California Western Law Review

Volume 32 | Number 1 Article 7

1995

The Application of the Doctrine of Successorship to the Privatization of Government Services

Erin M. Gee

Follow this and additional works at: https://scholarlycommons.law.cwsl.edu/cwlr

Recommended Citation
Gee, Erin M. (1995) "The Application of the Doctrine of Successorship to the Privatization of Government Services," *California Western Law Review*: Vol. 32 : No. 1 , Article 7.
Available at: https://scholarlycommons.law.cwsl.edu/cwlr/vol32/iss1/7

This Comment is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

THE APPLICATION OF THE DOCTRINE OF SUCCESSORSHIP TO THE PRIVATIZATION OF GOVERNMENT SERVICES

Labor is prior to, and independent of capital. Capital is only the fruits of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration.[1]

Privatization refers to the transfer of governmental assets, including labor, from the government to a private party.[2] Increasingly, it is advocated as a way to "downsize" the government by reducing costs while increasing productivity.[3] Inherent in this concept is the belief that private firms are more efficient than public bureaucracy, supposedly because they are motivated by profit, rather than the incentive of public service.[4]

Privatization is being proposed on the federal, state and local levels, and its support seems to be growing. Currently, there are six bills before Congress providing for privatization of various services, from the Post Office to the Tennessee Valley Water Authority.[5] In 1987, President Reagan established a President's Commission on Privatization to identify which federal functions should be transferred to the private sector.[6] President Clinton has expanded the concept and actively promotes the efforts of state and local governments to transfer infrastructure assets to the private sector.[7]

---

1. Abraham Lincoln, *in* THE COLUMBIA DICTIONARY OF QUOTATIONS 499 (1993).

2. Exec. Order No. 12,803, 57 Fed. Reg. 19,063 (1992).

3. E.S. SAVAS, THE PUBLIC SECTOR: HOW TO SHRINK GOVERNMENT (Aaron Wildavsky ed. 1982).

4. Milton Friedman, *The Role of Incentive in Private Behavior*, 29 SAN DIEGO L. REV. 1, 3 (1992).

5. H.R. 210, 104th Cong., 1st Sess. (1995) (provides for the privatization of the United States Postal Service); H.R. 313, 104th Cong., 1st Sess. (1995) (directs the President to develop a plan for transferring all real property, facilities and equipment of the Tennessee Valley Authority to public and private entities); H.R. 28, 104th Cong., 1st Sess. (1995) (Freedom From Government Competition Act requires the federal government to procure from the private sector the goods and services necessary for the operation and management of certain government agencies); H.R. 209, 104th Cong., 1st Sess. (1995) (amends the National Foundation on the Arts and the Humanities Act of 1965 to abolish the National Endowment for the Arts and National Council of the Arts); H.R. 310, 104th Cong., 1st Sess. (1995) (provides for the privatization of the Federal Power Marketing Administrations); and H.R. 579, 104th Cong., 1st Sess. (1995) (amends the National Foundation on the Humanities and the Humanities Act of 1965 to abolish the National Endowment for the Arts and the National Council on the Humanities).

6. Exec. Order No. 12,607, 53 Fed. Reg. 34,190 (1987).

7. Exec. Order No. 12,803, 57 Fed. Reg. 19,063 (1992) Infrastructure assets are defined as any assets financed at least partially by the federal government. *Id.* They include: roads, tunnels, bridges, electricity facilities, mass transit, railroads, airports, ports, waterways, water supply facilities, recycling and wastewater treatment facilities, solid waste disposal facilities,

Published by CWSL Scholarly Commons, 1995

California Western Law Review, Vol. 32 [1995], No. 1, Art. 7

Government employees performing public functions are often covered by collective bargaining agreements, and the number of unionized government workers is growing. Union membership in general was in a state of decline for fourteen years until 1994.[8] The new growth in union membership is attributed to the increase in the number of unionized government workers.[9]

While most unionized workers in the private sector are covered by the National Labor Relations Act (NLRA),[10] federal, state and local government employees are specifically excluded.[11] The NLRA, enacted in 1935, declared it to be the policy of the United States to encourage collective bargaining.[12] The Act gives employees the right to organize and bargain collectively and establishes the National Labor Relations Board (NLRB) to regulate union activities.[13] Additionally, the NLRB is given the power to enforce and remedy unfair labor practices.[14] In contrast, government employees' rights are controlled by state and federal public employee labor policies.[15] Because of the different statutes involved, labor relations in the public sector may differ from those in private industry[16] and may also differ from state to state.

Proponents of privatization presume that formerly public employees working in the private sector will not remain organized.[17] Privatization, therefore, is seen as one way to eliminate or reduce the overall numbers of

---

housing, schools, prisons and hospitals. *Id.*

8. Susan L. Behrmann, U.S. Dept. Of Labor, *Union Members in 1993*, 46 COMPENSATION AND WORKING CONDITIONS 2 (Feb. 1994).

9. *Id.* In California, a 1987 survey showed government employees produced the largest gain in unionization and represented the largest number of unionized workers. 1989 *Union Labor in California, 1987*, CALIF DEPT. OF INDUS. REL.

10. 29 U.S.C.A. §§ 151-169 (1988).

11. 29 U.S.C.A. § 152(2) (1988).

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Id.

12. 29 U.S.C.A. § 151 (1988).

13. 29 U.S.C.A. § 153 (1988).

14. 29 U.S.C.A. § 158 (1988).

15. Eric J. Pelton, Note, *Privatization of the Public Sector: A Look at Which Labor Laws Should Apply to Private Firms Contracted to Perform Public Services*, 1986 DET. C.L. REV. 805, 808. The Civil Service Reform Act of 1978 covers federal public employees. *See* 5 U.S.C.A §§ 1101-1501 (1994). State and municipal workers are covered by state labor laws.

16. MORRIS A. HOROWITZ, COLLECTIVE BARGAINING IN THE PUBLIC SECTOR 1 (John T. Dunlop & Arnold M. Zack, eds. 1994). A major difference between collective bargaining in the private and public sector is the right to strike. *Id.* Only ten states have granted public employees the right to strike: Alaska, Hawaii, Illinois, Minnesota, Montana, Ohio, Oregon, Pennsylvania, Vermont and Wisconsin. *Id.* Other differences include scope of bargaining, grievance procedures, bargaining unit size and grouping, and wage determination. *Id.* at 5-13.

17. Craig Becker, *With Whose Hands: Privatization, Public Employment and Democracy*, 6 YALE L. & POL'Y REV. 88, 89 (1988).

organized workers.[18] Opponents of privatization, however, see it as a labor relations strategy designed to cut labor costs at the expense of public employees covered by collective bargaining agreements.[19]

Under the doctrine of successorship,[20] when a new employer takes over a unionized business and certain conditions are met, the new employer may be considered a successor employer and thus may inherit certain obligations of the former employer. The term "successor employer" is imposed by the NLRB and generally denotes a private employer who has assumed a business from a private predecessor.[21]

The United States Supreme Court has held that this doctrine requires a successor employer to bargain with the union representing the displaced employees when there is a "substantial continuity" between the businesses.[22] One of the purposes of successorship law is to protect employees from uncertainty when business ownership is transferred in order to promote the ultimate goal of the NLRA: industrial peace.[23] One legal question that remains unanswered is whether successorship applies when privatization occurs, that is, when a governmental entity employing union workers is turned over to a private business. This Comment will discuss the doctrine of successorship in light of the current trend of privatization.

Section I of this Comment will review the background of the National Labor Relations Act and the history of the Supreme Court's treatment of successorship and collective bargaining. Section II will discuss current legal trends by analyzing NLRB cases and conclude that successorship will apply when a public employee becomes a private employee through privatization. Section III will briefly discuss some of the societal benefits associated with union organization and collective bargaining. Finally, this Comment will argue that its application is in the best interests of not only the employee, but society as a whole.

I. BACKGROUND

A. National Labor Relations Act

18. *Id.* at 90 (citing HARRY WELLINGTON & RALPH WINTER, THE UNIONS AND THE CITIES 62-65 (1971)).

19. *Id.* at 88.

20. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987); Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees Int'l Union, 417 U.S. 249 (1974); NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272 (1972); Wiley & Sons v. Livingston, 376 U.S. 543 (1964).

21. B. Glenn George, *Successorship and the Duty to Bargain,* 63 NOTRE DAME L. REV. 277, 277 (1988).

22. *Fall River*, 482 U.S. 27; *Howard Johnson*, 417 U.S. 249; *Burns*, 406 U.S. 272; *Wiley*, 376 U.S. 543.

23. *Fall River*, 482 U.S. at 38.

The National Labor Relations Act was passed in 1935.[24] In an effort to promote industrial peace, it encouraged collective bargaining by giving employees the right of self-organization.[25] It allows workers to form or join a labor union and outlines the procedure for union certification.[26] Once a union has been certified, under subsection 8(a)(5) of the Act, it becomes an unfair labor practice for the employer to refuse to bargain collectively with employee representatives.[27] Likewise, the labor organization itself has a duty to bargain with the employer.[28] The Act, however, does not expressly impose the duty to bargain in cases where a formally unionized business is sold or transferred to a non-union or different union company. The duty of a successor employer to bargain with a predecessor union has evolved from NLRB decisions and the federal courts. Underlying this duty is the assumption that industrial peace will be maintained as long as the employees' reasonable expectations are carried out.[29]

The term "successor employer" usually denotes an employer who has purchased or assumed a business.[30] A successor employer may obtain a business through "merger, sale of stock, sale of assets, loss of a renewable contract, incorporation of a formerly unincorporated entity, dissolution of a corporation, bankruptcy" or other means.[31] While a private business purchasing or assuming a government service has yet to be called a "successor employer," the above definition of the term perhaps is broad enough to include it.

B. Supreme Court Treatment of Successorship Cases

1. *John Wiley & Sons, Inc. v. Livingston*

The issue of successorship was first addressed by the Supreme Court in *John Wiley & Sons, Inc. v. Livingston*.[32] In *Wiley*, the Court held that the rights of employees under a collective bargaining agreement are not automatically lost after a company's merger, and a successor employer may be required to arbitrate under the agreement.[33] In *Wiley*, the predecessor employer, Interscience, had merged with the successor, Wiley, and was no

24. 29 U.S.C.A. §§ 151-169 (1988).
25. *Id.*
26. 29 U.S.C.A. § 159 (1988).
27. 29 U.S.C.A. § 158(a)(5) (1988).
28. *Id.* at § 158(b)(3) (1988).
29. Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973).
30. George, *supra* note 21, at 277.
31. Jonathan Silver, *Reflections on the Obligations of a Successor Employer*, 2 CARDOZO L. REV. 545, 545 n.1 (1981).
32. 376 U.S. 543 (1964).
33. *Id.* at 548.

longer in business as a separate entity.[34] After the merger, all but a few of Interscience's employees were retained by Wiley.[35]

The dispute arose when Wiley refused to recognize the union and asserted that the merger terminated the bargaining agreement, which contained an arbitration provision.[36] Wiley contended that the union lost its bargaining status when the Interscience unionized employees were merged with the Wiley non-unionized employees.[37] Thus, it would not have to honor seniority provisions and pension fund payments provided for in the collective bargaining agreement and it was not obligated to arbitrate.[38]

The union based its claim on a state law and argued that Wiley was a successor to Interscience and thus bound by the collective bargaining agreement.[39] In the alternative, the union claimed that federal policy and federal law mandated arbitration.[40]

The Supreme Court unanimously rejected Wiley's argument and required the company to comply with the arbitration provision in its predecessor's labor agreement. In affirming Wiley's obligation to arbitrate, the Court relied, in part, on the important role of arbitration in effectuating national labor policy.[41] The Court reasoned that since employees and their unions usually do not have a voice in corporate ownership negotiations, the well-being of the employees may become incidental to the considerations of the

---

34. *Id.* at 545. At the time of the merger, Interscience had eighty employees, forty of whom were covered by a collective bargaining agreement. None of Wiley's three hundred employees were unionized. *Id.*

35. *Id.* at 545-46.

36. *Id.* at 545.

37. *Id.* at 547. Wiley argued that it was never a party to the collective bargaining agreement and could not be bound to an agreement it did not sign. *Id.* Thus it was not bound to arbitrate and not bound to the previous collective bargaining agreement provisions. *Id.*

38. *Id.*

39. *Id.* at 547-548. N.Y. Stock Corporation Law § 90 reads in part:

> The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations.

Id. at 548 n.2.

40. *Id.* at 548.

41. *Id.* at 549. The Court further recognized the central role of arbitration in effectuating national labor policy. "It would derogate from 'the federal policy of settling labor disputes by arbitration,' if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established." *Id.* (citation omitted). Arbitration is seen "as the substitute for industrial strife" and as "part and parcel of the collective bargaining process itself." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 596 (1960).

negotiators.[42] Arbitration was seen as a method to "level the playing field" thereby easing the transition and avoiding industrial strife.[43] This national labor policy preference for arbitration could only be overcome by compelling circumstances, which Wiley did not show.[44]

Moreover, the *Wiley* Court characterized a collective bargaining agreement as a new common law, dictated by the NLRA and circumstance.[45] A collective bargaining agreement is more complex than an ordinary contract because it covers the entire employment relationship and governs many circumstances which cannot be anticipated.[46] Therefore, although the duty to arbitrate was contractually based, the Court did not apply ordinary contract principles and instead construed the obligation to arbitrate in the context of the national labor policy.[47]

With this in mind, the Court considered Wiley a successor employer because its operations were similar to those of Interscience and were continuous with them.[48] The fact that Interscience employees were a minority in Wiley's business was not relevant.[49] Instead the Court focused on the fact that there was a "wholesale transfer" of employees to Wiley.[50]

The implications of this decision were broad in that it potentially created substantial labor obligations for successor employers.[51] However, this would occur only if they hired nearly all of the predecessor's employees and if there was a substantial continuity of identity in the business enterprise.[52]

---

42. *Id.* The rights of owners to rearrange their businesses must be balanced against the need for some protection for employees against sudden change in their employment relationship. *Id.*

43. *Id.* (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

44. *Id.* at 549-50. However, the Court stressed that the duty to arbitrate may not survive in every case in which the ownership or corporate structure of a business is changed. *Id.* at 557. For example, if there is a lack of substantial continuity of the business enterprise or the union might fail to make its claims known. *Id.*

45. *Id.* at 550 (citing *United Steelworkers,* 363 U.S. at 580).

46. *Id.* Under contract law, an unconsenting successor would not be bound to the predecessor's agreement. *Id.*

47. *Id.* at 550-51.

48. *Id.* at 551.

49. *Id.* at 551 n.5 ("The fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises.") (citing Retail Clerks Int'l Assn., Local Unions Nos. 128 & 633 v. Lion Dry Goods, Inc., 369 U.S. 17 (1962)).

50. *Id.* at 551.

51. George, *supra* note 21, at 282.

52. Susan Frier, Note, *Labor Law: Expansion of the Successorship Doctrine:* Fall River Dyeing & Finishing Corp. v. NLRB., 23 WAKE FOREST L. REV. 549, 555 (1988).

2. *NLRB v. Burns International Security Systems, Inc.*

Following *Wiley*, legal commentators predicted that because of the Court's primary concern with protection of employee rights as a means of maintaining industrial peace, it would eventually rule that a successor employer would be bound by all provisions in a predecessor's labor agreement.[53] This did not happen. Eight years later, the Court, in *NLRB v. Burns International Security Systems, Inc.*, limited *Wiley* to its facts and held that a successor could not be required to assume its predecessor's collective bargaining agreement.[54]

In *Burns*, Wackenhut Corp provided plant protection services to Lockheed Aircraft Service Company.[55] United Plant Guard Workers of America (UPGWA) was certified as the exclusive bargaining representative for Wackenhut's employees a few months before their company's contract expired.[56] Burns International Security Service (Burns) was the successful bidder for the contract and took over the security service, employing forty-two guards, of whom twenty-seven were former Wackenhut employees.[57] Although Burns knew of Wackenhut's labor agreement, it refused to recognize and bargain with the union.[58] UPGWA filed suit, demanding that Burns recognize them and honor the collective bargaining agreement between it and Wackenhut.[59]

The Board relied on *Wiley* and ruled not only that Burns had a duty to recognize and bargain with the UPGWA, but that it was bound to the terms of the labor agreement.[60] The Court of Appeals affirmed the Board's finding of a duty to bargain, but held that the Board could not order Burns to honor

---

53. Marion Crain-Mountney, Comment, *The Unenforceable Successorship Clause: A Departure From National Labor Policy*, 30 UCLA L. REV. 1249, 1259 (1983).

54. 406 U.S. 272 (1972).

55. *Id.* at 274.

56. *Id.*

57. *Id.* at 274-75. On February 28, 1967, in a Board election, a majority of Wackenhut guards selected the union as their exclusive bargaining representative. *Id.* at 274. On March 8, 1967, the Regional Director certified the union and on April 29, 1967, Wackenhut and the union entered into a three year collective bargaining agreement. *Id.* at 274-75. On May 31, 1967, Wackenhut was notified that Burns would take over protection services. *Id.* at 275.

58. *Id.* Burns preferred to recognize another union which already represented guards at their other plants.

59. *Id.* at 275-76.

60. *Id.* at 276. Note 2 quotes the Board:

> The question before us thus narrows to whether the national labor policy embodied in the Act requires the successor-employer to take over and honor a collective bargaining agreement negotiated on behalf of the employing enterprise by the predecessor. We hold that, absent unusual circumstances, the Act imposes such an obligation.

Id. at 276 n.2.

the contract executed by Wackenhut.[61] The Supreme Court affirmed the Court of Appeals in a five to four decision.[62]

The Court recognized two factors in the determination of successorship: (1) whether a majority of the employees hired by the new employer had previously worked for the predecessor and (2) whether they had recently voted in favor of union representation.[63] Burns' obligation to bargain with UPGWA stemmed from its hiring of Wackenhut's employees, knowing of their representation, and from the recent election and Board certification.[64] Mere change in employers or ownership would not affect the force of Board certification if a majority of employees after the change were employed by the previous employer.[65]

The Court distinguished this case from *Wiley* on several grounds. First, *Wiley* was an action to compel arbitration under section 301 of the Labor Management Relations Act (LMRA) and reflected the LMRA's special concern with arbitration.[66] The Court reasoned that the *Wiley* decision was limited only to arbitration agreements and did not extend to other provisions of a collective bargaining agreement. However, this distinction seems weak because it is based on the technicality of procedure alone, thereby allowing differing results depending on the forum selected.[67]

Second, the Court held *Wiley* inapplicable because it relied heavily on the strong public policy favoring arbitration, which was not a factor in *Burns*.[68] However, this rationale has been criticized because the Court in *Wiley* viewed the labor agreement, and not the arbitration agreement, as the

---

61. *Id.* at 276.

62. *Id.* at 292. Chief Justice Rehnquist and three other justices joined in a partial dissent and opposed the imposition of the bargaining order. *Id.* at 296 (Rehnquist, J., dissenting). According to Rehnquist, there was no evidence indicating that all of the twenty-seven Wackenhut employees hired by Burns had supported the union. *Id.* at 297. Furthermore, the majority had imposed on Burns the duty not only to bargain with the Wackenhut employees' union, but it also had an obligation to bargain with another union certified by guards at its other facilities. *Id.* at 298. Rehnquist would have only imposed the duty to bargain when the successor had acquired some of the predecessor's assets. *Id.* at 305.

63. *Id.* at 277-81.

64. *Id.* at 278-79.

65. *Id.* at 279. The Court compares this to § 9(c)(3) of the NLRA, which states that there shall be no election if a valid election has been held in the preceding 12 month period. 29 U.S.C. § 159(c)(3) (1988). Where an employer remains the same, Board certification assumes a presumption of majority representation status for a reasonable period of time, usually a year after election. *See* Brooks v. NLRB, 348 U.S. 96, 98-99 (1954). After one year, there is a rebuttable presumption of majority representation. *See* Celanese Corp. of America, 95 N.L.R.B. 664, 672 (1951). An almost complete turnover of employees, however, can be a basis of a challenge to certification. *Burns*, 406 U.S. at 278 n.3.

66. *Id.* at 286. *Burns* was an unfair labor practice proceeding under the NLRA. *Id.* at 285.

67. Crain-Mountney, *supra* note 53, at 1262.

68. *Burns*, 406 U.S. at 286.

set of rules to preserve industrial peace.[69] It was the collective bargaining agreement in *Wiley* which was given special status.[70]

Third, the Court reasoned that *Wiley* was decided against a background of state law requiring that in merger situations, the surviving corporation would be liable for the obligations of the previous corporation.[71] Here, there was no merger or sale of assets, only competitive bidding for the service contract. Since there was no purchase of Wackenhut by Burns, it could not be held liable for its financial obligations.[72] This distinction, too appears weak because the Court in *Wiley* expressly stated that its decision was controlled by federal, not state law,[73] thus further undermining the Burns distinction.

3. *Golden State Bottling Co. v. NLRB*

One year later, the Court addressed a successor employer's duty to remedy the unfair labor practice of its predecessor in *Golden State Bottling Co. v. NLRB*.[74] Golden State was sold to All American Beverages after the NLRB had ordered it to reinstate with backpay an employee whose discharge was found to be an unfair labor practice.[75] All American and Golden State were both parties to the proceedings and both were held jointly liable.[76] The Board had found that since All American had acquired the business with knowledge of the Board order, as the purchaser of Golden State, it was a successor and thereby liable for the unfair labor practice.[77]

The Supreme Court focused its decision on successorship from the perspective of the employees.[78] The Court stated that "when a new employer . . . has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations, those employees who have been retained will understandably view their job situations as essentially unaltered."[79] The Court reasoned that if the successor was not held liable for the predecessor's unfair labor practice, the employees might consider the failure to remedy as a continuation of the

69. Crain-Mountney, *supra* note 53, at 1262.

70. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964).

71. *Burns*, 406 U.S. at 286.

72. *Id.*

73. *Wiley*, 376 U.S. at 548. *See also* Crain-Mountney, *supra* note 53, at 1263.

74. 414 U.S. 168 (1973).

75. *Id.* at 170.

76. *Id.* The Board, in its decision, found that Golden State violated §§ 8(a)(3), (1) of the NLRA, 29 U.S.C. §§ 158(a)(3), (1) (1988), when they discharged an employee because of union activities. The employee was ordered reinstated with backpay. *Golden State*, 414 U.S. at 171 n.1.

77. *Id.*

78. *Id.* at 184.

79. *Id.*

predecessor's labor policies.[80] Since employees have the legitimate expectation that unfair labor practices will be remedied, the failure to do so may result in labor unrest.[81] Furthermore, there were no underlying policy reasons for not imposing the duty to remedy.[82]

4. *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*

The following term, the Supreme Court again faced the problem of defining the labor law obligations of a successor employer in *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*[83] Here, the Court specifically addressed the appropriate criteria for successorship. Howard Johnson had purchased the assets of a restaurant and motor lodge from its franchisee.[84] Their agreement specified that Howard Johnson would not assume any labor obligations nor recognize any labor agreement.[85] Prior to the sale, the fifty-three employees of the restaurant and motor lodge were represented by the Hotel & Restaurant Employees & Bartenders International Union.[86] Their collective bargaining agreements contained successorship provisions, providing that the agreement was binding upon the employer's successors.[87]

Two weeks before the transfer, the employees were notified of their termination and Howard Johnson began to post hiring notices in the restaurant and motor lodge.[88] However, when Howard Johnson began operations with forty-five employees, only nine of them had been employed by the predecessor.[89]

The union brought an action to compel arbitration under section 301 of the Labor Management Relations Act[90] to require Howard Johnson to hire more of the previous employees.[91] The District Court held that both Howard

---

80. *Id.*

81. *Id.*

82. *Id.* at 185.

83. 417 U.S. 249 (1974).

84. *Id.* at 250. The franchisees entered into an agreement with Howard Johnson whereby they sold them all of the personal property used in the operation of the restaurant and motor lodge, while the franchisees retained ownership of the real property. Howard Johnson then leased the land from the franchisees. *Id.* at 251.

85. *Id.*

86. *Id.* Officially the restaurant employees were represented by the Hotel & Restaurant Employees & Bartenders International Union, while the motor lodge employees were represented by the Hotel, Motel & Restaurant Employees Union. The two unions were both represented in the litigation by the Detroit Local Joint Executive Board. *Id.* at 257 n.1.

87. *Id.* at 251.

88. *Id.* at 252. Howard Johnson also posted notices in local newspapers and other places. *Id.*

89. *Id.* The nine employees were from the restaurant. *Id.* None of the motor lodge employees were hired. *Id.*

90. 29 U.S.C.A. § 185 (1988).

91. *Howard Johnson,* 417 U.S. at 252.

Johnson and its predecessor were required to arbitrate the extent of their obligations to the former employees.[92] However, the district court held that Howard Johnson was not required to hire all of the predecessor's employees.[93]

The Supreme Court reversed and refused to order arbitration, in part because of a lack of substantial continuity in the identity of the workforce.[94] Because Howard Johnson had only hired nine of its predecessor's fifty-three employees, the Court held that there was no continuity in the identity of the workforce and thus no successorship obligations.[95]

The Court reaffirmed the continuity of identity in the business enterprise requirement first stated in *Wiley*.[96] Included in this requirement, and as a prerequisite to the analysis, the Court held that there must be a substantial continuity in the identity of the workforce throughout the change in ownership.[97] In other words, the Court will first determine if there is a majority of predecessor employees before considering any "continuity of identity in the business enterprise" factors. The Court rationalized that this was consistent with the *Wiley* Court's concern with protecting employees during the transition period and avoiding the industrial strife.[98] At the same time, employers were relieved from the obligation to hire any or all of their

92. *Id.* at 253.

93. *Id.* The company appealed the order to arbitrate and the Court of Appeals affirmed. *Id.*

94. *Id.* at 264. The existence of the successorship clause in the collective bargaining agreement cannot bind the successor where there is not continuity. This is clear especially when Howard Johnson refused to assume any obligations as part of its agreement. *Id.* at 258 n.3.

95. *Id.* at 263.

96. *Id.* Justice Douglas dissented, contending that the decisions in both *Wiley* and *Burns* would require successorship status, citing both policy considerations and contract principles. *Id.* at 265 (Douglas, J., dissenting). Although Wiley could not be bound to a contract he did not sign, in spite of the strong policy favoring arbitration in this case, Howard Johnson was the franchisor to the predecessor and exhibited substantial control over the business operation before it took over. *Id.* at 267. For example, the motel franchise agreement provided that Howard Johnson must determine and approve standards of construction, operation and service; that Howard Johnson must approve any equipment or supplies bearing the name 'Howard Johnson'; that Howard Johnson would have first option to buy out the business; and that Howard Johnson would have to approve any successor. *Id.* at 267 n.2. After the take-over, the business continued as usual, under the same name, at the same location, offering the same products and services to the same customers, with almost the same number of employees. *Id.* at 267. The only difference was the identity of the employees. *Id.* According to Justice Douglas, the majority's decision allows any new employer to determine whether or not to be obligated to the union, simply by arranging for the termination of all the prior employer's personnel, regardless of any substantial continuity of identity in the business enterprise factor. *Id.* at 269. This result is irreconcilable with public policy decisions laid down in *Wiley*. *Id.* at 268.

97. *Id.* at 263.

98. *Id.* at 264.

predecessor's employees,[99] so long as union activity was not the basis for the decision.[100]

The Court also distinguished this case from *Wiley*.[101] The lower courts had held that *Wiley* controlled because both were section 301 actions, rather than Burns, which involved an NLRB order.[102] The Court rejected this assertion, disallowing the form of the union claim to determine the new employer's rights.[103] Hence, successorship status was not found simply because the claim was brought under section 301, rather than under an unfair labor practice charge.

Furthermore, the Court found significant differences between this case and *Wiley*. First, *Wiley* involved a merger in which the predecessor employer completely disappeared.[104] Because of the disappearance of the original entity, the union would be without remedy unless successorship was found.[105] Second, *Wiley* was conducted in a state following a rule that a surviving corporation, after a merger, is held liable for the obligations of the disappearing corporation.[106] Thus state law alerted *Wiley* as to its possible liability, whereas *Howard Johnson*, decided in a state without such a law, was not.

After *Howard Johnson*, successorship cases were decided based on two questions: (1) whether a majority of the new company's employees were former employees of its predecessor;[107] and (2) whether there was "substantial continuity of identity in the business enterprise.[108] The Board developed criteria for determining the second question: (1) whether there was substantial continuity of the same business operations; (2) whether the same plant was used; (3) whether the same or substantially the same work force was employed; (4) whether the same jobs existed under the same working conditions; (5) whether the same machinery, equipment and methods of production were used; (6) whether the same product was manufactured or the same services offered; and (7) whether the same supervisors are employed.[109]

---

99. *Id.* "This holding is compelled . . . if the protection afforded employee interests in a change of ownership by Wiley is to be reconciled with the new employer's right to operate the enterprise with his own independent labor force." *Id.*

100. *Id.* at 262 n.8. It is an unfair labor practice for an employer to discriminate in either the hiring or retention of any employee based on union membership or activity. 29 U.S.C.A. § 158 (8)(a)(3) (1988).

101. *Howard Johnson,* 417 U.S. at 256.

102. *Id.*

103. *Id.*

104. *Id.* at 257. Here, the predecessor employer remained as the lessor of the property. *Id.* at 251.

105. *Id.* at 257.

106. *Id.*

107. *Id.* at 263.

108. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964).

109. Georgetown Stainless Mfg. Corp., 198 N.L.R.B. 234, 236 (1972).

5. *Fall River Dyeing & Finishing Corp. v. NLRB*

In cases subsequent to *Howard Johnson*, the Board only found successor liability in cases where a majority of the new employer's work force had been employed by the predecessor.[110] Thus, it seemed that a majority of the new employer's employees had to be former employees of the predecessor before the factors for business continuity would be applied.[111] In *Fall River*, thirteen years after *Howard Johnson*, the Supreme Court finally clarified the test for successorship and the duty to bargain.[112]

The predecessor company in *Fall River*, Sterlingwale, operated a textile dyeing and finishing plant in which the production and maintenance employees were represented by the United Textile Workers of America (UTWA).[113] Business declined and eventually all production employees were laid off.[114] Sterlingwale then went out of business about six months later.[115] The real property and equipment were assigned to creditors, while the inventory was sold at auction.[116]

Meanwhile, Sterlingwale's former vice-president in charge of sales formed a partnership with the president of one of Sterlingwale's major customers. They formed Fall River Dyeing & Finishing Corporation with the intention of taking advantage of Sterlingwale's assets and work force.[117]

Seven months after the final lay-offs, in September 1992, Fall River began operating out of Sterlingwale's former facilities and began to hire employees.[118] Out of twelve supervisors initially hired, eight were former Sterlingwale supervisors and three were former Sterlingwale production employees.[119]

In October, 1982, UTWA requested Fall River to recognize it as the bargaining agent and to begin collective bargaining. However, Fall River

---

110. George, *supra* note 21, at 287.

111. *Id.*

112. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987).

113. *Id.* at 30-31.

114. *Id.* at 31. The most recent collective bargaining agreement was due to expire at about the same time that business began to decline. In response to the company's financial difficulties, the union agreed to extend the expiration date of its contract by one year without any wage increase and also agreed to improve productivity. *Id.*

115. *Id.* at 32.

116. *Id.*

117. *Id.* The customer acquired the plant, real property and equipment from Sterlingwale's creditors and in turn, conveyed the property to the new corporation. The corporation also obtained some of Sterlingwale's remaining inventory at the auction. *Id.*

118. *Id.* Fall River advertised for employees in the newspaper and the vice-president personally contacted several prospective supervisors. *Id.* at 33.

119. *Id.* Fall River hoped to hire one full shift of workers, 55 to 66 employees, and then expand to a second shift as business permitted. The start-up employees spent four to six weeks in start-up operations and an additional month in experimental production. *Id.*

refused this request.[120] In November, 1982, the Union filed unfair labor practice charges against Fall River for its refusal to bargain with the union.[121]

The Administrative Law Judge (ALJ) decided that Fall River was a successor to Sterlingwale and it had an obligation to bargain with the union because a majority of its employees were former Sterlingwale employees.[122] The Board affirmed the ALJ's decision and the Court of Appeals for the First Circuit enforced.[123]

The Supreme Court on appeal considered four issues in *Fall River:* (1) whether *Burns* was limited to circumstances involving recent certification of the union; (2) whether *Fall River* was a successor to Sterlingwale; (3) whether the Board's "substantial and representative complement" rule fixing the moment to determine whether a majority of the successor's employees are former employees of the predecessor, was reasonable; and (4) whether the Board's "continuing demand" rule was reasonable.[124]

In response to the first issue, the Court agreed with the Board and Court of Appeals decisions that the *Burns* holding would be equally applicable where a union had not been recently certified before a transition in employers.[125] Mere change in ownership would not affect Board certification where, after a change in ownership, a majority of the employees were previously employed by the preceding employer.[126]

---

120. *Id.* At the time, Fall River employed 21 employees, 18 of them former Sterlingwale workers. *Id.*

121. *Id.* at 34. The union claimed that Fall River violated §§ 8(a)(1) and (5) of the NLRA. 29 U.S.C.A. § 158(a)(1), (5) (1988). The statute reads in part:

> It shall be an unfair labor practice for any employer–(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Id.

122. *Fall River*, 482 U.S. at 34. The ALJ determined that the proper date for making this determination was in mid-January, when Fall River had obtained a "representative complement" of employees, not in mid-April when the "full complement" of employees was hired. *Id.* Although the union's demand for bargaining occurred two months before this date, the demand was characterized as "of a continuing nature" which would take effect when the representative complement was reached. Because former Sterlingwale employees were in the majority in mid-January and the union's October demand was still in effect, the duty to bargain arose in mid-January and Fall River's refusal constituted an unfair labor practice. *Id.* at 35.

123. *Id.* The Court acknowledged the Board's substantial and representative complement standard as an attempt to determine when a successor has to bargain with the predecessor's union during a transition period when it may not be clear when the new employer will reach a full complement of employees. *Id.*

124. *Id.* at 29-30.

125. *Id.* at 37. *See* NLRB v. Auto Ventshade, Inc., 276 F.2d 303, 305 (5th Cir. 1960); Tom-A-Hawk Transit, Inc. v. NLRB, 419 F.2d 1025, 1026 (7th Cir. 1969).

126. *Fall River*, 482 U.S. at 37.

The Court cited the Board in identifying two presumptions regarding a union's majority status following certification.[127] For one year following certification, the Court held that the union is entitled to an irrebuttable presumption of majority support.[128] After the first year, the employer can rebut the presumption by establishing a good faith doubt regarding continuing union support.[129] The Court derived these presumptions from the NLRA's overriding policy of promoting industrial peace, not from any certainty that the union's majority status will remain.[130] This removes the temptation of the employer to delay bargaining in hopes of undermining union support.[131] Moreover, this policy allows unions to pursue the goals of their members, and this in turn will promote industrial peace.[132]

The Court expressed deep concern with the position of the employees in the successorship situation. It reasoned that if the employees were employed by a new enterprise that was substantially the same as the old, they might begin to feel that their choice of unions was subject to marketplace manipulations.[133] Moreover, the employees might believe that union support would jeopardize their job or blame the union for the change in ownership, all of which would lead to industrial unrest.[134] Without the presumptions, an employer could exploit the employees' ambivalent attitudes toward the union, in order to completely eliminate its presence,[135] while at the same time, taking advantage of the trained worked force.[136]

The Court next addressed the successor issue. The Board's criteria for substantial continuity were adopted[137] with emphasis on "whether those employees retained will understandably view their job situations as essentially unchanged."[138] Again, the NLRA policy of promoting industrial peace was

---

127. *Id.*

128. *Id.*

129. *Id.* at 38.

130. *Id.* The Court did not base its decision from any certainty that the union's majority status would remain indefinitely. *Id.*

131. *Id.*

132. *Id.* at 38-39. During the unsettling transition period between employers, this presumption is "particularly pertinent" to safeguard union members' rights as well as to develop a relationship with a successor. *Id.* at 39.

133. *Id.* at 39-40.

134. *Id.* at 40. This was true here, where some of Sterlingwale's employees complained of the Union's inability to obtain benefits from the failing Sterlingwale. *Id.* at 40 n.7.

135. *Id.* at 40.

136. *Id.* at 41.

137. *Id.* at 43. The factors are: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new enterprise has the same production process and produces the same products with basically the same customer base. *Id.*

138. *Id.* (quoting Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973)). The seven month hiatus between the fall of Sterlingwale and the start-up of Fall River was but a factor in the substantial continuity calculus, and thus was relevant only if there were other indicia of discontinuity, which the Court did not find. *Id.* at 45. In fact, the Court noted that from the employees' perspectives, the hiatus may have seemed like less than seven months, since during

the foundation for the approach.[139] Additionally, the Court approved the Board's findings that the duty to bargain arose when a representative complement of employees were previously working for the predecessor business.[140]

Fall River claimed that this representative complement rule would burden employers because of uncertainty of knowing when the bargaining obligation will arise.[141] The Court rejected this since the employer, as a successor, is in the best position to know when it has begun normal production, which triggers the "substantial and representative complement" rule.[142] Moreover, given the "expansionist dreams" of many new businesses, it would prove equally, if not more difficult, to determine the moment when a "full complement" of employees had been obtained.[143]

Finally, the Court held that the successor's duty to bargain at the "substantial and representative complement" date must be triggered by a union demand to bargain.[144] The doctrine of successorship has evolved through interpretation by the Board and the Supreme Court. If employees retained by a successor employer view their job situation as essentially unchanged from their previous employment, they can demand that the new employer bargain with their previous union. This demand is considered continuing until a representative complement is met. When a majority of the new enterprise employees are from the predecessor employer, the new employer has a duty to bargain with the existing collective bargaining unit, however it is under no obligation to honor any provisions in the agreement.

---

that period, workers were interviewing and waiting for the new business to start up. *Id.* at 45-46.

139. *Id.* at 43. The Board again prevailed on the representative complement issue. The Court approved the Board's attempt to balance the dual objectives of maximum employee participation and immediate representation, and held that the representative complement of mid-January was dispositive. *Id.* at 48-52.

140. *Id.* at 47. In determining when a substantial and representative complement of employees exists, the Board looks at whether the job classifications were filled or substantially filled and whether the operation was in normal or substantially normal production. It also considers the size of the complement and the time expected to pass before a substantially larger complement would be at work, as well as the relative certainty of expansion. *Id.* at 48. The Court also cleared up some confusion on when to measure work force continuity. Some courts had looked at whether a majority of the successor's employees were from the predecessor, while others looked at when the successor hired a majority of the predecessor's employees. *Id.* at 47 n.12. The Court adopted the former interpretation, that is, when the majority of the successor's employees are former employees of the predecessor. *Id.* at 47.

141. *Id.* at 49.

142. *Id.* at 50.

143. *Id.* at 51.

144. *Id.* at 52-53. By adopting the "continuing demand" rule, when a union has made a premature bargaining demand, it will remain in force until the moment when the employer reaches the "substantial and representative complement" of employees. *Id.* at 52. Because the union cannot possibly know when a representative complement has been hired and the employer does, it would not make sense to require the union to repeatedly demand recognition to coincide with that moment. *Id.* at 53.

II. NLRB DECISIONS

The courts have not yet faced the issue of whether a business can be a successor to a public employee collective bargaining agreement. However, the NLRB has specifically discussed the issue in three recent cases. These cases are not only significant for their holdings, but also because they demonstrate that federal courts give NLRB decisions great deference in general.[145] Findings of fact by the Board are conclusive if, on the whole, they are supported by substantial evidence on the record.[146] The "Board's application of the law to particular facts is also reviewed under the substantial evidence standard, and the Board's reasonable inferences may not be displaced on review even though the court might justifiably have reached a different conclusion had it considered the matter de novo."[147] The Courts defer to the NLRB's determination as to facts and statutory interpretation because the NLRA is a body of law the Board is entrusted with enforcing.[148]

The first case deciding whether a private business entity could be considered a successor to a government employer involved the Army's decision to contract out services at Fort Leonard Wood, Missouri.[149] In *Base Services,* the Army employed approximately 300-340 people in the Directorate of Logistics service (DOL), 269 of whom were represented by the union.[150] On June 1, 1988, Base Services took over the maintenance, supply, transportation, and quality control functions previously performed in the DOL.[151] At the time of the takeover, a majority of Base Service employees previously worked for DOL, as employees of the Federal Government.[152] However, out of the 239 employees working for Base Services, only 109 were union employees.[153]

The Board held that Base Services was not a successor employer to the Army because at no time were a majority of Base Service's employees previously represented by the union.[154] The Board did not mention any

145. NLRB v. Joe B. Foods, Inc., 953 F.2d 287, 291-92 (7th Cir. 1992).

146. U.S. Marine Corps. v. NLRB, 944 F.2d 1305, 1313-14 (7th Cir. 1991). 29 U.S.C. § 160(e) provides jurisdiction for the Court of Appeals to consider the Board's petition for enforcement and also provides the standard of review.

147. *Joe B. Foods,* 953 F.2d at 291 (quoting Indianapolis Power & Light Co. v. NLRB, 898 F.2d 524, 529 (7th Cir. 1990)).

148. *Id.* at 291-92.

149. Base Servs., Inc., 296 N.L.R.B. 172 (1989).

150. *Id.*

151. *Id.* Three new, small departments were created in addition. They were contract administration, employee relations and accounting. *Id.*

152. *Id.*

153. *Id.* Forty-six percent.

154. *Id.* at 173. The Board looked at the employees as a whole and also according to groups and reached the same conclusion. In the maintenance and supply area, only 77 (39%) of the 196 total maintenance and supply employees were for DOL union employees. Likewise in a unit comprised of maintenance, supply, transportation and quality control employees, only 108

problem with applying the NLRA to former public employees not previously covered by the Act.[155]

One year later the Board reached a similar conclusion in *Harbert International Services*.[156] The union represented 763 Army employees at Fort Leonard Wood, 219 of whom worked within the Directorate of Engineering (DEH).[157] Harbert International Services took over the DEH functions on June 1, 1988.[158] At the time of the take-over, Harbert employed 142 employees, seventy-two of whom previously worked for DEH and seventy of whom did not.[159] In dispute were fourteen employees, who were either temporary or supervisory employees.[160]

The Board agreed with the Administrative Law Judge (ALJ) in finding that employees who were temporary employees in the predecessor's unit and were permanently hired by the successor should be counted for successorship determination.[161] Even with the addition of these workers, only seventy-five of the 151 employees were former union employees from DEH and thus did not constitute the majority needed to find successorship status.[162]

Thus in both *Base Services* and *Harbert,* the reasons for denying successorship status were not because the former employer was the United States Government, but rather because the former employees did not constitute a majority at the new enterprise. As Administrative Law Judge Cates concluded in *Base Services*, "[t]he Board is not precluded from finding that successorship status exists simply because the predecessor was not covered by the Act."[163]

(43%) of the 253 total employees were previously represented by the union. *Id.*

155. *Id.* at 172-73.

156. Harbert Int'l Servs., 296 N.L.R.B. 472 (1989).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* A labor relations specialist testified that temporary employees were hired for a definite period of time, usually from one year. This employment could be extended in one year increments, for up to four years. Therefore, according to the ALJ, the four temporary employees had no definite termination dates. Furthermore, the absence of a job offer acceptance/refusal form did not preclude a temporary employee from being counted. *Id.* at 472-73.

162. *Id.* at 473.

163. *Base Servs.*, 296 N.L.R.B. at 175. The ALJ continued

> I am persuaded the traditional successorship test is the proper one to be applied in the instant case notwithstanding the fact the predecessor–the Army–was not an employer within the meaning of the Act. Imposing successorship in the instant situation fulfills the purposes of the Act by fostering stability and harmony in labor relations for an employer (Base) who is covered by the Act and which renders services to a customer (the Army) that directly affects national defense. To fail to apply the traditional successorship test in the instant case, merely because the predecessor was from the public sector, would place form over the substantive goals of the Act.

Id. at 177. The Board reversed the ALJ's decision only because a majority of the predecessor's employees were not hired by Base Services and did not address the public/private issue. *Id.*

Recently, in *JMM Operational Services*, the Board looked at a privatized municipal service: the operation of wastewater treatment plants.[164] The city of Pekin, Illinois, decided to contract out its wastewater treatment facility to a private entity, JMM Operational Services.[165] The International Order of Teamsters had been the exclusive bargaining representative for Pekin's wastewater treatment employees for more than twenty years.[166] When the city decided to privatize, four out of the five former city employees were hired by JMM.[167]

JMM refused to bargain with the City's union claiming that a private employer cannot be a successor to a public employer.[168] The Board disagreed and followed the successorship test articulated in *Fall River* and *Burns*.[169] Again this test was imposed from the employees' perspectives, that is, whether their job situation had been altered such that they would change their attitudes about being represented.[170] Although some changes in operation were instituted when the operation was privatized, the Board determined that they were not substantial enough to affect employees' attitudes about being represented by the union and thus, JMM was a successor employer to the city of Pekin.[171]

It is important that the Board thought insignificant JMM's claim that successor status could not be imposed where the predecessor was a public entity. The Board relied on the ALJ's reasoning in *Base Services* and

---

164. JMM Operational Servs., 1995 WL 25493 (June 20, 1995)

165. *Id.* at 3. The City of Pekin retained ownership of the wastewater treatment facilities and equipment. *Id.*

166. *Id.* at *2.

167. *Id.* at *3. The City employees were employees as defined by the Illinois Public Labor Relations Act (ILL. REV. STAT. 1989). *Id.* at *8. The statute covers individuals who work for either state, county or municipal employers. The city was also subject to the Act's rulings. The Illinois State Labor Relations Board (ISLRB) has jurisdiction over collective bargaining between the union and the units of local government. The ISLRB's purpose and policies are consistent with those of the NLRB. *Id.*

168. *Id.* at *10. The Union argued that it had represented various units of employees in state proceedings when their municipal employers privatized operations. *Id.* at *8. The ALJ ruled that the State Board's recognition of a lawful bargaining history should be acknowledged. *Id.* This conforms with the Board's longstanding policy of recognizing state agency proceedings where those proceedings are free of gross due process violations. *Id.*

169. *Id.* at *12.

> It is settled law under the Board and court's traditional test that when a new employer takes over the business of a formerly unionized operation and does so with a substantial and representative complement of bargaining unit employees, a majority of whom had been similarly employed by the predecessor, the new employer will be considered a "successor employer" and will inherit certain of the predecessor's bargaining obligations. The obligations the successor inherits include recognizing and bargaining in good faith with the union but does not bind it to the predecessor's collective bargaining agreement with the union.

Id.

170. *Id.*

171. *Id.* at *13. A mere change in ownership alone would not be sufficient unless there were an essential change in working conditions. *Id.* at *12.

decided that the emphasis in successorship cases must be placed on whether there is continuity of the enterprise rather than the source of the employment.[172]

Another recent Board case further supports the assertion of NLRB jurisdiction in cases where the Federal government contracts-out services.[173] Previously, if an employer lacked sufficient control over employment decisions, it was deemed unable to effectively bargain with a labor organization, and thus the Board would decline jurisdiction.[174] For instance, if government contracted-out a service, but retained sufficient control over salaries or other economic conditions, the Board would not have jurisdiction and thus could not decide successorship issues.

In *Management Training Corporation*,[175] the Board explicitly overruled previous precedent and held that a federally-funded job corp training program was subject to the NLRB.[176] The employer in *Management Training Corporation* operated a job corp facility pursuant to a contract with the United States Department of Labor (DOL).[177] In contract proposals, the DOL required information regarding salary structure and assurances of conformance to prevailing wage rates and benefits.[178] In addition, once the contract was awarded, any proposed changes in salary, personnel policies or employee benefits had to be approved by the DOL.[179] Under previous Board precedent,[180] because the employer lacked the final say concerning these primary economic aspects of its relationship with the employees, it was effectively precluded from bargaining with a union and thus would be outside the jurisdiction of the NLRB.[181]

The Board in *Management Training Corporation* declined to analyze the amount of control retained by the government and instead announced a new test to determine whether it should assert jurisdiction. Now the Board will consider only two factors: (1) whether the employer meets the definition of

---

172. *Id.*

173. Management Training Corp., 1995 LEXIS 710 (July 28, 1995).

174. Res-Care, Inc., 280 N.L.R.B. 670 (1986).

175. *Management Training Corp.*, 1995 LEXIS 710.

176. *Id.* at *12-*20.

177. *Id.* at *3. The Clearfield Job Corps Center was a federally funded employment and training program providing job training to economically disadvantaged individuals, authorized by the Job Training Partnership Act (29 U.S.C. §§ 1501-1791 (1995)).

178. *Id.* at *4. According to testimony, potential employers had to include the following in their contract proposals: (1) job classifications, labor-grade and salary scales showing the minimum and maximum wages for each grade; (2) personnel policies regarding compensatory time, overtime, severance pay, holidays, vacations, sick leave, raises, probationary employment and equal employment opportunity. *Id.* In addition, the employers were required to follow DOL policies regarding hiring, firing, promotion, demotion and transfer of all employees. *Id.* at *5.

179. *Id.* at *4. The DOL could deny reimbursement in excess of the contractual amount. *Id.* at *5.

180. Res-Care Inc., 280 N.L.R.B. 670, at 683 (1986).

181. *Id.* at 674.

"employer" under the NLRA,[182] and (2) whether the employer meets applicable monetary jurisdictional requirements.[183] In making this decision, the Board stressed that "without question, an employer's voluntary decision to contract away some of its authority over terms and conditions of employment should not be determinative of the Board's jurisdiction."[184] In fact, the dissent conceived of the case where a "governmental agency controls all economic terms and most of the noneconomic terms, and the employer controls only a handful of noneconomic terms" would be subject to NLRB jurisdiction.[185]

Because the courts usually will defer to NLRB decisions,[186] it is likely they will follow the Board's reasoning in deciding successorship of formerly government employers, even when the government retains control of economic conditions. Accordingly, the public/private distinction may become irrelevant for successorship purposes and those businesses that take over former governmental enterprises may have a duty to bargain with their predecessor's collective bargaining unit.[187]

The decision to assert or decline jurisdiction lies within the discretion of the Board.[188] The burden is on the employer to persuade the Board not to exercise its jurisdiction.[189] Additionally, the Board's findings of fact will be upheld if they are supported by substantial evidence on the record.[190] Thus, the burden of showing sufficient control to eliminate the duty of a successor to bargain is difficult to overcome.

However, a savvy employer can bypass these obstacles and refuse to hire the predecessor's union employees in an effort to avoid a collective bargaining obligation. Refusal to hire based on union membership, is a

---

182. *Management Training*, 1995 LEXIS 710, at *20. Section 2(2) of the Act specifically excludes the Federal and state governments from the definition of "employer." Additionally, "political subdivisions" of governmental entities are also excluded. 29 U.S.C. § 152(2) (1988).

183. *See* GENERAL COUNSEL, NLRB, A GUIDE TO BASIC LAW AND PROCEDURES UNDER THE NATIONAL LABOR RELATIONS ACT (1991). The Board limits its exercise of power to enterprises substantially affecting commerce. *Id.* at 43. Consequently it sets standards based on the yearly amount of sales, purchases or business and distinguishes between different types of businesses. *Id.* at 43-45.

184. *Management Training*, 1995 LEXIS 710, at *22.

185. *Id.* at *31 (Cohen, dissenting).

186. NLRB v. Joe B. Foods, 953 F.2d 287, 291 (7th Cir. 1992).

187. *See* Mansfield Volunteer Fire Co., 316 N.L.R.B. No. 41 (Jan. 31, 1995). In an advisory opinion, the Board declined to consider whether the NLRB had jurisdiction over a private, non-profit corporation funded primarily through the town with which it has contracted to perform fire-protection services. Instead, the Board's only inquiry was whether the employer satisfied the Board's monetary standards for asserting jurisdiction.

188. NLRB v. Parents & Friends of the Specialized Living Ctr., 879 F.2d 1442, 1450 (7th Cir. 1989).

189. Human Development Ass'n v. NLRB, 937 F.2d 657, 661 (D.C. Cir. 1991).

190. U.S. Marine Corps. v NLRB, 944 F.2d 1305, 1313-14 (7th Cir. 1991).

violation of Sections 8(a)(3) and (1) of the NLRA.[191] Successorship will be found if, but for the discriminatory refusal to hire, the union would have maintained the majority status required.[192] However, the discharged workers must make out an extraordinarily stringent case[193] by showing direct and substantial evidence of anti-union sentiment.[194] Even if an employee shows union discrimination, the penalty for the offender is only reinstatement with back pay, less interim earnings.[195] As a result, this remedy may be insufficient to protect union workers. In an attempt to protect workers and their jobs, a state may enact a successorship statute, however the statute may be preempted by Federal law and thereby be found unconstitutional under the Supremacy Clause.[196] Thus union workers may be left at the mercy of employers even if the successorship doctrine is applied.

---

191. 29 U.S.C.A. § 158(a)(1) (1988) reads: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 (section 157 of this title)." *Id.* Section 158(a)(3) reads in part: ". . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

192. Love's Barbecue Restaurant No. 62, 245 N.L.R.B. 78 (1979), *enforced sub nom.* Kallmann v. NLRB, 640 F.2d 1094 (9th Cir. 1981).

193. Dasal Caring Ctrs., Inc., 280 N.L.R.B. 60, 69 (1986), *enforced,* 815 F.2d 711 (6th Cir. 1987). To show discrimination in hiring to avoid union obligations

> it must be established that there is substantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; as well as a reasonable inference from the evidence that [the successor] conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of [the successor's] overall work force to avoid the Board's successorship doctrine.

Id.

194. *Id.* For example, a mass termination of predecessor employees is not sufficient to show discrimination. Wilson McLeod, *Rekindling Labor Law Successorship in an Era of Decline,* 11 HOFSTRA LAB. L.J. 271, 297-98 (1994).

195. *Id.*

196. United Steelworkers of Am. v. St. Gabriel's Hosp., 871 F. Supp. 335 (D. Minn. 1994). Two preemption doctrines define the scope of the NLRA. The first, "Garmon preemption", prohibits state regulation of activities protected by section 7 of the NLRA or constitute an unfair labor practice under section 8. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959). Within this rule are two exceptions, the first allows states to regulate activity which is only a peripheral concern of the NLRA. *United Steelworkers,* 871 F. Supp. at 340. The second allows conduct which touches interests rooted in local feeling that, in the absence of compelling congressional direction, could not infer that Congress had deprived the states the power to act. Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 613 (1986). The second preemption principle, "Machinists preemption" prohibits state regulation of areas that Congress intended to be controlled by the free play of economic forces. Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140 (1976). The Minnesota district court found both principles applied. *Id.* at 341-42.

III. SUCCESSORSHIP AND PRIVATIZATION

A. Positive Effects of Unionization

Consistent throughout the Court's and the Board's treatment of the successorship issue is the overriding concern for the preservation of industrial peace, viewed from the employees' perspectives. According to the NLRA, inequality of bargaining power not only leads to labor unrest, but tends to aggravate business depressions, by reducing wages, thereby decreasing the purchasing power of workers.[197]

The Act recognizes that employees that are paid decent wages and receive adequate benefits, are employees that can purchase other goods and services, thus encouraging interstate commerce.[198] The ability to bargain collectively safeguards and promotes commerce by removing recognized sources of industrial strife and promoting practices essential to the friendly adjustment of disputes.[199]

As a result of these policies, union workers have made strides that their non-union counterparts have not.[200] For instance, union workers receive higher pay, obtain better benefits and have greater job security than their non-union counterparts.[201] Moreover, unions have attempted to equalize pay between the sexes.[202] Because of this, union workers may be better able to purchase homes, go on vacations and the like, all of which contribute to the economy.

Additionally, there is some evidence that union workers are more likely to vote and are more active politically than non-union workers.[203] Unions are able to exact concessions from political constituents as well as from employers.[204] Unions exert this influence because of their size and solidarity of membership and through lobbying and political contributions.[205]

This "empowerment" has a marked effect on worker effectiveness and worker motivation.[206] Unionization produces efficiency through the creation of a formalized and effective "voice" for employees, which allows them to express shared concerns and individual grievances, and to seek their

197. 29 U.S.C.A § 151 (1988).

198. *Id.*

199. *Id.*

200. *See generally* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984).

201. Al Bilik, *Privatization: Defacing the Community,* 43 LABOR L.J. 338, 339 (1992).

202. ROBERT HEBDON, THE PERILS OF PRIVATIZATION: LESSONS FOR NEW YORK STATE 30 (1994).

203. FREEMAN & MEDOFF, *supra* note 200, at 192-93.

204. HEBON, *supra* note 202, at 14.

205. *Id.*

206. Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act,* 71 TEX. L. REV. 921, 956 (1993).

resolution.[207] Because of the effectiveness of their voice in union activities, unionized workers may be more likely to use their "voice" on a national level.

Likewise, studies find that unions are associated with higher productivity than nonunions.[208] Unions reduce the threat of retaliation that an individual employee would face for complaints against the management, especially regarding such "public goods" as workplace safety.[209] These across-the-board workplace regulations are better enforced in unionized workplaces, since there is a body with more resources, experience and protection from retribution than any individual employee would have.[210]

Unions also promote efficiency in production.[211] Because unions are able to secure higher wages and benefits, rewards for seniority, training programs, limitations on the power to discharge, and mechanisms for redressing grievances and seeking improvements, employees have greater security and a greater stake in the enterprise.[212] As a result, there may be less employee turnover and an increased willingness to train new employees and encourage communication between employees and management, which in turn can lead to greater efficiency and quality in production.[213]

These benefits of union organization are obviously good for both the union employee and society in general. The application of successorship doctrine to privatized industries will ensure that these benefits continue.

B. Consequences of Privatization

The most obvious consequences of privatization without successorship are the loss of union jobs and lower wages.[214] Public sector contracting-out has tended to emphasize hiring of temporary and part-time workers, in

---

207. HEBDON, *supra* note 202, at 15.

208. *Id.* For example, unions may promote efficiency within the firm by forcing management to reduce organizational slack, institute personnel policies and monitor employees and supervisors. *Id.*

209. *Id.*

210. *Id.* at 957.

211. *Id.*

212. *Id.* at 958.

213. *Id.*

> [A]s long as management regards employees as expendable factors of production, and gives them no real voice in the governance of the enterprise, employees will justifiably regard every technological improvement, every improvement in efficiency, every change in the direction of the enterprise as a potential threat to their livelihood. Employees will be loath to communicate ways to make their jobs more efficient, or even to eliminate them, if they perceive that to do so may endanger their continued employment.

Id. at 960.

214. Bilik, *supra* note 201, at 339.

part, to circumvent paying higher wages and benefits.[215] Consequently, contractors pay lower wages and benefits, provide fewer vacations and days for sick leave and make extensive use of part-time, temporary or less-skilled personnel.[216] Accordingly, the quality of service declines when there is no commitment between employer and employee.[217] Any decline in quality of service can have drastic consequences especially in service-oriented industries, such as the post office or medical services.

The quality and the quantity of non-union jobs has been steadily declining.[218] One third of all American workers and one fifth of full-time, year-round workers, now receive poverty level wages.[219] Concurrently, the number of part-time workers has increased substantially.[220] A disproportionate number of these workers are female and/or Black.[221] These part-time employees are less likely to receive health benefits or retirement benefits from their employers.[222] This may result in profit for the business, but also cuts corners on quality and places a large burden on the employees, who cannot afford these benefits on their own.[223]

Because wages and jobs are cut, taxpayers must shoulder new expenses, such as unemployment compensation and public health services for those who have lost their employment and benefits.[224] In effect, the privatized business is passing many of the costs of doing business onto the taxpayer, all in the name of profit for itself.[225]

Social goals, such as employment of minorities, women and the handicapped may also be undermined by privatization.[226] In the public sector, federal, state and local governments must provide employment opportunities to minorities.[227] But when public jobs are privatized, these are usually the first to go.[228] With privatization, private employers would not be accountable to the government for their hiring and firing practices. Consequently, more minorities and women may find themselves both without employment and without recourse.

---

215. *Id.*

216. *Id.*

217. *Id.*

218. McLeod, *supra* note 194, at 282-83.

219. JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE 150 (1991).

220. McLeod, *supra* note 194, at 284.

221. *Id.*

222. *Id.*

223. Bilik, *supra* note 201, at 340.

224. *Id.*

225. *Id.* at 340-41.

226. *Id.* at 341.

227. *Id.*

228. *Id.* For example, in 1983 in Los Angeles County, Blacks and Chicanos experience more than 90% of the layoffs that resulted from privatization, although they only represented 47% of the workforce. *Id.*

Constitutional rights granted to protect citizens from governmental intrusion and exclusion do not apply to private employers.[229] When a government service is privatized, a private source may decide who receives services without due process considerations.[230] The private business would decide whom it would serve, when it would serve, and for how much. For example, if the post office were privatized, the new private postal business could charge more for mail service in dangerous neighborhoods or stop service altogether, and yet be shielded from due process claims.

In addition, employees may lose the freedom of speech protections necessary for whistleblowing.[231] If an employer is free to terminate any employee at will, employees will be less likely to complain when something is wrong, for fear of losing their jobs. Consequently, dangerous or illegal acts of an employer may go unreported.

The problem of social accountability argues against privatization.[232] Service arrangements should be evaluated in terms of their faithfulness to "public values," in other words, how things are produced, or the equitableness of how they are distributed, or the pay, benefits or working conditions of those producing them.[233] Privatization proponents tend to look only at the cost of the item or service and not the public value of it.[234] If the bottom line is always cost, without regard to these public values, what does that say about us as a society?

Another problem with privatizing public functions is the inevitable weakening in the lines of political accountability.[235] Government decision-making capacity is transferred to for-profit and not-for-profit corporations for which the government can exert little control.[236] This can result in a threat to public order and safety,[237] as well as corruption.[238] When there is no one overseeing the employer and little or no recourse for wrongdoing, the temptation for the employer to become all-powerful is great. Consequently, for the employee to be heard he or she would have to resort to drastic measures, such as civil unrest or slacking off. Thus, privatization may detrimentally affect society as a whole if it means loss of union representation. Proponents fail to consider these effects or minimize them by concentrating on perceived cost savings only. These social aspects must be

229. HEBDON, *supra* note 202, at 19.
230. *Id.*
231. *Id.*
232. *Id.* at 15.
233. *Id.*
234. *Id.*
235. *Id.* at 18 (explaining Ronald Moe, *Exploring the Limits of Privatization, in* PUBLIC ADMINISTRATION REVIEW 453-60 (1987)).
236. *Id.*
237. *Id.* As an example the author cites the Challenger space shuttle disaster. *Id.*
238. *Id.* at 19.

considered in the decision to privatize any government enterprise and bolster support for the application of successorship doctrine.

C. Expansion of Successorship Doctrine

In order to preserve and maintain the benefits the union workers have achieved as well as promote the goals of the National Labor Relations Act, more safeguards should be given to union employees facing privatization. The application of the doctrine of successorship is a beginning. However, even if the new employer recognizes its duty to bargain, it is under no obligation to honor the terms of the collective bargaining agreement.[239] Requiring a successor employer to take over an existing bargaining agreement as part of the privatization contract may be a solution. The private enterprise, in deciding to bid on a government contract, must analyze many factors, such as costs of equipment and estimates of future profit. The identity of a collective bargaining unit and the costs incurred by it, would be just one more factor in their analysis.

Another problem with current successorship law is that the employer essentially decides if it is to become a successor. By simply not hiring any of the previous entity's unionized workers, it can avoid any successorship obligations. Moreover, the remedy for such union discrimination in hiring imposed by the NLRA is weak and difficult to prove.[240] In order to rectify this, the penalties for anti-union discrimination should be made harsher. By imposing more expensive monetary penalties, the successor employer may find it less cost-beneficial to refuse to hire union employees.

These proposals for increased worker protection also work to the employer's advantage. The former government employees have experience and knowledge in their particular fields which can be particularly useful for the new employer. Many of the industries considering privatization are highly specialized and technical. The private employer can save training costs and other start-up costs by hiring its predecessor's employees.

Society in general benefits when union workers are protected as well. Less unemployment means less people requiring public welfare. It also means more people with expendable income, which in turn benefits businesses and the general public. Finally, studies have shown that union members are more productive and politically active than their non-union counterparts, all of which we as a society should be striving to promote.

CONCLUSION

Privatization is increasingly mentioned as a partial solution to the ever-increasing federal budget and is being proposed on a potentially large scale.

---

239. NLRB v. Burns Int'l Sec. Sys., 406 U.S. 272, 276 (1972).

240. McLeod, *supra* note 194, at 247.

It has been suggested as a way to reduce government spending at the national, state and local levels while at the same time increasing efficiency and effectiveness.

Although advocates claim that it will shrink the size and bureaucracy of government, one outcome of this reduction in government is the loss of jobs, many of which are held by workers covered by collective bargaining agreements. These workers may be laid off by their governmental employer and then rehired by the private operator in essentially the same capacity, potentially without their union benefits.

Current labor successorship law obligates an employer to recognize the union only when the successor has hired a substantial complement of workers from the predecessor's company.[241] Therefore, a private company could avoid any collective bargaining obligations simply by not hiring union employees.

Although the NLRB has the authority to bring an unfair labor practice suit against the successor for refusal to hire based on union membership,[242] this remedy may be insufficient to protect unions and their employees.[243] The potentially large scale in which privatization is proposed demands a more effective remedy to protect workers, who would otherwise be unemployed and unemployable in their fields. These workers may inevitably have to settle for minimum wage work or end up on public assistance.

Legislation on the national level seems most plausible, because state legislation would be prone to preemption by the NLRA or LMRA.[244] In that way, the NLRA goal of industrial peace will be sustained, while at the same time, a more productive, benevolent and democratic economy will be promoted.

*Erin M. Gee**

241. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 46-52 (1987).

242. 29 U.S.C. § 158 (1994).

243. McLeod, *supra* note 194, at 297.

244. *Id.*

* B.A., M.A., San Diego State University; J.D., 1995, California Western School of Law California Western School of Law. Special thanks to Professor Ellen Dannin for her topic suggestion, invaluable assistance and unwavering enthusiasm for this project.