at the new location.²⁵ One federal court held that the cost of transportation cannot be included in the order.²⁶ The Board, however, continues to grant this relief when the removal itself is found to be an unfair labor practice.²⁷

II. *Transfer and Sale of Businesses*

A. Bad Faith Transfer or Sale — The "Alter Ego"

When an employer to avoid complying with his statutory or contractual duties to a union forms a new business, but continues as the actual owner of the new enterprise, the succeeding company is generally held to be merely the "alter ego" of the old company²⁸ and therefore bound by the obligations of the old company. Such a transaction is usually accomplished by means of an outright sale or by a lease of the premises to the "alter ego."

Whether a particular business association is the "alter ego" of the original company is a question of fact to be determined by the intent of the original owner and by a consideration of all the surrounding circumstances.²⁹ In holding that the duties of an employer under the Act cannot be evaded by

²² The power is implied from the Board's duty to effectuate the purposes of the Act. *J. Klotz & Co.*, 13 N.L.R.B. 746 (1939); *cf.*, *Dubinsky v. Blue Dale Dress Co.*, 162 Misc. 177, 292 N.Y. Supp. 898 (1936) (power of equity court to order return)

²³ *Republic Steel Co. v. NLRB*, 311 U.S. 7, 61 Sup. Ct. 77 (1940) (Board may not require employer to pay back to a government agency amounts earned by discharged employees while working for the agency).

²⁴ Where the union did not request specific relief the Board only ordered the company, in effect, to observe the contract in the new location. *J. Klotz & Co.*, 13 N.L.R.B. 746 (1939).

In a recent case the Board's decision seemed to indicate a more lenient attitude towards requiring an employer to return to his original location. Although the discriminatory removal was clearly shown the Board made no mention of a forced return and furthermore did not require the employer to recognize the complaining union as bargaining representative in the new location because of the great distance the plant was moved (Mass. to N.C.) *Mount Hope Finishing Co.*, 106 N.L.R.B. No. 95 (1953).

²⁵ *Schueber Millinery Co.*, 26 N.L.R.B. 937 (1940); *S & K Knee Pants Co.*, 2 N.L.R.B. 940 (1937) In the *Schueber* case the Board stated that removal of a millinery plant is a comparatively simple matter. Perhaps this was intended as a caveat that in a proper case the Board will not find the expenses of returning too great a burden for a runaway employer.

²⁶ *NLRB v. Remington Rand, Inc.*, 94 F.2d 862 (2d Cir. 1938)

²⁷ *J. Klotz & Co.*, 13 N.L.R.B. 746 (1939)

temporarily stopping the operation of a plant and commencing business again under a different form with the same ownership, a federal court has laid down a test to determine whether a bad faith transfer has been made.³⁰ Generally, if the following facts are present the successor company is held to be an "alter ego"

(1.) A shutdown takes place either after a unionizing drive or an unusual demand by an incumbent union.

(2.) Although no bona fide business reason appears to make this necessary, a second company is organized to operate the plant.

(3.) The financial structure of the second company is the same as that of the first company.

(4.) The new company pays an amount equal to its net income as rent or other compensation to the owners of the old company.

(5.) The personnel of the new company is the same as that of the old company except for the absence of known union members.

The list is admittedly not exhaustive and substantial variations from it may still have the same result. However, at least one of these facts seems to have been present in every case concerning an "alter ego."³¹

(a) Statutory duties of an "alter ego."

To emphasize exactly what it is that the NLRB and the courts seek to protect on behalf of a union when a business is sold, it is necessary to note two of the important statutory duties incumbent upon all employers under the NLRA. An employer must recognize a union certified by the NLRB to be the representative of his employees.³² The Act also places an affirmative duty on the employer to bargain in good faith with a union so certified.³³

Nowhere does the Act specifically state that a fraudulent transfer of a business burdens the transferee with these duties. However, the Board and the courts have consistently held that an "alter ego" may not claim that it need not bargain with a union because the certification of the union was not made for its employees but for the employees of the "former" company.³⁴

³⁰ NLRB v. Hopwood Retinning Co., 104 F.2d 302 (2d Cir. 1939) (Board order against old company is effective against new company if it is an "alter ego").

³¹ NLRB v. E.C. Brown Co., 184 F.2d 829 (2d Cir. 1950).

³² *Id.* at 830.

³³ In addition a company may estop itself from denying it is an "alter ego" by pursuing a course of conduct with the union that clearly shows it considers itself to be the same entity as its predecessor. Thus a company cannot give the same vacation pay and wages as did its predecessor and then refuse seniority rights to certain affected employees on the ground that it is a new corporation. N.Y.C. Omnibus Co., 7 Lab. Arb. Rep. 794 (N.Y. 1947).

³⁴ 49 Stat. 453, 29 U.S.C. § 159(d) (1935) as amended; 61 Stat. 143, 29 U.S.C. 159(a) (1947).

³⁵ 49 Stat. 452, 29 U.S.C. § 158(5) (1935) as amended; 61 Stat. 140, 29 U.S.C. 158(a) (5) (1947).

Indeed, the Board recently ruled that where a union serves its bargaining request upon a man who is president of two corporations, the second of which has only recently been organized and is as yet unknown to the union, an affirmative duty exists on the part of the president to disclose the true inter-corporate relationship, and if he fails to do so he may not advance the argument that the second corporation did not refuse to bargain because the union made no formal request to bargain.³⁵

(b) Contractual duties of the "alter ego."

The NLRB apparently does not have jurisdiction to determine directly whether a contract executed between a company and a union is binding on the successor company.³⁶ However, the Board is able to decide the question indirectly in some instances. Under the Board's rules a written collective agreement of reasonable duration covering the customary conditions of employment, ordinarily bars during its term a petition for certification or decertification of a union by a rival union or other party.³⁷ These "contract bar" rules are pertinent here because if a union has a contract with an employer and the business is sold, the Board must determine whether the contract is binding on the successor employer.³⁸ This is done for the purpose of deciding whether there is an existing contract which will act as a bar to a petition for certification by a rival union.³⁹

In the case of an "alter ego," although no decision has specifically so held, there is much language in the opinions of the Board and the courts to the effect that an "alter ego" may not escape liability from its predecessor's contract.⁴⁰

³⁵ Joseph N. Fournier, 86 N.L.R.B. 397 (1949); *Cardinale Trucking Co.*, 5 N.L.R.B. 20 (1938) (rule applies even though owner of first company has no legal interest in second company)

³⁶ *C & D Coal Co.*, 93 N.L.R.B. 799 (1951)

³⁷ Since the NLRA gives the NLRB power only to remedy unfair labor practices, contracts, as such, would not seem to be within the Board's jurisdiction.

³⁸ *Snow & Neally Co.*, 76 N.L.R.B. 390 (1948)

³⁹ The Board has held a five-year contract to be a bar. *San Francisco Retailers Council*, 90 N.L.R.B. 1803 (1950)

⁴⁰ This is the only manner in which the Board gets jurisdiction to decide contract questions. *E.g.*, *Continental Bus System*, 84 N.L.R.B. 670 (1949).

⁴¹ "It could only be the blindness of formalism that would suggest separately instituted proceedings against the predecessor and the successor." *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 43 (3d Cir. 1942) "It needs no demonstration that the strife which is sought to be averted is no less an object of legislative solicitude when contract, death or operation of law brings about a change of ownership in the employing agency." *NLRB v. Colten*, 105 F.2d 179, 182 (6th Cir. 1939); *accord*, *H.F. Wilcox Oil & Gas Co.*, 28 N.L.R.B. 79 (1940) It was there shown that a "sale" was made to an employee who was to have "control, supervision and operation" of the property, but who was to receive "compensation." The Board held the transfer was fictitious and in its dicta said the contract would be binding on the successor.

B. Merger, Consolidation, Bankruptcy and Related Cases.

There is another group of cases the facts of which put them mid-way between a bad faith and a good faith transfer of business. These are cases where there is more than a nominal connection between the old and new businesses, but the affiliation is not sufficient to label the successor business an "alter ego." Included in this category are merged and consolidated corporations, bankrupt businesses and enterprises formed by a few but not all parties common to both the old and new entities.

Merged and consolidated corporations are held by the Board to be bound by the statutory duties of their predecessors.⁴¹ This includes the duty to remedy unfair labor practices of their predecessors.⁴² Since in all states the surviving or resulting corporation, by statute, assumes the debts and obligations of the merged or consolidated corporation,⁴³ the Board seems justified in including liabilities to labor unions. Further, if the Board has made an order requiring the merged corporation to cease and desist from continuing any unfair labor practices, the surviving corporation may be added to the order upon petition by the union without affording the survivor a hearing.⁴⁴

Bankruptcy presents a different problem because the very purpose of the proceeding is to purge a company of all its obligations. However, where a corporation underwent statutory reorganization under the Bankruptcy Act, the resulting corporation was held liable for the unfair labor practices of the trustee in bankruptcy on the ground that after the reorganization the new company intended to and did assume the position occupied by its predecessor.⁴⁵

If there has been no fraudulent transfer and no merger or consolidation, but there is evidence of a close financial or other connection between the

⁴¹ *Andrew Jergens of California*, 43 N.L.R.B. 457 (1942); *Nat. Supply Co.*, 16 N.L.R.B. 304 (1939). *But cf.*, *NLRB v. Timken Silent Automatic Co.*, 114 F.2d 449 (2d Cir. 1940), where the court held that a parent company which absorbed a subsidiary found to have committed unfair labor practices was not liable to remedy the acts of its subsidiary despite having assumed all the liabilities of the subsidiary. The court stated that to assume all the liabilities does not operate as a merger. This appears to be a case of putting the cart before the horse. The important inquiry is whether a merger automatically causes the surviving company to assume the liabilities of the merged company. The dissent points out that the holding is against the weight of authority. Since the case arose on a jurisdictional issue, it cannot strictly be called *contra* to the Board holdings. At best the case is of doubtful value as a precedent in view of later holdings. *NLRB v. Blair Quarries, Inc.*, 152 F.2d 25 (4th Cir. 1945); *NLRB v. Adel Clay Products*, 134 F.2d 342 (8th Cir. 1943).

⁴² *Sussex Dye & Paint Works, Inc.*, 34 N.L.R.B. 625 (1941).

⁴³ See BALLANTINE, *CORPORATIONS* §§ 289, 294 (Rev. ed. 1946).

⁴⁴ *Autopart Mfg. Co.*, 91 N.L.R.B. 80 (1950)

⁴⁵ *Kelly-Springfield Tire Co.*, 6 N.L.R.B. 328 (1938). The Board stressed the fact that after reorganization the company failed to give notice for nine months that it was not assuming the obligation to recall certain discharged employees who had been

new and old firms, the Board will hold the successor employer responsible for any unfair labor practices of the predecessor regardless of the good faith of the transfer. For example, a family partnership which in good faith becomes a family corporation, with some outside capital, must remedy the statutory breaches of the partnership.⁴⁶ The rationale for this result is that, although the change in form of ownership may have been sufficient at common law to avoid certain obligations, this factor is of no weight under the statute since the NLRA is not concerned with private rights but with the vindication of the public policy embodied in the Act.⁴⁷

C. Bona Fide Transfer of Business.

When the transfer of a business is not effected for the purpose of evading the NLRA, but is in good faith, the Board must decide what duties are owed the incumbent union by the purchaser. To apply the same rules to a bona fide transfer of business as are applied to fraudulent transfers carries the risk that the buying and selling of property may be subjected to hazards and restrictions not contemplated by the parties.⁴⁸ Therefore it is necessary to inquire as to the extent which labor interests have displaced commercial interests in this segment of the law.

- (1) Statutory duties of a bona fide purchaser.
- (a) Duty to recognize certified union.

The procedure for certification of the bargaining representative of the majority of workers in an appropriate unit is set forth in Section 9 of the NLRA.⁴⁹ The Act does not cover the disposition of a certification when

discriminated against by the trustee in bankruptcy. A contrary result was reached by an arbitrator where the second employer had acquired the bankrupt's assets at bankruptcy sale. *Cliquor Club Bottling Co.*, 14 Lab. Arb. Rep. 260 (Ohio 1950)

⁴⁶ *DeBardelben v. NLRB*, 135 F.2d 13 (5th Cir. 1943); *NLRB v. Adel Clay Products Co.*, 134 F.2d 342 (8th Cir. 1943); *accord*, *Fred P. Weisman Co. v. NLRB*, 170 F.2d 950 (6th Cir. 1948)

⁴⁷ *NLRB v. Colten*, 105 F.2d 179 (6th Cir. 1939). See note 46 *supra*. Since the material on contractual rights under this section is scanty, there is no separate discussion. Upon a merger or consolidation the collective agreement of each firm has been held binding on both the resulting corporation and the signatory unions. *Union v. Western Union*, 53 F. Supp. 90 (D.C. 1943) See Note, 60 *YALE L. J.* 1026 (1951).

A collective bargaining agreement executed prior to bankruptcy proceeding was held to be a bar to a rival union's petition although such agreement had never been affirmed by the trustee in bankruptcy. The trustee, however, had refused to disavow expressly the agreement and complied with its terms within the limits of the re-organizational proceeding. *Marcalus Mfg. Co.*, 86 N.L.R.B. 315 (1949).

Recently the Board ruled that where two businesses merge, the contract between the merged corporation and its union is not a bar to a petition filed on behalf of all the workers in the new unit. *L.B. Spear & Co.*, 106 N.L.R.B. No. 118 (1953). What happens to a theretofore valid contract is not the concern of the Board since it decides only whether the contract bars the petition of a rival union. The Board has indicated that labor contracts consummated with unions bargaining under the NLRA

a business is transferred. The Board has filled this gap by analogizing a certification to the equitable servitude of property law. The Board's rule is that a certification "runs with the employing industry"⁵⁰ and is binding upon any employer who purchases a going concern with notice of the certification.

An illustrative case, typical of the types of fact situations that occur and of the Board's rules, is *Krantz Wire & Mfg. Co.*⁵¹ After certification by the Board, the union and company signed a one year contract. Before the expiration of the contract the first employer leased his property and machinery to another concern and thereupon ceased doing business. The first employer discharged all his workers though some were rehired by the purchaser. The new owner continued working on some old orders and hired the former owner as plant manager. The new employer thereupon refused to bargain with the union on the ground that his company was a "new" employing industry with no relation to its predecessor and therefore the certification was not binding on him. The Board rejected this contention and held that the second employer had the duty of bargaining with the certified representatives of his employees.⁵²

The reason for such a decision becomes apparent when the certification provisions of the NLRA are consulted. The Act is construed to provide that the bargaining agent, once certified, is entitled to continue to represent the employees for a reasonable time.⁵³ The Board logically presumes that a union's representative status continues for one year. This presumption is generally considered to be conclusive, and in the absence of unusual circumstances, the duty to bargain with a certified union rests upon the employer

may be peculiar creatures of statute and not ordinary contracts. *American Seating Co.*, 106 N.L.R.B. No. 44 (1953). This idea, if carried to its logical conclusion, means that the Board has power to extinguish contracts, a power not expressly granted, but one which may be necessary to the proper administration of the NLRA.

⁴⁸ The Board is aware of this consideration. See *Alexander Milburn Co.*, 78 N.L.R.B. 747, 755 (1947) (dissenting opinion).

⁴⁹ 49 Stat. 453, 29 U.S.C. § 159 *et seq.* (1935) as amended; 61 Stat. 143, 29 U.S.C. § 159 *et seq.* (1947).

⁵⁰ " in the *South Carolina Granite* cases we held and the court agreed in effect that a board certification runs with the employing industry and is binding on a bona fide successor company as well as on its predecessor. We are therefore of the opinion that the corporation, having taken over and continued the 'employing industry' in the present case, is obligated to bargain collectively with the representative duly selected by the employees just before the transfer." *Northwest Glove, Inc.*, 74 N.L.R.B. 1697, 1700 (1947).

⁵¹ 97 N.L.R.B. 971 (1952).

⁵² *Accord*, *Stonewall Cotton Mills*, 80 N.L.R.B. 325 (1948); *Simmons Engineering Co.*, 65 N.L.R.B. 1373 (1946); *Metal Hose & Tubing Co.*, 23 N.L.R.B. 1121 (1940); *Charles Cushman Co.*, 15 N.L.R.B. 90 (1939).

⁵³ *NLRB v. Prudential Ins. Co. of America*, 154 F.2d 385 (6th Cir. 1946); *NLRB v. Blair Quarries*, 152 F.2d 25 (4th Cir. 1945).

for at least the certification year.⁵⁴ Relying on its power to effectuate the purposes of the Act, the Board holds that the certification is not limited to the particular employer operating the business at the time of the issuance of the certification but binds a later operator of the "same" business who takes over within the certification year.⁵⁵

The *Krantz* case illustrates another proposition. The successor argued that it was not the "same" business because it intended to manufacture a different product than had previously been produced. The Board refused to consider this factor, saying that so long as the same general type of product is produced, as was the case, the change has no effect on the certification.⁵⁶ Even where a purchaser's express purpose was to manufacture a radically different product and that purpose was consummated, the Board held that the second employer was bound to bargain with a union certified within a year of the purchase.⁵⁷ A change in product accompanied by a substantial change in number of personnel does not, in the absence of other circumstances, alter the result.⁵⁸ Nor does the fact that the purchaser did not buy all the assets of his predecessor have any effect on the purchaser's duty to bargain.⁵⁹

A certification by the Board that a union represents the majority of workers in an appropriate unit is an affirmation of an already existing fact and is not an operative order.⁶⁰ Therefore, even though a union is not certified, if in fact, it represents a majority of the workers and this fact is known to the employer, he cannot rely on the lack of a Board certification for his refusal to bargain with the union.⁶¹ This rule applies to a successor employer even though the union was not certified before the new employer acquired the business.⁶²

In the case of equitable servitudes running with the land, one of the requirements to bind the vendee is that he take with notice.⁶³ The Board

⁵⁴ *Jersey City Welding & Machine Works, Inc.*, 92 N.L.R.B. 510 (1950); *West Fork Cut Glass Co.*, 90 N.L.R.B. 944 (1950); *Belden Brick Co.*, 83 N.L.R.B. 465 (1949)

⁵⁵ See note 52 *supra*. Even if the employer takes over the business after the certification year has ended, he must show that the union certified no longer represents the present choice of his workers. *Klamath Pine Co.*, 56 N.L.R.B. 587 (1944)

⁵⁶ *Krantz Wire & Mfg. Co.*, 97 N.L.R.B. 971, 986 (1952)

⁵⁷ *Syncro Machine Co.*, 62 N.L.R.B. 985 (1945)

⁵⁸ *Simmons Engineering Co.*, 65 N.L.R.B. 1373 (1946)

⁵⁹ *Cruse Motors, Inc.*, 105 N.L.R.B. No. 35 (1953)

⁶⁰ *NLRB v. Solvay Process Co.*, 117 F.2d 83 (5th Cir. 1941).

⁶¹ *NLRB v. Remington Rand, Inc.*, 94 F.2d 862 (2d Cir. 1938).

⁶² *Charles R. Krimm Lumber Co.*, 97 N.L.R.B. 1574 (1952). Further, a union may request that the name of the new corporation be substituted for the old company on the union's certification where the old company was sold three months after the certification. This makes explicit the already existing obligation to bargain. *Stonewall Cotton Mills*, 80 N.L.R.B. 325 (1948); *accord*, *Miller Lumber Co.*, 90 N.L.R.B. 1361 (1950).

⁶³ See WALSH, EQUITY § 100 (1930)

has also required that the purchaser have notice.⁶⁴ Notice of the certification of a union or its existence as a majority representative is accomplished in two ways. Having a common supervisory employee with its predecessor will suffice as notice to the new employer that a union has been certified.⁶⁵ And it will also be sufficient⁶⁶ if circumstances exist which show that the company did or ought to have had notice of the certification.

(b) Duty to bargain with the union: Affirmative duties of buyer.

The situation described in the preceding section is often complicated by the additional fact that the predecessor has refused to bargain or has committed other unfair labor practices. Generally the bona fide purchaser is liable to correct these acts despite not having participated in them. If the purchaser acquires the business with knowledge of the existence of a pending unfair labor practice proceeding⁶⁷ and continues to operate the business without a *discernible*⁶⁸ change in labor policy, it will be held to have "effectively substituted itself not only as successor in the business enterprise, but also as beneficiary of the unremedied unfair labor practices."⁶⁹ The reason is again based on the Board's policy of effectuating the purposes of the Act.⁷⁰

⁶⁴ The Board usually states that "notice has been satisfied." *E.g.*, Autopart Mfg. Co., 91 N.L.R.B. 80, 81 (1950).

⁶⁵ Lunder Shoe Corp., d.b.a. Bruce Shoe Co., 103 N.L.R.B. No. 122 (1953) (common general manager); Charles Krimm Lumber Co., 97 N.L.R.B. 1574 (1952). *Cf.* NLRB v. Bonita Fruit Co., 158 F.2d 25 (4th Cir. 1945) (common foremen)

⁶⁶ A letter sent after the transfer of operations to a new owner, reciting that a pending certification proceeding was discussed during negotiations for the sale of the business is sufficient to show notice of the certification. Indianapolis Wire-Bound Box Co., 93 N.L.R.B. 875 (1951). Where a company did not raise the issue of notice, although it was admitted that the new owner did not become aware of the certification until a week after operating the business, it was held bound by the certification. NLRB v. Hoppes Mfg. Co., 170 F.2d 962 (6th Cir. 1948).

⁶⁷ There is some indication that it might be sufficient if a purchaser acquires a business under circumstances which charge it with actual notice of outstanding unfair labor practices or under circumstances sufficient to put the transferee on inquiry as to the existence of outstanding, unremedied, unfair labor practices. Alexander Milburn Co., 78 N.L.R.B. 747, 765 (1947) (opinion of trial examiner)

⁶⁸ "Discernible" in this context evidently means that the purchaser is identified with its predecessor. NLRB v. Blair Quarries, Inc., 152 F.2d 25 (4th Cir. 1945)

⁶⁹ Alexander Milburn Co., 78 N.L.R.B. 747 (1947); *accord*, Southerland's Tennessee Co., 102 N.L.R.B. No. 118 (1953)

⁷⁰ "The coercive effects of such unfair labor practices must be presumed to have continued, in the absence of evidence that some steps have been taken to mitigate the restraint thus imposed upon the employees in the exercise of their right to organize and bargain collectively under the Act. Under these circumstances we are convinced that, in order to restore to the employees the free exercise of their statutory rights and to effectuate the purposes of the Act, the [second] company must be held to have assumed the obligation of remedying those unfair labor practices." Alexander Milburn Co., 78 N.L.R.B. 747, 749 (1947). The Board did not pass on the question whether the failure of a successor employer to remedy unfair labor practices of

In principle the circuit courts have agreed with the Board on this question. In a case where the successor corporation retained a foreman who had made coercive statements against the union on behalf of the predecessor, a federal court held the successor liable to remedy the effects of those statements on the ground that since the successor had retained the same foreman, the employees would be likely to interpret the subsequent actions of the successor as a continuation of former policies.⁷¹ Once this premise was established the court held that the order to cease and desist should issue against the successor without compelling the union to commence a separate complaint against it.⁷²

(2) Contractual duties.

The most difficult question to answer when a business is transferred and there is an existing labor contract is: what is the disposition of the contract between the prior owner and the union?

(a) Generally.

As a general rule, in the absence of an express or implied assumption of the contract, the courts hold that a collective bargaining agreement does not bind a transferee of the business.⁷³ The leading NLRB case is *Herman Lowenstein*.⁷⁴ There the union, which had a contract with the seller, claimed that its contract was a bar to a rival union's petition because the buyer had expressly or impliedly adopted the contract. The Board stated that if the record disclosed a continuity of interest and operations, the contract obligation would be binding.⁷⁵ However, the sale was solely of physical assets and therefore the contract was held not binding on the buyer. Without an express or implied assumption of the contract, the Board ruled, it could not be a bar to the petition.⁷⁶

It has since become clear that the dicta in this case was too broad. Although the Board has repeated the statement that the contract of a prior

its predecessor may, per se, constitute an unfair labor practice on its part. The case decides only that a successor company with notice is so liable. *Id.* at 751. For a criticism of the "public right" idea see, Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720 (1946).

⁷¹ NLRB v. Blair Quarries, Inc., 152 F.2d 25 (4th Cir. 1945).

⁷² *Accord*, NLRB v. Bonita Fruit Co., 158 F.2d 758 (5th Cir. 1945)

⁷³ International Longshoremen & Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237, 72 Sup. Ct. 235 (1952); Empire Case Goods Workers Union v. Empire Case Goods Co., 271 App. Div. 149, 63 N.Y.S.2d 35 (1946)

⁷⁴ 75 N.L.R.B. 377 (1947) It is important to note here again that the Board only gets jurisdiction over contract cases via its contract bar rules.

⁷⁵ As authority for this proposition the Board cited its own cases which had dealt with inheritance of statutory and not contractual duties of the predecessor. *Id.* at 379.

⁷⁶ *Accord*, Sewell Mfg. Co., 72 N.L.R.B. 85 (1947); Tampa Transit Lines, 71 N.L.R.B. 742 (1946).

owner may be adopted expressly or impliedly by the successor, no case has decided that the prior contract was a bar by virtue of an implied acceptance.⁷⁷ The Board has consistently held that the purchaser of a going concern will not be held to its predecessor's contract unless it is expressly assumed. Operating the same business as the prior owner is sufficient to charge the buyer with statutory duties but not contractual obligations. The only case upholding a contract as a bar was one in which the new employer expressly agreed with the union to insert its name in the place of the old company.⁷⁸ The Board stated that the express assumption by the union's contract with its predecessor barred the rival petition.⁷⁹ It was not made clear whether this assumption must be agreed to by the union in all cases.

Assuming that the union desired to be bound by the old contract, what would constitute an implied adoption by the new employer? Thus far the Board had held that a general knowledge of the existence of the contract will not bind the vendee.⁸⁰

Adoption of the contract by conduct relied upon by the union may bind the new employer to its predecessor's contract.⁸¹ This principle of estoppel has been recognized by the Board in its dicta.⁸²

⁷⁷ *Krantz Wire & Mfg. Co.*, 97 N.L.R.B. 971 (1952), contains a repetition of the *Herman Lowenstein* dictum. See also, Admin. Decis. of General Counsel, 2 CCH Lab. Rel. Rep. ¶ 12,075 (1952). It is instructive to compare the decisions of arbitrators on this point. In *Spatex Corp.*, 11 Lab. Arb. Rep. 1076 (N.C. 1949), the arbitrator held the successor corporation liable for its predecessor's contract because of an express assumption which was accepted by the union. The predecessor had forgotten to include a certain clause in the copy he showed to the buyer. In view of the express assumption the buyer was held to the omitted clause.

⁷⁸ *International Paper Co.*, 80 N.L.R.B. 751 (1948). Cf. *Blaw-Knox Co.*, 57 N.L.R.B. 1551 (1944) (contract adopted by express agreement with union held not a bar where consummated after petition of rival union was filed)

⁷⁹ *International Paper Co.*, 80 N.L.R.B. 751, 752 (1948).

⁸⁰ *Blue Mountain Mills*, 101 N.L.R.B. No. 11 (1952). In *Patton Throwing Mills*, 13 Lab. Arb. Rep. 615 (1949), the company was held to its predecessor's contract because it had been "assumed." It is not clear from the opinion of the arbitrator how this was done. It appears to have been accomplished by the company's unilateral decision, without the consent of the union. Of course, there the union was seeking to hold the company to the contract. If the company, after unilaterally assuming the contract, sought to hold the union to the contract, the result might have been different.

⁸¹ This factor was held conclusive in an arbitration case where the new employer used the rehiring procedure in the contract of its predecessor. *City Packing Corp.*, 11 Lab. Arb. Rep. 358 (N.Y. 1948).

⁸² See note 77 *supra*. It should be noted that in a recent case, *Prudential Ins. Co. of Am.*, 106 N.L.R.B. No. 158 (1953), the Board held that a labor contract could be assigned by one union's membership to another union and thereby become a bar to a certification election. Coming only a few weeks after the *American Seating* case, 166 N.L.R.B. No. 144 (1953), the instant case is indeed a surprise. The holding recognizes a principle of assignability not credited before. Most important, however, is the fact that the Board has allowed one party to the contract to assign its rights without permission from the other. In this case it was done by the union. Logically, if the same thing were to be attempted by employers the Board would have to hold

(b) A "Successors and Assigns" Clause.

Many unions, in an attempt to get the benefit of their bargain regardless of change of ownership of the business, insist that the collective bargaining agreement have a clause making it binding on the "employer, his officers, agents, successors and assigns." These words are of doubtful value to the union. In the commercial law a phrase such as this is not binding on a bona fide purchaser for value without notice.⁸³

The Board holds that such a clause or its equivalent has no legal effect on a bona fide purchaser without notice. The following clause occurred in one contract: "[That the agreement would] apply to this shop or any other shop or shops operated by the firm or which may be operated by the firm."⁸⁴ After committing unfair labor practices the firm dissolved and reorganized. The Board held that the new company was bound to remedy the unfair labor practices in accordance with its general rule.⁸⁵ But the Board held that the clause in the contract did not create any contract liability on the part of the new company even though it was obvious that this company took over with notice.⁸⁶

A New York court held that arbitrators are bound by the commercial law principle that a "successors and assigns" clause is not binding on a bona fide purchaser without notice.⁸⁷ In that case a packing company purchased premises rented by another company and also purchased the good will of the company, but refused to assume the labor contract which contained a "successors and assigns" clause. It was held that the new company was not bound by the contract unless it was expressly assumed.

the contract binding as between the purchaser of the business and the incumbent union. Cf. *The Louisville Ry.*, 90 N.L.R.B. 678 (1950)

⁸³ *Meado-Lawn Homes, Inc., v. Westchester Lighting Co.*, 171 N.Y. 667, 30 N.E.2d 722 (1940). Cf. TIFFANY, *REAL PROPERTY* § 854 (3d ed. 1939). See Note, 64 COL. L. REV. 276, 285 (1946)

By analogy to the orders of the NLRB, which regularly contain this phrase, the words would not seem to give greater security to the union than if they were left out of the contract. The United States Supreme Court has held that the Board is empowered to include the phrase in its orders. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 62 Sup. Ct. 452 (1942). However, the court later qualified its ruling by holding that although the words by themselves may be put into an order they cannot enlarge the contempt liability of a defendant beyond what would exist without the words. *Regal Knitwear Co. v. NLRB*, 324 U.S. 14, 65 Sup. Ct. 481 (1945).

⁸⁴ *Eva-Ray Dress Mfg. Co.*, 88 N.L.R.B. 361 (1950).

⁸⁵ *Id.* at 370. Since this provision attempts to do less than a "successors and assigns" clause, *a fortiori* such a clause would not help a union to bind a later employer. Cf. *Sani-Aqua Curtains, Inc.*, 88 N.L.R.B. 1289 (1950) ("any shop presently or hereafter owned or controlled by employer shall be covered"); *Continental Bus System*, 84 N.L.R.B. 670 (1949) (buyer "shall adopt and take over all contracts of [seller] now in effect").

⁸⁶ *Eva-Ray Dress Mfg. Co.*, 88 N.L.R.B. 361 (1950)

⁸⁷ *In re Swift & Co.*, 76 N.Y.S.2d 881 (Sup. Ct. 1947)