CHAPTER 6

Collective Bargaining Obligations

Following A Hiatus in Coal Mining Operations

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§ 6.01. Introduction.

Market conditions and other variables dictate whether coal mining operations will begin, terminate, or resume following a hiatus in operations. Each of these business decisions involve concomitant collective bargaining obligations for the employer. This Chapter focuses on the employer's bargaining obligations when resuming operations following a hiatus. Specifically, it addresses (1) whether an employer that resumes mining operations following a hiatus must recognize and bargain with the United Mine Workers of America (UMWA) and honor the terms and conditions of the National Bituminous Coal Wage Agreement of 1988 (1988 Wage Agreement) or a subsequent Wage Agreement, (2) how such obligations may be affected by the expiration of any Wage Agreement during the hiatus in operations, and (3) what obligations may apply to an asset or stock purchaser in this situation.\(^1\)

§ 6.02. Obligations on Resumption of Operations During the Term of a Wage Agreement.

[1]--Resumption of Operations by the Signatory Employer.

Historically, there has been little or no dispute that when a signatory employer resumes operations during the term of a Wage Agreement, that employer normally remains obligated to honor the Agreement, including, in particular, its recall provisions. This practice is generally consistent with the National Labor Relations Board's (Board) position that an employer resuming operations during the term of a collective bargaining agreement must recognize and bargain with the pre-hiatus union and abide by the terms of the pre-hiatus agreement unless (a) the termination of operations clearly was intended to be permanent and the bargaining unit therefore ceased to exist,\(^2\) or (b) the resumption of operations occurred at another site and less than 40% of the prior employees transferred to or accepted employment at that site.\(^3\)

This practice is consistent with the fact that, even if the Board concluded that the employer did not violate the National Labor Relations Act\(^4\) (NLRA) by not honoring the 1988 Wage Agreement upon a resumption of operations, the collective bargaining agreement still may be enforceable in a different forum. For example, even if the Board failed to find a violation of the NLRA, the UMWA still may be able to file a grievance or a lawsuit for breach of contract in federal court under Section 301 of the Labor-Management Relations Act\(^5\) (LMRA). Additionally, the Trustees of the United Mine Workers of America Health and Retirement Funds may be able to assert a colorable claim in federal court to collect contributions under Section 515 of the Employee Retirement Income Security Act (ERISA).\(^6\)

Therefore, as a rule, a signatory employer that resumes operations during the term of a Wage Agreement most likely will be obligated to continue recognizing the UMWA and abiding by that Agreement for its term.
[2]--Resumption of Operations by a Purchaser.

Although the continuing nature of a signatory employer's bargaining obligations following a hiatus in operations has not been widely contested, a signatory employer's and a purchasing employer's bargaining obligations after the sale of a mine during an existing Wage Agreement have been extensively litigated. Most recently, the litigation has focused on whether a signatory employer can sell a closed mine during the term of its Wage Agreement without requiring the purchaser to assume any of the seller's obligations under that Wage Agreement. This area of litigation is relevant because the extent to which a signatory employer must transfer its contractual obligations will necessarily affect the conditions under which the purchaser can resume operations.

[a]--Historical Developments.

Since 1974, Article I of each National Bituminous Coal Wage Agreement has provided, in pertinent part, that "[i]n consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred to any purchaser without first securing the Agreement of the successor to assume the Employer's obligations under the Agreement."

Arbitrators as well as judges have wrestled with the interpretation of this successorship clause. The Arbitration Review Board, which was the supreme court of arbitration under the National Bituminous Coal Wage Agreements of 1974 and 1978, and whose decisions continue to have precedential effect, issued three decisions which are frequently cited in successorship disputes: Decision Nos. 35, 78-16, and 78-17. Collectively, these decisions stand for the general principle that when direct financial, organizational, or operational linkage exists between a prior signatory operator and a new signatory operator, the new signatory operator will be deemed a contractual successor bound by the prior signatory's obligations under the Wage Agreement.

[b]--Recent Developments.

The successorship analysis under the Wage Agreement changed substantially in 1985. In United Mine Workers of America v. U.S. Steel Mining Company, Inc., the District Court of Utah concluded that U.S. Steel Mining did not breach its obligations under the successorship clause when it sold a closed mine to a purchaser that did not assume any of U.S. Steel Mining's obligations under the 1984 Wage Agreement. The district court, however, did not rely on the linkage analysis developed by the Arbitration Review Board. Instead, focusing on the word "operations," it reasoned as follows:

Determination of whether U.S. Mining was bound under Article I of the 1984 NBCWA to secure the unconditional agreement of Kaiser to assume U.S. Mining's obligations under the 1984 NBCWA in connection with the sale of the Geneva/Horse Canyon Mine turns on whether Kaiser purchased an "operation" within the meaning of Article I of the 1984 NBCWA.

Based on a careful reading of the 1984 NBCWA and the entire file, this court is convinced that, as a matter of law, a mining "operation," for purposes of the 1984 NBCWA, refers to a mine site or facility where active coal mining operations are being conducted. That is, an "operation" connotes a mine that is actively producing coal and operating as a coal mine. Thus, a mine that has ceased to function as an active coal mine is not an "operation," assuming the mine was closed in good faith.

The Tenth Circuit affirmed the district court's decision in U.S. Steel Mining. In so doing, it expressly rejected the UMWA's argument that the case was controlled by Arbitration Review Board Decision Nos. 78-
Relying on arbitration decisions from the Arbitration Review Board, the UMWA argues that the successorship clause "applies whenever a signatory employer, such as [U.S. Mining], sells a mine covered by the NBCWA unless the employment obligations of the employer were terminated. . . . But we disagree. The arbitration decisions cited by UMWA discussing enforcement of the successorship clause against a subsequent operator of a closed mine relied on an "operational linkage" between the former operator and the successor before the clause would apply. See Standard Pocahontas Coal Corp., 78-16 (Arb. Rev. Bd., UMWA-BCOA 1979) (when former operator makes a direct contractual arrangement with second operator to take over and continue part or all of the mining operations for the benefit of the former operator, the second operator becomes the successor operator); Nephi Coal Properties, Inc., 78-17 (Arb. Rev. Bd., UMWA-BCOA 1979) (where no direct sale, conveyance, or other transfer or assignment of an operation takes place between a former operator, there is no basis for finding that the subsequent operator is the successor under Article I.)(12)

The Tenth Circuit's narrow interpretation of the word "operations" is not necessarily the governing standard. Two other courts recently employed different approaches in determining the meaning of "operations."(13)

The Second Circuit addressed this issue in In re Chateaugay Corp.(14) In Chateaugay, the employer sold a closed drift mine without requiring the purchaser, who intended to operate the site as a strip mine, to assume any of the employer's obligations under the 1984 Wage Agreement. Although the Second Circuit found that the mine was not an operation and that contractual successorship obligations therefore did not apply, the Second Circuit's reasoning differed from that found in U.S. Steel Mining:

The intended meaning of the word "operations" in the second sentence is unclear . . . .

. . . .

We believe the meaning of the word "operations" should cover those methods of coal mining, production, preparation, transportation and other ancillary activities in which the Union and Tuscaloosa were engaged during the term of the Agreement between them. In this case, none of those methods or activities were engaged in after the mine was idled over three years ago in 1986. As a consequence, the benefits of Article I, such as recall and seniority rights to the drift mining operation, did not survive the permanent shutdown of the mine and no obligation remains for the purchaser to assume.

The term "operations" within the successorship clause of Article I of the Coal Wage Agreement does not apply to the sale of a mine that has been permanently closed in good faith by a seller that retains no financial interest in any potential future mining activity at that site, and there is no evidence that the same operations, as when the Agreement was executed, could reasonably be contemplated or conducted.(15)

The Second Circuit's interpretation of "operations" obviously requires a broader analysis than simply whether the mine was closed in good faith. Specifically, this analysis focuses on the continuing relationship between the seller and the purchaser, if any, and, more importantly, whether the operations existing when the Wage Agreement was executed could reasonably be contemplated or conducted by the purchaser. While this interpretation of "operations" is easily applied to a situation where, as in Chateaugay, the seller operated a drift mine and the purchaser intended to operate a surface mine, the standard may not be as easily applied where the purchaser acquires and intends to operate an underground mine. For example, it remains to be determined whether the purchaser's intention to operate in a different area of the mine or with a different method of production would be considered the same "operations" as when the Wage Agreement was executed.
The dichotomy between the Tenth and Second Circuits' interpretation of "operations" was presented for review in *United Mine Workers of America v. Kitt Energy Corp.* In *Kitt*, the employer sold an underground mine to a purchaser that did not assume the employer's obligations under the 1984 Agreement. The employer argued that it was entitled to summary judgment because the mine had been closed in good faith and, therefore, ceased to be an "operation" under the *U.S. Steel Mining* standard. The UMWA, among other things, argued that the mine remained an "operation" under the *Chateaugay* standard because the purchaser ultimately operated it as an underground mine. The district court declined to chose a standard. Instead, the district court denied summary judgment because, in its view, the successorship clause was ambiguous. The district court reasoned as follows:

The issue here is whether a mine that has been closed or idled is an "operation" within the meaning of Article I (Successorship Clause) of the 1984 National Bituminous Coal Workers Agreement and thereby required defendants/sellers of Kitt No. 1 Mine to secure an agreement from defendant/purchasers as successors, to continue under the contract with plaintiff at that site, upon its sale. The question is one of the first impression in our jurisdiction and conflicting interpretations exist of the meaning of the term "operations" within Article I of the 1984 National Bituminous Coal Wage Agreement.

... Whether the idled status of the Kitt No. 1 Mine, previous to sale, removes it from the status of an "operation" within the meaning of Article I of the 1984 NBCWA is subject to conflicting interpretations. Summary judgment must be denied where conflicting interpretations of a collective bargaining agreement exists and the non-moving party advances the interpretation which is supported by evidence sufficient to create a genuine issue of material fact as to the parties' intent.

Following the district court's denial of summary judgment, a jury trial was conducted in late 1991. After four weeks of testimony, the selling employer settled the case; however, the case continued as to the purchasers, who were being sued under a variety of theories, including tortious interference with contractual relations. Ultimately, the jury returned a verdict in favor of the purchasers; however, as part of that verdict, the jury concluded in a special interrogatory that the seller had breached the 1984 Agreement by virtue of this transaction.

Consequently, there exists no clear standard governing the interpretation of the word "operations." Instead, given the Second Circuit's interpretation in *Chateaugay* and the district court's finding of ambiguity in *Kitt*, it remains to be determined whether the *U.S. Steel Mining* standard will govern any disputes outside the Tenth Circuit.

Under these circumstances, the successorship clause may affect the resumption of operations by a purchaser in two ways. First, unless a selling employer is willing to risk an adverse ruling in litigation, the seller is likely to require a purchaser assume its obligations under the Wage Agreement.

Second, if a purchaser does not contractually agree to accept the seller's obligations, the UMWA still may achieve that result in court. For example, in *United Mine Workers of America v. Eastover Mining Co.*, the court held that the purchaser had tortiously interfered with the UMWA's rights under the 1981 Wage Agreement by improperly inducing the seller to breach the successorship clause. Although the same court reached a contrary conclusion on jurisdictional grounds in *United Mine Workers of America v. Covenant Coal Corp.*, and the jury in *Kitt* returned a verdict in favor of the purchasing defendants on a similar claim, the fact remains that the UMWA may prevail in a future case depending on the particular court and the facts presented.
As a practical matter, it is uncertain whether a signatory employer will sell or a purchaser will buy a closed
or inactive mine unless either the purchaser is willing to assume the seller's obligations under the 1988
Wage Agreement or a subsequent Wage Agreement or both parties are willing to litigate their respective
rights and obligations. Consequently, regardless of whether the same employer or a new employer resumes
operations during the term of the 1988 Wage Agreement or a subsequent Wage Agreement, it is likely that
the employer will agree to, or be required to, abide by the terms of that Agreement despite a hiatus in
operations.

§ 6.03. Obligations on a Resumption of Operations After a
Wage Agreement Has Ended.

The resumption of mining operations after the 1988 Wage Agreement or a subsequent Wage Agreement has
terminated presents substantially different issues for an employer than where the resumption occurs during
the term of a Wage Agreement.

[1]--Resumption of Operations by a Purchaser.

After the 1988 Wage Agreement or a subsequent Wage Agreement terminates, a selling employer's and a
purchasing employer's bargaining obligations regarding the sale of a mine may change. The successorship
clause may have only a limited impact on the sale.

The successorship clause does not survive the Wage Agreement's termination. Therefore, a post-
expiration sale cannot be challenged in court as a violation of the successorship clause, and it is unlikely
that an employer could be compelled to arbitrate a dispute regarding that clause. As a result, the rights
and obligations of the parties to a post-expiration sale of a mine should be governed exclusively by the
NLRA.

Under the NLRA, it is well settled that unless an employer lawfully withdraws recognition from the
union, the employer generally will be required to abide by the mandatory terms and conditions of
employment under an expired collective bargaining agreement. This obligation typically continues until
the parties negotiate a new contract, achieve an agreement regarding the effects of a decision to close or
cease operating, or their negotiations reach an impasse and the employer unilaterally implements
alternative terms and conditions of employment.

The Wage Agreement's successorship clause has been deemed to be a mandatory subject of bargaining.
Therefore, an employer's obligations under the NLRA may require it to continue honoring the clause even
after the 1988 Wage Agreement has expired.

Nevertheless, the employer's obligations in this regard can change. For example, if the employer lawfully
withdraws recognition, its obligation to honor the successorship clause will end with that withdrawal.
Alternatively, the employer may lawfully propose to transfer its property free of or under different
restrictions than those contained in the successorship clause. If negotiations regarding these or any other
proposals reach an impasse, the employer may lawfully implement its final proposals and transfer its
property subject to the terms of those proposals.

Accordingly, the sale of a mine after termination of a Wage Agreement need not be subject to the
contractual successorship requirements that existed during the term of the Wage Agreement. Unlike the pre-
expiration situation, the successorship clause should have little or no effect on a purchaser's bargaining
obligations following a post-expiration acquisition and resumption of operations.

[2]--Resumption of Operations by the Same Employer.

The mere fact that the same employer resumes operations at the same mine is not necessarily sufficient to obligate that employer either to honor the terms and conditions of the expired Wage Agreement (including its recall provisions) or to recognize the UMWA as the representative of its employees. Instead, the employer's obligations will depend on a variety of factors, including (1) the circumstances surrounding the cessation of operations, particularly whether the cessation originally was intended to be temporary or permanent; (2) whether the mine was maintained on a regular basis during the hiatus; (3) to what extent the employer has, by effects bargaining or otherwise, terminated its relationship with the UMWA and its former employees before or during the hiatus; and (4) whether a majority of its current employees previously worked at the site.

[a]--Basic Principles.

One of the first cases to address an employer's bargaining obligations regarding a post-expiration resumption of operations was Molded Fiberglass Body Co.\(^{(32)}\) In Molded Fiberglass, the union was certified as the employees' bargaining representative on October 16, 1967. On March 15, 1968, after unsuccessful efforts to negotiate a new collective bargaining agreement, the employer was forced to close its facility for economic reasons. The employer intended the closure to be permanent and attempted to sell the plant. Nevertheless, because of an overflow of business at the employer's other plants, the employer was forced to reopen the closed plant on November 22, 1968. The employer did not notify the union or its former employees that it was reopening and, with minor exceptions, hired an entirely new complement of employees.

The Board concluded that the employer did not violate the NLRA by refusing to recognize or bargain with the union when the facility reopened. In essence, the Board reasoned that (1) since the original closure was for good faith business justifications and was intended to be permanent, there was no reason to presume the union continued to be a legitimate bargaining representative during the hiatus, and (2) there was no evidence to indicate that the new employees had chosen the union as their bargaining representative.

The Board reached a similar conclusion in Cen-Vi-Ro Pipe Corp.\(^{(33)}\) In Cen-Vi-Ro, the employer closed its plant indefinitely in 1964 due to a lack of work. That same year, the parties' collective bargaining agreement expired. In 1968, the employer decided to reopen the plant. Although the prior collective bargaining agreement had expired and the employer retained no employees after closure, the employer, before resuming operations, agreed with the union to adopt the prior collective bargaining agreement with certain modifications.

Subsequently, four employees were discharged for refusing to abide by the collective bargaining agreement's union security clause. Those employees filed charges with the Board alleging that the employer had prematurely recognized the union as their representative. The Board agreed and the Ninth Circuit enforced the Board's Order. In so doing, the court made the following pertinent comments:

Respondents argue that the 1968 Agreement was merely a reiteration of the 1964 Agreement which was still effective because it never officially terminated. However, an automatic renewal clause cannot keep a collective bargaining relationship alive when the employer's business has been discontinued indefinitely. When the plant closed in 1964, the relationship between the Company and the Union disappeared; there were no employees for the Union to represent. We are not persuaded to the contrary by the Respondent's contention that the nature of the steel and concrete pipe-manufacturing industry is such that an actual hiatus of four years in operations is insufficient to destroy the collective bargaining relationship.\(^{(34)}\)
The Board next addressed this issue in *Sterling Processing Corp.* (35) In *Sterling*, the employer closed its facility on January 21, 1981 for legitimate economic reasons and notified the union that the facility would be closed "until further notice." Nineteen months later (which was five months after the collective bargaining agreement had expired), the employer reopened the facility.

Before resuming operations, the union contacted the employer to discuss the terms and conditions of employment upon reopening. The union also urged the employer to recall employees in accordance with the seniority provisions of the expired agreement. The employer refused to discuss anything with the union, hired its post-hiatus employees through a local job service, and unilaterally imposed terms and conditions of employment which differed significantly from those in the expired agreement. Ultimately, however, a majority of the employer's post-hiatus workforce consisted of pre-hiatus employees.

The Board, relying primarily on *Cen-Vi-Ro*, concluded the employer was not obligated to recognize the union or honor the terms of the expired agreement when it initially staffed the plant and resumed operations. The Board reasoned as follows:

The difficulty with the [Administrative Law] Judge's conclusion [that the Union continued to represent a majority of the employees and had to be consulted before the terms and conditions of employment could be altered] is that at the time the Respondent modified the preexisting wages and working conditions there were no employees. The entire prehiatus workforce had been discharged or laid off with no reasonable expectation of recall. There, in fact, were no employees for the Unions to represent during the hiatus. The Respondent's ultimate hiring of a majority of the prehiatus workforce is not relevant in determining whether the Respondent is obligated to bargain with the Unions concerning terms and conditions set prior to the hiring of that workforce. As the Board held in *Cen-Vi-Ro*, . . ., under very similar circumstances, a union cannot be the exclusive bargaining representative prior to the hiring of a representative complement of employees. (36)

Nevertheless, the Board in *Sterling* further held that despite the hiatus, once it became apparent that the employer was engaged in basically the same business with substantially the same workforce, the union's status as the employees' representative and the employer's concomitant bargaining obligation were revived:

We reach a different result with respect to the Respondent's obligation to recognize and bargain with the Unions after August 19, 1982. In agreement with the Judge, we find that, as of that date, the Respondent's bargaining obligation with the Union revived. As found by the Judge, the Respondent had resumed production under the same ownership, corporate form, and management and was engaged in the same business at the same location with basically the same production process as prior to the shutdown. Further, the Respondent had in fact rehired substantially the same workforce as that in the historic bargaining unit. Under these circumstances, where the employing entity remains the same after the hiatus as it was before, we find that the hiatus, standing alone, does not relieve the Respondent from its bargaining obligations. [Citation omitted.] Indeed, we agree with the Judge that "where, as here, the identity and location of the employer is unchanged, the legal import of any supervening change in circumstances to an established bargaining relationship ought to be assessed in terms of whether or not the employer denied recognition upon objective factors furnishing a reasonably based doubt that the Union continued to represent a majority." (37)

The Board recently applied this latter conclusion from *Sterling* in *Morton Development Corp.* (38) It held that an employer that had closed a rehabilitation facility for mentally retarded adults just before the collective bargaining agreement's expiration and later reopened it as a skilled nursing home with essentially the same workforce was obligated to recognize and bargain with the union despite the hiatus in operations.
As a general rule, if an employer closes with a good faith intention to remain closed permanently or at least indefinitely, and the collective bargaining agreement terminates before or during the closure period, the employer's bargaining obligation should terminate with the closure. If the parties' engage in effects bargaining regarding the closure and those negotiations extend beyond the actual closure, however, the employer's bargaining obligation should terminate when the effects bargaining ends.

Furthermore, if the employer resumes the same or similar operations at the same location following closure, the employer should not be obligated to bargain with the union or hire employees under the terms and conditions of the expired collective bargaining agreement. Instead, the employer should be free to hire any employees on a non-discriminatory basis and unilaterally to set the terms and conditions of employment. Nevertheless, if the employer ultimately hires a majority of its employees from its prior workforce, its bargaining obligations may be revived unless it can demonstrate, by objective considerations, that the union does not, in fact, represent a majority of its present workforce.

As may be expected, this general rule, which this Chapter will call the *Sterling* Rule, is subject to exceptions and restrictions. These are discussed in the following subsections.

[b]--Exceptions.

[i]--Minor Operational and Management Changes Following Hiatus.

The revival of a bargaining obligation under the *Sterling* Rule can occur only if, in conjunction with other factors, the employer is conducting essentially the same business operations. In making this determination, however, no weight is given to insubstantial changes which do not affect the employees' attitudes regarding union representation. For example, in *United Food & Commercial Workers International Union v. NLRB*,(39) which was cited with approval in *Sterling*,(40) the court found that a change in stockholders, a change in supervisors, a one-third reduction in the size of the workforce, the termination of one line of business, and a variety of capital improvements were inconsequential because there was no evidence these "changes were so substantial as to affect employee attitudes toward representation."(41) Similarly, in *Morton Development Corp.*, (42) the Board held that a rehabilitation facility for the mentally retarded, which closed temporarily for four months and later reopened as a skilled nursing home, was essentially the same operation as before with only minor changes. The minor changes, which were deemed not to affect the employees' attitude toward representation, included the methods by which the employees performed their jobs, various physical changes in the facility and its equipment, and changes in the employer's customers and business purpose.(43)

 Accordingly, in the absence of truly substantial changes that may affect the employees' attitude toward union representation, the resumption of a similar business enterprise at the same location is likely to be considered a resumption of the same operations for purposes of evaluating the employer's bargaining obligations.

[ii]--A Temporary Cessation of Operations.

The *Sterling* Rule applies only if the original cessation of operations was intended to be permanent or at least indefinite. Accordingly, in *Finger Lakes Plumbing & Heating Company, Inc.*, (44) the Board found that the layoff of all employees during the last few months of the collective bargaining agreement did not affect the employer's bargaining obligations. The Board reasoned that the cyclical nature of the employer's business, coupled with the fact that the employer continued to have employees perform unit work after the
contract expired, established that the hiatus was only temporary. As a result, the Board held the employer’s bargaining obligation survived the hiatus in operations.

Likewise, in *United Food & Commercial Workers* (45) and *Morton Development Corp.* (46) hiatuses of eighteen months and of four months, respectively, were found to be temporary because the employers always intended that the same or similar operations would eventually be resumed by a purchaser or, failing that, by the original employer. Therefore, those hiatuses were not sufficient to relieve the employers of their bargaining obligation. (47) Accordingly, an employer can rely on the Sterling Rule only where the original cessation of operations truly was intended to be permanent or at least indefinite.

[iii]--An Indefinite Hiatus.

Although the Sterling Rule does not apply unless the original cessation of operations was intended to be permanent, or at least indefinite, an indefinite hiatus alone still may not relieve the employer of its bargaining obligations.

In *Rockwood Energy Corp.*, (48) the Board concluded that an employer's bargaining obligation survived a five-year hiatus because its employees had a reasonable expectation of recall throughout the hiatus. In *Rockwood*, the employer ceased active coal mining operations in 1982. In 1984, the employer terminated the 1981 Wage Agreement, but did not sign the 1984 Wage Agreement. The employer continued to have one bargaining unit employee and a supervisor maintain the mine during the hiatus. Although the employer initially bargained with the UMWA for a successor Wage Agreement, and later offered to bargain over the effects of its desire to sublease the property, no agreements were reached and no final proposals implemented. Moreover, during the hiatus, the UMWA maintained regular contact with the employer, the one active bargaining unit employee, and those of its members who had completed panel forms at the time of their layoff in 1982.

In 1987, the employer decided to resume operations and hired new employees rather than recalling any of the laid-off employees. The employer also refused the UMWA's request to bargain regarding the terms and conditions of employment for the employees at the mine.

The Board found that despite the five year hiatus in operations and the fact that the employer did not resume operations until more than two years after the 1981 Wage Agreement had terminated, the employer violated the Act by refusing to bargain with the UMWA and by refusing to abide by the recall provisions from the expired 1981 Wage Agreement. The Board expressly distinguished this case from *Sterling*:

We do not consider the lengthy suspension of production warrants relieving the mine owner of its bargaining obligation. During the suspension period, the mine and equipment were maintained, preserving the capacity to produce. One unit employee worked throughout the suspension period and others were in layoff status, thus having some expectation of recall. Further, during the suspension period, the Union communicated with the employees and with management. These facts, in our opinion, distinguish this case from *Molded Fiberglass Body Co.*, 182 N.L.R.B. 400 (1970) relied on by the Respondent and the Judge. The continuing employment of a unit employee and the reasonable expectations of recall possessed by other employees on layoff distinguish this case from *Sterling Processing Corp.*, 291 N.L.R.B. No. 30 (1988). There, the Board held that an employer which resumed business nineteen months after it had closed and discharged all of its employees, was obligated to bargain with the Union that had represented the employees prior to the closing because the majority of its workforce on reopening consisted of its pre-hiatus employees. But because all of the employees had been discharged at the closing and none had expectations of recall, the Board concluded that the employer was free to act unilaterally in setting initial terms and conditions of employment on reopening, *i.e.*, unlike here, it was not obligated to bargain over any terms and
conditions that represented changes from those established under the last union contract.

The Third Circuit enforced the Board's order in *Rockwood*. The court emphasized that unlike the employees in *Sterling*, the employees in *Rockwood* maintained an expectation of recall throughout the hiatus:

Significantly, in this case, the Board found that the laid-off employees had a reasonable expectation of recall, and that they demonstrated their expectation of continued union representation by maintaining their names on layoff panels and attending union meetings, and through the union's communications with the employees and management during the five year suspension of mining. This finding is supported by substantial evidence: during the production hiatus, the mine and equipment were maintained; one unit employee continued to work and other unit members were in layoff status with the contractual right to be recalled.

. . .

Furthermore, the Board noted that although the Harmony Mine produced no coal for five years, the mine and equipment were maintained during the suspension, thus, preserving the capacity of the mine to produce and supporting the laid-off employees' expectation of recall.\(^{(50)}\)

In *Morton Development Corp.*,\(^{(51)}\) the Board similarly discounted the significance of a four month hiatus, in part because some bargaining unit employees were hired to perform paperwork tasks related to the closing and maintenance work during the hiatus.

Accordingly, even if the original closure or cessation of operations is intended to be indefinite, conduct by the employer and the union during the hiatus period that provides the laid-off employees with a reasonable expectancy of recall may preserve the employer's bargaining obligations. However, just because some of the factual circumstances in *Rockwood* may be present in another case will not necessarily mean that the employees will be considered to have an expectancy of recall.

[c]--Some Very Special Cases for Indefinitely Closed Coal Mines.

*Rockwood* was based on unique facts and should not be read to mean that laid-off employees from an indefinitely closed mine necessarily will maintain a reasonable expectancy of recall sufficient to defeat application of the *Sterling* Rule.

*One-Person Unit.* The Board in *Rockwood* relied in part on the fact that a single bargaining unit employee continued to work throughout the hiatus. The ultimate significance of this fact will depend on the employer's conduct. It is well settled that, while an employer lawfully can bargain with a union that represents only a one-person unit, the employer cannot be compelled to bargain in that situation.\(^{(52)}\) As the Board explained in *Stack Electric, Inc.*:

It is settled that if an employer employs one or fewer unit employees on a permanent basis that the employer, without violating Section 8(a)(5) of the Act, may withdraw recognition from a union, repudiate its contract with the union, or unilaterally change employees' terms and conditions of employment without affording a union an opportunity to bargain . . . .

The Board has held that it will not certify a one man unit because the principles of collective bargaining presuppose that there is more than one eligible person who desires to bargain. . . . By parity of reasoning, the Act precludes the Board from directing an employer to bargain with such a unit.\(^{(53)}\)
Accordingly, during a post-expiration hiatus in operations, an employer that has only one bargaining unit employee may exercise its right under Stack and withdraw recognition from the union on that basis. This, in turn, should relieve the employer of any bargaining obligations during the hiatus and place the employer in a Sterling type of situation, where, if it later decides to resume operations, it can hire employees and set the initial terms and conditions of employment without regard to the expired Wage Agreement.

**Voting Rights of Laid-Off Employees.** The Board in Rockwood attached significance to the facts that the laid-off employees had been placed on a panel rather than being discharged, the UMWA continued to communicate with the laid-off employees, and the employer maintained the mine throughout the hiatus. These facts should carry little weight in determining whether laid-off employees maintain a reasonable expectancy of recall where a hiatus truly is intended to be of indefinite duration.

In El Torito v. NLRB, the Ninth Circuit observed that, while neither the courts nor the Board have defined what constitutes a reasonable expectancy of recall for purposes of determining whether a bargaining obligation survives a hiatus in operations, the Board's rules regarding laid-off employees' voting eligibility in representation elections provides a reasonable analogy. A brief examination of those rules is warranted.

In Apex Paper Box Co., the Board observed that laid-off employees can vote in a representation election only if "objective factors support a reasonable expectancy of recall in the near future which establishes the temporary nature of the layoff" since "it is well established that permanently laid-off employees, i.e., those employees with no reasonably expectancy of recall, are ineligible to vote." The objective factors the Board considers include the employer's past experience (e.g., are layoffs and recalls an established pattern or is the work cyclical), the employer's future plans, and the circumstances surrounding the layoff, including what the employees were told at the time of the layoff concerning the likelihood of recall. Nevertheless, absent "any employer past experience or future plans, if any, where an employee is given no estimate as to the duration of the layoff or any specific indication as to when, if at all, he will be recalled there is no reasonable expectancy of recall." Given these standards, the Board's finding in Rockwood that the laid-off employees retained a reasonable expectancy of recall during a five-hear hiatus is somewhat questionable. If, as the Board's opinion suggests, the employees were on an indefinite layoff and had no reasonable expectancy of recall in the near future, and the employer had no history of layoffs or recalls and no plans to resume operations prior to 1987, it is unlikely that the laid off employees' mere presence on the panel, their communications with the UMWA, or the ongoing maintenance of the mine would have been enough to render them eligible to vote in a representation election during that time. Consequently, since these employees should not have been able to vote in a representation election, it seems illogical to conclude they maintained an expectancy of recall for purposes of preserving the employer's bargaining obligations.

The mere fact that laid-off employees are on a panel, that they communicate with the UMWA, or that the mine is maintained during a hiatus, should not, alone, establish that the laid-off employees maintain an expectancy of recall during an indefinite hiatus in operations.

**Effects Bargaining.** The employer in Rockwood apparently never completed any effects bargaining with the UMWA following the 1981 Wage Agreement's expiration. This point is significant since the timely completion of effects bargaining may help to determine whether an employer will have a bargaining obligation upon a resumption of operations.

For example, in effects bargaining, an employer could propose to limit the amount of time it retains laid-off employees on a panel or to modify the recall arrangements under the expired Wage Agreement by, among
other things, proposing to recall employees on some basis other than seniority. If the parties cannot achieve agreement on these issues and the negotiations reach an impasse, the employer then could unilaterally implement its final proposals.\(^{(60)}\) This, in turn, may eliminate or reduce the duration of any possible expectation of recall.

Accordingly, an employer's timely completion of effects bargaining may materially enhance its ability to rely on the \textit{Sterling} Rule if and when it resumes operations.

[d]--Summary.

The question of whether an employer that resumes operations following a Wage Agreement's expiration will be required to abide by the terms of the expired Agreement or to bargain with the UMWA will depend on the overall circumstances. If the original cessation of operations was intended to be permanent, or at least indefinite, and the employer did not do anything during the hiatus that would create a reasonable expectancy of recall for the laid-off employees, the employer should not be obligated to bargain with the UMWA regarding the resumption of operation or to rehire its former employees under the terms of the expired Wage Agreement.\(^{(61)}\) Nevertheless, even if the employer can resume operations free of any previous hiring or bargaining obligations, the employer's bargaining obligations may be revived. If, following resumption of operations and truly non-discriminatory hiring, a majority of the employer's present workforce is composed of pre-hiatus employees, the employer most likely will be required to bargain with the UMWA from that point forward.

\textbf{§ 6.04. Obligations of Asset or Stock Purchaser Following Hiatus.}

Under the NLRA, a stock or asset purchaser that resumes operations may have certain bargaining obligations with respect to the seller's union. These obligations are independent of any contractual obligations the purchaser may assume. Their existence turns on whether the purchaser can be considered a successor employer.

Both stock and asset purchasers can be successor employers under the NLRA. Generally, however, the Board and courts treat a stock purchase more like a continuation of the original employer than a true successor. Therefore, a stock purchaser typically will have the same rights and obligations as any employer that resumes operations, whereas an asset purchaser's obligations will depend on whether it satisfies the NLRA's criteria for a successor employer.

[1]--Successorship and the Asset Purchaser.

Under the NLRA, an employer that acquires substantial assets from a predecessor will be deemed a successor and obligated to recognize and bargain with the predecessor's union if (1) a majority of its current employees had been employed by the predecessor and (2) similarities between the two operations manifest a "substantial continuity" between the two enterprises.\(^{(62)}\)

[a]--Substantial Continuity.

The determination of whether a substantial continuity exists between the two enterprises involves an analysis of several factors including, but not limited to: (1) whether the business of both employers is essentially the same, (2) whether the employees of the new employer are doing the same jobs under the same working conditions with the same supervisors, (3) whether the new employer uses the same production process and produces the same products, (4) whether the new employer generally has the same customers,
and (5) whether and to what extent there has been a hiatus in operations. It is important to recognize that these factors are to be assessed from the perspective of the employees, i.e., the inquiry focuses primarily on whether the employees will view their job situations as essentially unaltered by the change in employers. (64)

Changes in such subjects as marketing, sales, size of the operation, number of employees, number of supervisors, or product mix (unless the change alters basic job skills) are not consequential. (65) Likewise, the fact that only a part of the prior business is continued is not significant if the remaining employees would, on their own, constitute an appropriate bargaining unit. (66)

Although a hiatus in operations is a relevant consideration in this analysis, the Supreme Court emphasized, in *Fall River Dyeing & Finishing Corp. v. NLRB*, (67) that it is only one of the pertinent criteria and "thus is relevant only when there are other indicia of discontinuity." (68)

Moreover, the Board and courts typically attach little significance to a hiatus in operations in the successorship analysis. For example, in *Fall River Dyeing* and *Capitol Steel & Iron Co.*, (69) hiatuses of approximately eight months were not considered sufficient to destroy the continuity between the two enterprises. Further, in *Nephi Rubber Products Corp.*, (70) the Board concluded that a sixteen month hiatus, during which the contract expired and the employer filed for bankruptcy, did not prevent a finding of substantial continuity between the two enterprises:

Although we agree with the Judge that the 16-month hiatus in plant operation and Bastian's bankruptcy indicate instability, we find that the instability and uncertainty during the period before the Respondent reopened the plant do not negate our finding that, once the plant reopened and employees were put back to work, they found their job situation basically the same as before. Nothing about Bastian's bankruptcy or the hiatus period itself indicates that, once rehired, the employees would no longer desire union representation. Under the circumstances presented here, the hiatus, although 16 months in duration, was not "of such length as to call into question the likelihood that former [Bastian] employees viewed their current jobs as essentially unchanged." (71)

[b]--Majority Support.

There are three general principles to consider in evaluating whether a majority of the current employees came from the predecessor's workforce and will be presumed to support the union.

First, while the purchaser is free to select its own employees, it may not discriminate or refuse to hire the predecessor's employees for the purpose of defeating a successorship finding. This discrimination may result in a reinstatement obligation and a conclusion that the new employer satisfies this aspect of the successorship analysis. (72)

Second, the determination of whether a majority of the employees came from the predecessor is to be made when the employer has a "substantial and representative complement" of employees. (73) In making this determination, the Board considers a number of factors, including whether the job classifications designated for the operation are filled or substantially filled, whether the operation was in normal or substantially normal production, and the likelihood and timing of any further hiring. (74)

Third, a successor meeting all of the foregoing standards still will not be obligated to bargain with the union unless the union first makes a demand for bargaining. While a premature demand is not legally effective, it will be given continuing effect, i.e., it remains in force until the employer obtains a representative complement of employees. The employer's status as a successor will be determined at a later time. (75)
Given these standards, if a purchaser acquires the assets of a closed or idled mine without contractually assuming a bargaining obligation and later produces coal from the same location with employees, a majority of whom came from the predecessor's workforce, the purchaser most likely will be considered a successor employer under the NLRA and will be bound to recognize and bargain with the union. Nevertheless, if, following non-discriminatory hiring, the predecessor's employees comprise less than a majority of the purchaser's workforce, the purchaser will not be subject to a bargaining obligation when resuming operations.

[c]--Nature of the Successor's Bargaining Obligations.

If an asset purchaser is considered to be a successor employer under the NLRA, the specific nature of its bargaining obligation may vary depending on the circumstances. For example, a successor is not required by the NLRA to adopt the predecessor's collective bargaining agreement, can unilaterally set the initial terms and conditions of employment, and can bargain only with respect to future changes. However, the employer may waive those rights. The employer, by its conduct, may effectively adopt the predecessor's collective bargaining agreement. Further, the employer may assume an obligation to continue the prior terms and conditions of employment by making clear its intent to retain all or most of the predecessor's employees, but either misleads those employees into believing that they will continue to work under the old terms and conditions of employment, or fails to clarify that it intends to offer new terms and conditions.

[d]--Summary.

While a hiatus in operations is a factor in the successorship analysis under the NLRA for an asset purchaser, it generally will not be the determinative factor. Instead, the operational changes, if any, and the ultimate complement of employees most likely will be determinative. Unlike the employer resuming operations, an asset purchaser will be free to hire employees and set the initial terms and conditions of employment without regard to the predecessor's collective bargaining obligations. Although the successor ultimately may be required to bargain with the union that represented the predecessor's employees, that obligation should be restricted only to future changes in the terms and conditions of employment.

[2]--Successorship and the Stock Purchaser.

The Board and courts treat a stock purchaser somewhat differently than an asset purchaser in the evaluation of its bargaining obligations. In TKB International Corp., the Board explained:

The stock transfer differs significantly, in its genesis, from the successorship, for the stock transfer involves no break or hiatus between two legal entities, but is, rather, the continuing existence of a legal entity, albeit under new ownership.

It is true that the "secondary characteristics" of a successor are often times identical to those of a stock transfer: continuity in operations, location, workforce, conditions of employment, supervision, machinery, equipment, methods of production, product and/or services. It is, therefore, essential that any consideration of the nature of such a transaction begin with an examination of its "primary characteristics."

Given this starting point, the Board and courts typically have held that a stock purchaser is bound by the corporation's bargaining obligations at the time of the purchase. Various rationales have been employed to support this conclusion.

In Esmark, Inc., the Seventh Circuit observed that "[t]he successorship doctrine is simply inapplicable to a stock sale transaction . . . . Having chosen to preserve Sipco as a viable enterprise, Esmark may not now
elect to ignore only those agreements which it finds disagreeable."

In contrast, the Fourth Circuit commented, in *EPE Inc. v. NLRB*,(82) as follows:

[W]e do not adopt a rule that labor agreements remain in force in every situation where corporate ownership changes through a stock sale. On the contrary, a stock sale could in many cases serve as a vehicle for acquisition of resources that will be used to operate a substantially different enterprise from that conducted by the original owners . . . should substantial changes in an operation indicate that its sale was not a "mere substitution of one owner for another through a stock transfer within the context of an ongoing enterprise," the obligations of the employer may be governed by successorship principles rather than by continued enforcement of an agreement.(83)

The District of Columbia Circuit similarly held, in *United Food & Commercial Workers International Union v. NLRB*,(84) that, while a stock transfer was a significant factor in evaluating the employer's bargaining obligations, the analysis still requires an assessment of whether "an examination of the operations of the business, `as they impinge on union members' . . . reveals an `essential change in business operations that would have affected employee attitudes towards representation' . . . ."(85)

Finally, the Board has held that "a mere change in stock ownership does not absolve a continuing corporation of responsibility under the [National Labor Relations] Act."(86)

When the foregoing cases are viewed together, it appears that a stock purchaser generally will be subject to all of the corporation's bargaining obligations unless the purchaser can demonstrate that there have been significant changes which affect the employees' attitude toward representation. Therefore, a stock purchaser's bargaining obligations following a hiatus in operations typically will be determined as if the same employer is resuming operations, i.e., they will be decided under the *Sterling* Rule rather than traditional successorship standards.

§ 6.05. Conclusion.

A hiatus in operations, standing alone, will not necessarily affect an employer's collective bargaining obligations. Under certain circumstances, a hiatus may relieve the employer from such obligations. As a rule, the bargaining obligations of an employer or a stock or an asset purchaser resuming operations during the term of a Wage Agreement are not likely to be affected by a hiatus. In other words, this employer most likely will agree to, or be obligated to, abide by the terms of that Wage Agreement.

If the resumption of operations occurs after the Wage Agreement has terminated, the resumption of operations may or may not involve a concomitant bargaining obligation. Specifically, if the hiatus was originally intended to be a permanent, or at least an indefinite, closure, and the employer does not, by its conduct, create a reasonable expectancy of recall on the part of the laid-off employees during the hiatus, the hiatus may relieve that employer of its collective bargaining obligations. In these circumstances, the employer may be able to hire employees and set the initial terms and conditions of employment without regard to the terms of the expired Wage Agreement or the UMWA's demands for bargaining. If, however, upon a resumption of operations, this employer ultimately conducts basically the same business and rehires a majority of its employees from its pre-hiatus workforce, its duty to bargain may be revived.

Alternatively, if the original closure was intended to be temporary or the employer's conduct during the hiatus gives the laid-off employees a reasonable expectancy of recall, the employer's bargaining obligations will survive the hiatus and the Wage Agreement's expiration. Consequently, this employer most likely will be required to recall its pre-hiatus employees under the terms and conditions of the expired Wage
Agreement and to bargain with the UMWA before changing any of the mandatory terms and conditions of employment from that Wage Agreement.

Finally, if a purchaser resumes operations following a hiatus and the Wage Agreement's termination, the purchaser's bargaining obligations will depend on the particular circumstances. Specifically, a stock purchaser generally will have the same rights and obligations as the original employer. If, however, the purchaser is an asset purchaser, it generally will not assume any bargaining obligations unless, after non-discriminatory hiring, a majority of its employees came from the predecessor's workforce. Even an asset purchaser is free to set the initial terms and conditions of employment and to bargain only with respect to future change.

1. For the purposes of this Chapter, two assumptions are made. First, it is assumed that prior to the hiatus in operations, the employer was a signatory to the 1988 Wage Agreement. Second, it is assumed that resumption of operations would again involve mining or processing of bituminous coal at the same location.

2. In General Extrusion Co. Inc., 121 N.L.R.B. 1165 (1958), the Board held that where, after an indefinite closing, an employer resumes operations with new employees during the term of a collective bargaining agreement, the contract does not bar an election challenging the union's continued majority support. The Board also reached a similar conclusion in Sheets & Mackey, 92 N.L.R.B. 179, 27 L.R.R.M. 1087 (1950). Nevertheless, in El Torito - La Fiesta Restaurants, Inc., 295 N.L.R.B. No. 56 (1989), enforced, 929 F.2d 490 (9th Cir. 1991), and Coastal Cargo Co., Inc., 286 N.L.R.B. 200 (1987), the Board distinguished these cases and held that the bargaining unit and the employer's concomitant bargaining obligations survived a temporary hiatus in operations since the employees continued to have an expectancy of recall. Accordingly, although the hiatus in Coastal Cargo was 9 months and 14 months in El Torito, the Board held that the employer's obligation to abide by the pre-hiatus agreement survived the hiatus since the cessation of operations was intended to be temporary in each case.

3. In Harte & Co., Inc. and Christopher Bates, 278 N.L.R.B. 947 (1986), the Board held that an existing contract "will remain in effect after a relocation if the operations at the new facility are substantially the same as those at the old facility and if the transferred employees from the old plant constitute a substantial percentage--approximately 40 percent or more--of the new plant employee complement."


6. See e.g., Martin v. Garman Constr. Co., 945 F.2d 1000 (7th Cir. 1991) (although Board found that employer properly withdrew recognition from union, that did not prohibit trustees from arguing that, for ERISA purposes, contract remained in effect and that contributions were still due and owing). But see Sheet Metal Workers' Int'l Assoc. v. West Coast Sheet Metal Co., 954 F.2d 1506 (9th Cir. 1992) (decertification precluded trustees from collecting contributions).

7. Article § 7III, Section (k) of the National Bituminous Coal Wage Agreements of 1981, 1984, and 1988 provide that these decisions shall continue to have precedential effect "to the extent that the basis for such decisions have not been modified by subsequent changes in this Agreement."

8. In Decision No. 78-16, the new signatory employer was deemed to be a successor and required to hire employees from the prior signatory employer's panel because it was mining under a lease from the prior employer and was providing the coal to the prior employer subject to a "contracting fee." In contrast, in Decision Nos. 35 and 78-17, the new signatory operators were not found to be successors since they did not have any direct contracts with the prior signatory operators and contracted solely with the owners of the property.


10. Although Decision Nos. 35, 78-16, and 78-11 involved situations wherein mining operations had terminated before the transactions, the Arbitration Review Board did not expressly consider whether that fact affected the analysis, nor did it consider
whether the same approach should apply to a sale to a non-signatory employer.

11. 10. 636 F. Supp. at 153. Although a district court in Ohio had reached an identical conclusion in 1980 regarding the sale of a closed preparation plant, that decision was not officially reported; District 6, United Mine Workers of Amer. v. The North Amer. Coal Corp., No. C2-79-242 (S.D. Ohio, March 21, 1980). Additionally, although a district court in Virginia previously had concluded that a closed mine was subject to successorship restrictions, that court did not expressly analyze the word "operations." Instead, the court relied on the fact that the mine had been closed in bad faith for the express purpose of evading contractual successorship obligations; United Mine Workers of Amer. v. Eastover Mining Co., 603 F. Supp. 1038 (W.D. Va. 1985).

12. 11. 895 F.2d at 701.

13. 12. Arbitrators also have split on whether to apply a U.S. Steel Mining type of analysis. See e.g., Clinchfield Coal Co. and UMWA District 28, Case No. 84-28-87-248 (April 17, 1988, Arbitrator John J. Morgan) (arbitrator did not cite U.S. Steel Mining, but applied similar analysis); District 17, UMWA and Red Ash Sales Co., Case No. 84-17-87-1003 (February 17, 1988, Arbitrator Norman Harlan) (arbitrator expressly rejected U.S. Steel Mining approach).

14. 13. 891 F.2d 1034 (2d Cir. 1989).

15. 14. 891 F.2d at 1039.

16. 15. Civil Action No. 87-822 (W.D. Pa.).


18. 17. Unfortunately, given the UMWA's various arguments, it is not clear why the jury found that transaction violated the 1984 Wage Agreement. The jury may have believed that (a) the mine was not, in fact, closed given certain ongoing coal processing, equipment removal, and other closure work; (b) the mine remained an operation despite its closed status; (c) the mine remained an operation because the sellers and buyers had manipulated the closing to avoid the successorship clause; or (d) some combination of these.

19. 18. It is noteworthy that the damages associated with a breach of the successorship clause can be substantial. In Kitt, the UMWA argued that the damages extended for the purchaser's projected economic life of the mine (approximately 20 years). In contrast, the seller argued that the damages, if any, terminated when the 1984 Agreement expired, since damages after that date were not contemplated by the 1984 Wage Agreement and were, therefore, speculative. Although this issue was not resolved by the district court, courts are split on whether contract damages can be awarded for periods after a collective bargaining agreement expires. The decisions in District 17, United Mine Workers of Amer. v. Allied Corporation, 765 F.2d 412 (4th Cir. 1985), cert. denied, 473 U.S. 905 (1986) and Richardson v. Communication Workers of Amer., 443 F.2d 974 (8th Cir. 1971), cert. denied, 414 U.S. 818 (1972), support the proposition that damages remain available even after the collective bargaining agreement has expired. The decisions in General Warehousemen & Helpers Local 767 v. Standard Brands, Inc., 579 F.2d 1282 (5th Cir. 1978), cert. denied, 441 U.S. 957 (1979), International Bhd of Elec. Workers v. A-1 Electric Serv. Inc., 535 F.2d 1 (10th Cir. 1976), cert. denied, 429 U.S. 832 (1977), In re Continental Airlines Corp., 64 Bankr. 865 (Bankr. S.D. Tex. 1986), and In re U.S. Truck Co., Inc., 74 Bankr. 515 (Bankr. E.D. Mich. 1987), however, support the proposition that damages necessarily end when the collective bargaining agreement expires.


22. 1. In United Mine Workers of Amer. v. G. M. & W. Coal Co., 642 F. Supp. 57 (W.D. Pa. 1985), the court held that § 301 of the LMRA, 29 U.S.C. § 185, could not be used to enforce an alleged breach of the successorship clause since that clause did not survive the 1981 Agreement's termination. The court further found that the UMWA's remedy for an alleged violation of that clause, if any, was to file an unfair labor practice charge with the Board.

23. 2. Id.
3. In Litton Fin. Printing Div. v. NLRB, ____ U.S. ____, 111 S.Ct. 2215 (1991), the Supreme Court held that an employer need not arbitrate a post-expiration grievance unless it arose under the prior contract. The Supreme Court explained that a post-expiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

25.

4. The Trustees of the United Mine Workers of America Health and Retirement Funds currently are pursuing claims against a variety of employers under what has become known as the "evergreen" theory. See United Mine Workers of Amer. Employee Benefit Plans Litig., Multidistrict Litig. No. 886 (D.D.C.). In essence, the Trustees claim that any employer who was signatory to a National Bituminous Coal Wage Agreement since 1978 adopted a perpetual obligation to contribute to the UMWA Health and Retirement Funds at the rates in the current National Bituminous Coal Wage Agreement, regardless of whether it is presently signatory to that Agreement. While this theory arguably could affect a signatory employer's contribution obligations following a resumption of operations after the 1988 Wage Agreement has expired, it is doubtful that the obligation would apply to a purchaser that does not otherwise agree to assume the employer's obligations under the 1988 Wage Agreement. Hence, it is unlikely that the Trustees' enforcement rights under ERISA would affect a purchaser in this scenario. [For a discussion of the "evergreen" litigation and related matters, see Foster, "United Mine Workers: Evolution of the Promise and Alternatives for Funding Post-Retirement Health Care Benefits," 13 Eastern Min. L. Inst. ch. 8 (1992), infra, this Volume -- Ed.]

26.

5. Absent unusual circumstances, there is an irrebutable presumption that, during the first year after its certification and during the life of a collective bargaining agreement, a union enjoys majority status. Thereafter, the presumption of majority status may be rebutted and recognition withdrawn. The employer's mere assertion that it doubts the union's majority status, however, is not enough to withdraw recognition. The employer must show that, on the date recognition was withdrawn, (1) the union did not in fact enjoy majority status or (2) the employer had objective evidence sufficient to establish reasonable doubt as to the union's continued majority status. Once the employer lawfully withdraws recognition, it can refuse to bargain with the union. See Bickerstaff Clay Prod. Co., Inc. v. NLRB, 871 F.2d 980 (11th Cir. 1989), cert. denied, ___ U.S. ____, 111 S.Ct. 292 (1989); Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988), cert. denied, 488 U.S. 889 (1988).

27.

6. See Litton Fin. Printing Div. v. NLRB, ____ U.S. ____, 111 S.Ct. 2215 (1991); Big Track Coal Co., 300 N.L.R.B. No. 132 (1990); Mar-Jan, Inc., 271 N.L.R.B. 1393 (1984). Although the Board in Big Track Coal Co. refused to comment on whether these principles applied to an employer that closed a mine and was willing to participate in effects bargaining, a cautious approach would be to conclude that they do apply and can compel the employer to maintain the mandatory terms and conditions of employment from the expired Wage Agreement during the parties' effects bargaining.

28.

7. In First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), the Supreme Court noted that even if an employer lawfully can decide to close or cease operating, it must bargain with the union over the effects of that decision. Effects bargaining includes such subjects as recall rights, transfer rights, successorship restrictions, and continuing health care insurance.

29.

8. In E.I. DuPont deNemours & Co., 268 N.L.R.B. 1075 at 2 (1984), the Board observed that it "has defined impasse as a state of bargaining at which the party asserting its existence is warranted in assuming that further bargaining would be futile." At impasse, the employer may lawfully implement any of its pre-impasse proposals, thereby modifying its obligations under the expired agreement. Western Newspaper Publishing Co., 269 N.L.R.B. 355 (1984).

30.


31.

10. Legal successorship principles under the NLRA may impact the purchaser's obligations in this situation. This subject is discussed in the text, infra, at Section § 6.04.

32.


33.


34.

13. 457 F.2d at 776.

35.

36. 15. 291 N.L.R.B. at 210.

37. 16. Id.


39. 18. 768 F.2d 1463 (D.C. Cir. 1985).

40. 19. The Board in Sterling noted that it was overruling its own decision in United Food & Commercial Workers to the extent that it was inconsistent with the court's opinion. 291 N.L.R.B. at 210 n.9.

41. 20. 768 F.2d at 1463.


43. 22. The Board's reluctance to find that management and minor operational changes are not sufficient to show that the employing entity has substantially changed is analogous to its broad interpretation of the "substantial continuity" standard in successorship cases under the NLRA. See discussion of this issue in the text, infra, at Section § 6.04[a].

44. 23. 253 N.L.R.B. 406 (1980).

45. 24. 768 F.2d at 1463 (D.C. Cir. 1985).


47. 26. The decisions in Coastal Cargo Co., 286 N.L.R.B. 200 (1987), and El Torito - La Fiesta Restaurents, 295 N.L.R.B. No. 56 (1989), enforced, 929 F.2d 490 (9th Cir. 1991), provide analogous support. In those cases, the Board found that the bargaining units and the employers' bargaining obligations survived hiatuses in operations during the term of their collective bargaining agreements in part because the cessations were intended to be temporary.


49. 28. 299 N.L.R.B. No. 162 at 11 n.11.

50. 29. 942 F.2d at 175.


54. 33. 929 F.2d 490, 497 n.6 (9th Cir. 1991).


56. 35. 302 N.L.R.B. No. 17 at 4 n.2.


58. 37. Foam Fabricators of Minnesota, Inc., 273 N.L.R.B. 511 1305 (1984). See also Heatcraft Div. of Lennox Indus., Inc., 250 N.L.R.B. 58 (1980) (no reasonable expectancy of recall where employees were told layoff was indefinite and employer had no plans to recall them in near future); Tony's Trailer Serv., Inc., 257 N.L.R.B. 878 (1981) (employee did not have expectancy of recall where
employer hoped to recall employee, but there was no basis for reasonably believing that opening would exist by eligibility date); Aloe Coal Co., Case No. 6-RM-673 (December 14, 1990) (laid off employees on mine panel not eligible to vote since employer had no present plans to reopen closed site or expand; no evidence of history of cyclical layoffs and recalls; employees were told at time of layoff that there was little or no likelihood of recall).

59. 38. Regardless of whether an employer has a duty to bargain over a decision to cease operating or close, it must bargain over the effects of that decision if requested to do so. For example, it must bargain over such issues as layoff and recall rights, successorship rights, transfer rights, and the continuation of health insurance. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

60. 39. Western Newspaper Publishing Co. 269 N.L.R.B. 355 (1987) (once good faith bargaining reaches impasse, employer is free to implement some or all of its pre-impasse proposals).

61. 40. The NLRA prohibits an employer from discriminating against union members in its hiring of employees. See 29 U.S.C. § 158(a)(3). Therefore, while the Sterling Rule may relieve an employer from an obligation to hire its former employees in accordance with the recall provisions in the expired Wage Agreement, the NLRA will prohibit the employer from refusing to hire its former employees simply because of their union membership. This prohibition against discrimination does not require an employer to hire union members or to hire its former employees by seniority; it simply requires the employer to use neutral criteria in the selection of its employees. See e.g., Lone Star Indus., Inc., 298 N.L.R.B. No. 160 (1990) (employer not obligated to rehire strikers in order of seniority).


63. 2. Id.


68. 7. Id. at 45.


71. 10. 303 N.L.R.B. No. 19 at 7. The fact that the assets are acquired through a bankruptcy proceeding apparently does not alter the basic analysis. See Aircraft Magnesium, Div. of Grico Corp., 265 N.L.R.B. 1344 (1982), enforced, 730 F.2d 767 (Table) (9th Cir. 1984).


74. 13. Id.

75. 14. Id.


80. 19. 887 F.2d 739 (7th Cir. 1984).

81. 20. Id. at 751-52.

82. 21. 845 F.2d 483 (4th Cir. 1988).

83. 22. Id. at 490.

84. 23. 768 F.2d 1463 (D.C. Cir. 1985).

85. 24. Id. at 1471.