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Successorship Doctrine, the Courts and Arbitrators: Common Sense or Dollars and Cents?

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Successorship Doctrine, the Courts and Arbitrators: Common Sense or Dollars and Cents?

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I. INTRODUCTION

Capital mobility has a singular importance in the American economy.¹ This is particularly critical in the context of successorship doctrine, in which an ongoing business enterprise is acquired by another business. A fundamental tension exists between the rights of the buyers and sellers of the company, on one side of the equation, and the rights of the employees of the company, on the other side. This conflict between entrepreneurial flexibility and stable employment conditions is central to labor law.²

The resolution of this conflict is confounded by a myriad of questions and potential answers: When management decides that a company will be sold to another, are any rights automatically retained by the labor force? Can the labor force prevent the sale or transfer, either by statutory or contract rights? Can an acquiring company be forced to assume a collective bargaining agreement as a condition of the sale? Must it continue to employ the same labor force or can it hire a new set of employees? If the workers are retained, is the former collective bargaining agreement automatically assumed, or is there merely a duty to arbitrate differences? If a collective bargaining

1. Silverstein, *The Fate of Workers in Successor Firms: Does Law Tame the Market?*, 8 INDUS. REL. L.J. 153, 174 (1986).

2. *Id.* at 156.

agreement is not assumed, is there nevertheless a duty to bargain with workers that are retained or hired as new employees? Under what circumstances may a company that sells its business nevertheless remain liable to its former employees for damages, wages, or benefits? The answers to these questions impact directly on the value of a company, and correspondingly on the ability of the owners of a company to sell or otherwise transfer the company, and in effect, their capital.

The critical forum for resolving the conflict, and answering these questions, is arbitration, the primary means of dispute resolution in labor relations.³ Arbitrators, in their interpretation of a collective bargaining agreement, often must attempt to balance the need of management to make changes in the operation of a company against the rights and entitlements that the employees believe have been negotiated into the collective bargaining agreement in exchange for other concessions. This Comment examines the way in which arbitrators make these decisions in the doctrinal area of successorship, and the values they express in doing so. Section II explores both how the Supreme Court has defined the concept of successorship, and how the values expressed by the Court concerning the free flow of capital underlie its decisions. Section III reviews arbitration decisions in an effort to ascertain the way in which arbitrators apply the doctrine in individual cases. Section IV analyzes the patterns of values and processes that emerge from these arbitral decisions. Finally, Section V concludes that although there may be an underlying assumption concerning the necessity of capital mobility and entrepreneurial flexibility, particularly in what is categorized as predecessor cases, this assumption is often left unstated in arbitration opinions. Accordingly, arbitrators most often rely on Supreme Court doctrine, prior arbitrations, and the negotiating positions and past practice of the parties in an attempt to ground their opinions within a narrow range

3. See Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973); see also Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1523-25, 1528-29 (1981).

The Supreme Court has long recognized, and continually affirmed, the special role of arbitration in labor-management disputes. There is generally great deference to arbitrations: Courts will rarely review or overturn an arbitral decision. The Court originally set out the doctrine of deference to labor arbitration in the series of cases known as the *Steelworkers Trilogy*. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). For a more recent affirmation of these principles, see *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986). For a discussion of judicial deference to arbitrators, see generally Note, *Judicial Deference to Grievance Arbitration in the Private Sector: Saving Grace in the Search for a Well-Defined Public Policy Exception*, 42 U. MIAMI L. REV. 767 (1988).

of principles and rationales that ensure the continued perception of the fairness and reasonableness of arbitration.

II. SUCCESSORSHIP DOCTRINE: THE SUPREME COURT'S FOUNDATION

The doctrine of successorship evolved in a series of United States Supreme Court cases that revolved around a successor employer's duty to bargain or arbitrate disputes with a union representing the employees of a predecessor employer.⁴ The cases are primarily important because of the definition of successor that has evolved from them. However, they are also valuable because of the underlying views expressed by the Court concerning the free flow of capital in a market economy. Although the Court recently modified the doctrine,⁵ this Section discusses the cases upon which arbitrators have relied in formulating the decisions that are reviewed in Section III of this Comment.

A. *The Duty to Arbitrate: John Wiley & Sons*

*John Wiley & Sons, Inc. v. Livingston*⁶ was the first significant successorship doctrine case decided by the Court. In *Wiley*, Interscience Publishers, Inc., merged with the much larger John Wiley & Sons, Inc., and ceased to do business as a separate entity.⁷ The union that represented the employees of Interscience argued that it continued to represent the employees who were hired by Wiley, and that Wiley was obligated to recognize certain rights of these employees that had been negotiated into the collective bargaining agreement with Interscience, the former employer. Wiley refused to recognize the union, asserting that the merger terminated the previous bargaining agreement and any rights based on the agreement, such as an obligation to arbitrate disputes.⁸ The parties were unable to resolve these

4. However, as will be seen in Section III of this Comment, many of the successorship doctrine arbitrations have very little, if anything to do with the duty to bargain or arbitrate.

5. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *infra* notes 69 & 80 (reviewing *Fall River* and its possible implications for successor doctrine arbitration).

6. 376 U.S. 543 (1964).

7. *Id.* at 545. The former Interscience employees were merged into the larger unit of John Wiley employees. *Id.* There was no express provision in the contract between the union and Interscience binding successors or assigns. Interscience Encyclopedia, Inc., 55 Lab. Arb. (BNA) 210, 211 (1970) (Roberts, Arb.). Before and after the merger, the union representing forty of the eighty Interscience employees attempted to negotiate with both Interscience and Wiley over the rights of the unionized Interscience employees. *Wiley*, 376 U.S. at 545. No agreement was reached, however, as to the effect of the merger on those employees represented by the union that were hired by Wiley. *Id.*

8. *Wiley*, 376 U.S. at 545.

disputes on their own and the union commenced a suit to compel arbitration⁹ under Section 301 of the Labor Management Relations Act (LMRA).¹⁰ The district court refused relief,¹¹ but the United States Court of Appeals for the Second Circuit ordered that the dispute be submitted to arbitration.¹²

The United States Supreme Court held that, even though Wiley had not been a party to the collective bargaining agreement between the union and Interscience, it was still bound by the arbitration provision contained in the agreement.¹³ The Court noted that, although principles of law ordinarily do not bind an unconsenting successor to a contract, a collective bargaining agreement is not an ordinary contract.¹⁴ The Court stated that impressive national labor policy considerations favoring arbitration¹⁵ take precedence over the fact that Wiley did not sign the agreement being construed.¹⁶

The Court noted that the duty to arbitrate would not necessarily survive in every case in which the ownership or the corporate struc-

9. *Id.* at 546.

10. Ch. 120, tit. I, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-200 (1982 & Supp. IV 1986)). The Labor Management Relations Act (LMRA) applies to employees in private industries that affect interstate commerce. Section 301 provides that:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

LMRA § 301, 29 U.S.C. § 185(a).

11. *Livingston v. John Wiley & Sons, Inc.*, 203 F. Supp. 171 (S.D.N.Y. 1962), *rev'd*, 313 F.2d 52 (2d Cir. 1963), *aff'd*, 376 U.S. 543 (1964).

12. *Livingston v. John Wiley & Sons, Inc.*, 313 F.2d 52 (2d Cir. 1963), *aff'd*, 376 U.S. 543 (1964).

13. *Wiley*, 376 U.S. at 550.

14. *Id.*

15. *See, e.g.*, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *see also supra* note 3. The *Wiley* Court noted the preference of arbitration as a substitute for tests of strength between contending forces. *Wiley*, 376 U.S. at 549. The Court stated the objectives of national labor policy as follows:

The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their business, and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by "the relative strength . . . of the contending forces."

Id.

16. *Wiley*, 376 U.S. at 550.

ture of an enterprise is changed.¹⁷ In order to determine whether the duty to arbitrate may be imposed on a successor company, the Court established a test of "substantial continuity of identity in the business enterprise."¹⁸ Wiley was therefore obligated to arbitrate the claims of the former Interscience employees because there had been a wholesale transfer of employees from Interscience to Wiley, apparently without difficulty.¹⁹ The Court explicitly stated that it would not suggest any view on whether, in all circumstances, a union has a right to continue as certified representative for employees following a change in ownership.²⁰

B. *The Duty to Bargain: NLRB v. Burns*

The Supreme Court examined the issue of continued union representation in the successor doctrine context in *NLRB v. Burns International Security Services, Inc.*²¹ *Burns* arose, not in an arbitration context, but rather in an unfair labor practices action brought under Subsections 8(a)(1), 8(a)(2) and 8(a)(5) of the National Labor Relations Act ("NLRA" or "Act").²² *Burns* had successfully bid on a contract to provide security services to Lockheed Aircraft Services Co.²³ These security services previously had been provided by Wack-

17. *Id.* at 551.

18. *Id.*

19. *Id.* The former Interscience employees' claims were eventually arbitrated. Interscience Encyclopedia, Inc., 55 Lab. Arb. (BNA) 210 (1970) (Roberts, Arb.). The arbitrator decided that Wiley had to recognize seniority rights built up by the former Interscience employees, but only until the date that they actually were transferred from the former Interscience location to the Wiley plant, when they were to be considered merged into the larger Wiley workforce. *Id.* at 225. Similarly, there were no continuing obligations for contributions to the union pension and thrift plans once the former Interscience employees moved into the Wiley premises and their separate identity ceased. *Id.* at 225-26.

20. *Wiley*, 376 U.S. at 551. None of the Wiley employees previously had been represented by a union, and they far outnumbered the former Interscience employees performing similar work after the merger. *Id.* at 545. The Court later addressed the issue of continued representation in the context of the duty to bargain. See *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972); see also *infra* notes 21-41 and accompanying text.

21. 406 U.S. 272 (1972).

22. Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982 & Supp. IV 1986)).

Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title." NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1).

Section 8(a)(2) provides: "It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2).

Section 8(a)(5) provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5).

23. *Burns*, 406 U.S. at 275.

enhut Corp. Burns hired some of the former Wackenhut guards who were represented by a union—the United Plant Guard Workers of America (UPG)—and informed them that to keep working they would have to join a rival union, the American Federation of Guards (AFG).²⁴ The UPG then filed unfair labor practice charges with the National Labor Relations Board (“NLRB” or “Board”).²⁵ The Board found that Burns had violated Subsections 8(a)(1), 8(a)(2), and 8(a)(5) of the NLRA²⁶ by unlawfully assisting the AFG and by failing to bargain with the UPG or honor the collective bargaining agreement that previously had been negotiated between Wackenhut and the union.²⁷ On review, the United States Court of Appeals for the Second Circuit upheld the finding of unlawful assistance of a rival union and refusal to bargain, and held that the NLRB had exceeded its authority in ordering Burns to honor the contract that had been negotiated with Wackenhut.²⁸ Both Burns and the Board petitioned for certiorari, with both petitions being granted.²⁹

The Supreme Court took this opportunity to distinguish its *Wiley* decision.³⁰ The Court adopted the Board’s finding that the bargaining unit determination was correct, and held that Burns was obligated to bargain with the UPG as the collective bargaining representative of the guards.³¹ A change in either ownership or management, the Court reasoned, was not sufficient to upset the Board’s recognition of the UPG as collective bargaining representative when a majority of the workers after the change in ownership or management had been

24. *Id.* Shortly before the contract with Lockheed was due to expire, the security guards’ union, the United Plant Guard Workers of America (UPG), had been certified by the NLRB as bargaining representative for the guards. *Id.* at 274. Lockheed informed Burns and all other potential bidders for the next security services contract that the guards currently on their premises, although in the actual employ of Wackenhut, were represented by a union. *Id.* at 275. Burns nevertheless entered a bid for the contract that was accepted. Burns subsequently chose to retain twenty-seven of the Wackenhut guards and brought in fifteen of its own guards from other facilities to service the Lockheed plant. *Id.* Burns intended to treat the bargaining unit as part of a larger bargaining unit, the American Federation of Guards (AFG), composed of guards at different locations in the same general geographic area for which Burns provided security services, and with whom Burns had a collective bargaining agreement. *Id.*

25. *Id.* at 276.

26. 29 U.S.C. § 158(a)(1), (a)(2), (a)(5) (1982 & Supp. IV 1986); see *supra* note 22.

27. *Burns*, 406 U.S. at 276.

28. *Id.* at 276-77; see *William J. Burns Int’l Detective Agency, Inc. v. NLRB*, 441 F.2d 911 (2d Cir. 1971), *aff’d sub nom. NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272 (1972).

29. *Burns*, 406 U.S. at 277. Burns challenged both the unit determination and the bargaining order. The Board maintained its position that Burns was bound by the prior collective bargaining agreement with Wackenhut. *Id.* Although certiorari was granted for both petitions, the Court declined to review the propriety of the bargaining unit, accepting the Board’s determination as correct. *Id.*

30. *Id.* at 285-88.

31. *Id.* at 278-79.

employed by the predecessor in the original bargaining unit.³² The Court implied, however, that its ruling might be different if an appreciable difference in the operational structure and practices of Burns and Wackenhut existed, or if Burns had not hired employees who already were represented by a certified union.³³

The Court stated that *Wiley* was not controlling on the issue of whether Burns was bound to the contract negotiated between Wackenhut and the union.³⁴ The Court distinguished the *Wiley* situation, finding that an action to compel arbitration differed from an unfair labor practice proceeding.³⁵ In *Burns*, unlike the situation in *Wiley*, there was no sale or merger of corporate assets, and no direct contact between the supposed predecessor, Wackenhut, and the supposed successor, Burns.³⁶ Although Burns had taken over a bargaining unit that was largely intact, and thus had a duty to bargain with it, the Court found little basis for implying that Burns also had agreed to honor the collective bargaining agreement that previously had been negotiated between the bargaining unit and the prior employer. Thus, Burns was not obligated to assume the prior contract.³⁷

The Court also advanced an economic rationale for its holding, arguing that serious inequities could result if either a new employer or the union was bound to the substantive terms of the former collective bargaining agreement.³⁸ In one of the more significant passages in successorship doctrine, the Court stated:

A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage

32. *Id.* at 279-80. The Court also noted that it may not be clear when the successor's duty to bargain actually begins. *Id.* at 295. Until such time as a "full complement" of employees are hired, the duty to bargain with the bargaining representative may not mature, as it may not be evident until then that union workers constitute a majority of the workforce. *Id.* This "full complement" rule was also an important issue in *Fall River*. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

33. *Burns*, 406 U.S. at 280. The Court later addressed the successorship doctrine issues that arise when employees of the predecessor are not hired by the successor in *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249 (1974). See *infra* notes 51-64 and accompanying text.

34. 406 U.S. at 285.

35. *Id.*

36. *Id.* at 286.

37. *Id.* at 287.

38. *Id.*

and inhibit the transfer of capital.³⁹

The Court further stated that a union also may suffer inequities if it had made concessions to an economically distressed employer that it might not have made to a larger or more economically successful firm.⁴⁰ Finally, the Court noted that congressional policy embodied in the NLRA enables both labor and management to negotiate for any protection either might deem appropriate, but at the same time allows the bargaining advantage to be set by economic power realities.⁴¹

C. *Liability for the Predecessor's Unfair Labor Practices:*
Golden State

Unfair labor practices, rather than arbitration, were at issue in *Golden State Bottling Co. v. NLRB*,⁴² in which the Court held a successor company liable for an obligation of its predecessor. In *Golden State*, a wrongfully discharged employee brought an action that resulted in an NLRB order of reinstatement and backpay.⁴³ After the Board decision, but before a hearing to determine the amount of backpay due to the employee, the company was acquired by a successor who was aware of the litigation and the NLRB order.⁴⁴ The Board then ordered the successor to reinstate the employee, and found the predecessor and successor jointly and severally liable for the backpay.⁴⁵ The United States Court of Appeals for the Ninth Circuit enforced the order.⁴⁶ The Supreme Court held that the Board's order applied to the successor company.⁴⁷ The Court reaffirmed the rationale it had stated in *Wiley* for recognizing the special nature of contract principles in the labor law context: Rights of owners to rearrange their business must be balanced against protection for the

39. *Id.* at 287-88. Professor Silverstein notes that although the failing company example has surface appeal, it has no particular relevance to *Burns*. Silverstein, *supra* note 1, at 167 & n.61. Although it may be common sense to avoid the business failure of an ailing company by freeing a successor from the contractual obligations of the predecessor, in *Burns* the Court was not dealing with a moribund business whose marketability depended on the ability of a successor to restructure the operation. *Id.* Any impact on restructuring opportunities or capital mobility was speculative at best. *Id.*

40. *Burns*, 406 U.S. at 287-88.

41. *Id.* at 288.

42. 414 U.S. 168 (1973).

43. *Id.* at 170.

44. *Id.* at 171.

45. *Id.* at 172; see *Golden State Bottling Co.*, 187 N.L.R.B. 1017 (1971), *aff'd*, 467 F.2d 164 (9th Cir. 1972), *aff'd*, 414 U.S. 168 (1973).

46. 467 F.2d 164, 166 (9th Cir. 1972).

47. *Golden State*, 414 U.S. at 179.

employees.⁴⁸ The Court recognized that although generally a purchaser is not responsible for a seller's liabilities unless agreed to, or unless the purchaser merely continues in the seller's business, in the context of labor law successorship doctrine this rule will not be narrowly construed.⁴⁹ Although in this instance the purchaser committed no unfair labor practice, the Court nevertheless held that the purchaser could be held liable as successor for the back pay due the discharged employee because it had acquired the predecessor with full knowledge of the NLRB order.⁵⁰

D. Remedies from the Predecessor: Howard Johnson

The most recent Supreme Court decision on which arbitrators have relied for successorship doctrine is *Howard Johnson Co. v. Detroit Local Joint Executive Board*.⁵¹ In *Howard Johnson*, as in *Wiley*, the Court was again faced with an action to compel a successor company to arbitrate.⁵² Howard Johnson purchased the assets of a restaurant and motel from sellers who were Howard Johnson franchisees.⁵³ Howard Johnson contracted for the purchase with knowledge that the sellers had union contracts, but stated that it would not recognize or assume any of the labor agreements between the sellers and any labor organization, nor would it assume any liabilities of the sellers arising from any labor agreements.⁵⁴ By refusing to recognize the union or the labor contracts, Howard Johnson contravened clauses in the collective bargaining agreements between the sellers and the unions that provided that the agreements would bind successors.⁵⁵

The union then instituted an action seeking to compel Howard Johnson and the seller to arbitrate the extent of their obligations to

48. *Id.* at 182 (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964)); see also *supra* note 15.

49. *Golden State*, 414 U.S. at 182 n.5.

50. *Id.* at 184-85.

51. 417 U.S. 249 (1974).

52. *Id.* at 252-53.

53. *Id.* at 250-51.

54. *Id.* at 251-52.

55. *Id.* at 251. Two weeks before the transfer of control, the sellers notified all employees that their employment would be terminated as of the date of transfer. *Id.* at 252. Howard Johnson, as purchaser, also notified the unions that it would not recognize the unions nor assume any of the pre-existing obligations under the labor agreements between the unions and the sellers. *Id.* Howard Johnson then placed advertisements in local newspapers seeking new employees, so that when it actually commenced operating the facility, only nine of its 45 employees had previously been employed by the predecessor sellers. Of these nine, none were supervisory personnel. *Id.*

the employees of the seller.⁵⁶ Both the district court⁵⁷ and the United States Court of Appeals for the Sixth Circuit⁵⁸ relied on *Wiley* in ordering Howard Johnson to arbitrate.

The Supreme Court, however, distinguished *Wiley* as not being applicable. *Wiley* involved a merger in which the original employer disappeared as a separate entity, while *Howard Johnson* involved a partial sale of assets, in which the original employer remained in existence as a viable corporate entity.⁵⁹ The sellers in *Howard Johnson* thus remained available as a target for arbitration to consider whether the successorship provisions of the collective bargaining agreement had been breached, and what remedy, if any, might be available under the terms of the agreement between the sellers and the union.⁶⁰

The Court emphasized that, unlike *Wiley*, in which all of the predecessor's employees were given the opportunity to continue working, and unlike *Burns*, in which a majority of the new employees had worked for the predecessor, Howard Johnson had selected and hired its own independent workforce.⁶¹ The Court relied on *Burns* as establishing that Howard Johnson had the right not to hire any of the employees of the predecessor management.⁶² Thus, the Court held that because there was "no substantial continuity of identity in the workforce . . . and no express or implied assumption of the agreement to arbitrate,"⁶³ the successor employer did not have to arbitrate the extent of its obligations to the former employees of the predecessor employer.⁶⁴

56. *Id.* The action originally was filed in state court but was removed to federal court as the grounds for the action were under Section 301 of the Labor Management Relations Act. LMRA §301, 29 U.S.C. § 185; see *supra* note 10.

57. Detroit Local Joint Executive Bd. v. Howard Johnson Co., 81 L.R.R.M. (BNA) 2329 (E.D. Mich. 1972), *aff'd*, 482 F.2d 489 (6th Cir. 1973), *rev'd*, 417 U.S. 249 (1974).

58. Detroit Local Joint Executive Bd. v. Howard Johnson Co., 482 F.2d 489 (6th Cir. 1973), *rev'd*, 417 U.S. 249 (1974).

59. *Howard Johnson*, 417 U.S. at 257-58.

60. *Id.* The Court also noted that the unions could have, in the alternative, moved to enjoin the sale. *Id.* at 258 n.3; see, e.g., Local Lodge No. 1266, Int'l Ass'n of Machinists v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981) (upheld status quo injunction preventing sale of business pending arbitration); see also *infra* note 98.

61. *Howard Johnson*, 417 U.S. at 259. It is important to emphasize that the action seeking arbitration was not for the benefit of the employees who were hired by Howard Johnson, but rather was for the benefit of those former employees who were not. *Id.* at 260.

62. *Id.* at 262. This interpretation of *Burns* has been strongly criticized as opening the door for successor employers to avoid obligations towards the employees of their predecessor. See, e.g., Severson & Wilcoxon, *Successorship Under Howard Johnson: Short Order Justice for Employees*, 64 CALIF. L. REV. 795 (1976).

63. *Howard Johnson*, 417 U.S. at 264.

64. The Court seemed to recognize the somewhat muddled state of successorship doctrine by explaining its holding in a footnote. *Id.* at 262 n.9. The Court limited its holding solely to the issue of whether Howard Johnson could be compelled to arbitrate over the former

E. *Successorship Doctrine and Capital Mobility*

The Supreme Court has shaped the parameters of successorship doctrine on two levels. First, on the more overt of these levels, the Court has developed doctrine that defines the concept of successorship. Second, on a more subtle level, the Court has influenced successorship doctrine through its expositions on the free flow of capital in the American economy. At its most basic level, successorship doctrine stands for the proposition that arbitration may be compelled against a successor employer following a merger if there is substantial continuity of identity in the business enterprise.⁶⁵ In addition, if a successor employer hires a majority of its work force from among the seller's employees, the purchaser is obligated to bargain with the union that represents the seller's employees, despite no concomitant obligation to assume the collective bargaining agreement between the union and the predecessor seller.⁶⁶ A successor can be obligated for the liabilities arising from a predecessor's unfair labor practices under the NLRA when the acquisition of the predecessor is made with knowledge of the potential liabilities.⁶⁷ Finally, a successor does not have to arbitrate over obligations to former employees of the predecessor when a new work force is hired.⁶⁸ Although the Court recently has added another major case to the successorship doctrine, *Fall River Dyeing & Finishing Corp. v. NLRB*,⁶⁹ the effects of that decision are

employees in the circumstances of the case. *Id.* It expressly did not decide whether Howard Johnson could be considered a successor employer for any other purpose. *Id.* The Court noted that "[t]here is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others." *Id.*

65. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). Although the continued viability of the substantial continuity test as a factor in compelling arbitration has been questioned, it remains an important test used by arbitrators in defining successorship.

66. *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972).

67. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

68. *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249 (1974).

69. 482 U.S. 27 (1987). *Fall River* concerned the duty of a potential successor to bargain with a union following the failure of a textile dyeing business and an attempt to resurrect, not the company, but the plant itself. A new company, Fall River, acquired the physical plant and equipment from the creditors, and remaining inventory at public auction. *Id.* at 32. There was no purchase of a trade name, good will, or customer lists. *Id.* at 57. Workers were hired through advertisements in local newspapers. *Id.* at 32-33.

Less than two months after beginning operations, the union requested that Fall River recognize it as the bargaining agent for the employees. *Id.* at 33. The company refused the request. *Id.* One year after Fall River began operations, the union filed an unfair labor practices charge with the NLRB. *Id.* at 34. The Administrative Law Judge ruled that Fall River was a successor to the prior owner, Sterlingwale, and therefore had a duty to bargain with the union. *Id.* at 34-35. This order was affirmed by both the Board and the United States

yet to be reflected in arbitrations.⁷⁰

On the more subtle and complex level of successorship doctrine lies the Court's economic vision of the effects of its decisions on the

Court of Appeals for the First Circuit. See *Fall River Dyeing & Finishing Corp.*, 272 N.L.R.B. 839 (1984), *aff'd*, 775 F.2d 425 (1st Cir. 1985), *aff'd*, 482 U.S. 27 (1987).

The Supreme Court affirmed, holding that Fall River was a successor to the former textile plant and therefore was under a duty to bargain with the union that had represented the workers of the predecessor. *Fall River*, 482 U.S. at 41. The Court held that when a union has a rebuttable presumption of majority status, the status continues despite a change in employers so long as the new employer is, in fact, a successor to the prior employer. *Id.* This constitutes an expansion of the doctrine in *Burns* that there was a presumption of continued representation because the union had only recently been certified. *Id.* at 36-38. The Court applied essentially the substantial continuity test to decide that Fall River was a successor to Sterlingwale. *Id.* at 43-46. Although there had been a seven month hiatus between the operations of Sterlingwale and Fall River, the Court held that this was now only one of the factors to be considered in the substantial continuity calculus. *Id.* at 45. In addition, the Court dismissed as irrelevant the fact that there were no direct dealings between Fall River and Sterlingwale. *Id.* at 44 n.10. How a successor obtains a predecessor's assets generally is not determinative of the substantial continuity question. *Id.* The Court also found persuasive the fact that Fall River specifically was formed to take advantage of the labor and physical plant of Sterlingwale. *Id.* at 44 & n.10.

Having decided that Fall River was a successor to Sterlingwale, the Court then examined exactly when the duty to bargain arose. *Id.* at 46-52. In *Burns*, the Court held that the duty arose when a "full complement" was hired. See *Burns*, 406 U.S. at 294-95. The *Fall River* Court, however, now stated that *Burns* was not to be read as defining "full complement" to mean when the employer has hired all the employees it intends to employ. *Fall River*, 482 U.S. at 47 n.14. The Court held that the duty to bargain arises when a "substantial and representative complement" of employees has been hired. *Id.* at 52. Thus, the duty to bargain may arise before all employees are hired.

Fall River, therefore, extends several elements of the successorship doctrine as it relates to the duty to bargain. It is now apparent that a hiatus in operations between a predecessor and a possible successor will not disqualify a finding of successorship. *Id.* at 45. In addition, there no longer seems to be any necessity for a finding of direct dealing between the predecessor and the successor. *Id.* at 43-44. Finally, *Burns* has been modified on two fronts: The requirement of a "full complement" of workers has been extended to a "substantial complement"; and the union has a rebuttable presumption of majority status that is not limited to the special *Burns* situation in which the union had been certified just before the change in employers. *Id.* at 47-52.

The Court's decision in *Fall River* certainly will have an effect on both judicial and arbitral forums. By extending the substantial continuity doctrine, potential successors are likely to be found, both in the courts, and in arbitrations, to be "successors." The "substantial and representative complement" rule also places added pressure on potential successor employers. Will they now avoid successorship problems altogether by following the doctrine of *Howard Johnson* and not hiring any employees of a predecessor?

The most probable impact on arbitrators will be in those situations requiring a determination of whether a new employer is a successor. As reviewed in Section III of this Comment, arbitrators often use the doctrine as a foundation upon which to lay their own views. *Fall River*, by extending the definition of what constitutes a successor, will thus give arbitrators even more leeway to find that an employer is a successor when there is no direct dealing between the supposed predecessor and successor. See, e.g., *Little Rose Coal Co.*, 85 Lab. Arb. (BNA) 1103 (1985) (Feldman, Arb.).

70. See *infra* note 82.

transfer of capital.⁷¹ In analyzing the successorship cases, it is apparent that the Court does not want federal labor policy to inhibit the free flow of capital. This is seen as particularly critical when a purchaser is willing to revamp and revitalize a weak enterprise by making changes that will increase profitability and the economic health of the enterprise.⁷² In order to protect this core value of capital mobility, the Court has retreated from the initial implications of *Wiley* that a purchaser might be bound by the collective bargaining agreement of a seller without having affirmatively assumed the agreement.⁷³ Unless the transfer is a merger, with the original party that signed the collective bargaining agreement being swallowed by the surviving entity, a purchaser will not be obligated to assume the terms of the predecessor's collective bargaining agreement.⁷⁴

When a company has agreed to a successor clause but nonetheless has sold the business without forcing the purchaser to assume or recognize the agreement, the only recourse left to the union is an action against the predecessor seller. In this circumstance, arbitration assumes a key position in the resolution of the dispute. The central question in the arbitral forum becomes whether the successor language has actually been bargained for, with the union accepting the clause in lieu of higher wages or other benefits. If so, the clause should be enforceable by either an injunction or by an award of damages, as the successor clause language should logically affect the transfer price of the company.⁷⁵

In addressing the core issue in *Burns* of whether there was a duty to bargain, the Court also discussed the issue of transfer of capital. The duty to bargain is a much more limited constraint on the transfer of capital than the duty to arbitrate or otherwise assume a collective bargaining agreement.⁷⁶ Although a duty to bargain may exist, the successor employer may set initial employment terms in accordance with the real market for wages and benefits, rather than rely on the

71. This also may inform the decisions of arbitrators, but not as overtly as in the Court decisions. See *infra* Sections III and IV.

72. *Burns*, 406 U.S. at 287-88.

73. See *id.* at 287 (The hiring of Wackenhut employees "is a wholly insufficient basis for implying either in fact or in law that Burns had agreed or must be held to have agreed to honor Wackenhut's collective-bargaining contract.").

74. See *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 257 (1974).

75. See, e.g., *Marley-Wylain Co.*, 87-1 Lab. Arb. Awards (CCH) ¶ 8293 (1987) (Jacobowski, Arb.) (damages and back pay to be determined when company sold without successor assuming collective bargaining agreement); *Sexton's Steak House, Inc.*, 76 Lab. Arb. (BNA) 576 (1981) (Ross, Arb.) (arbitrator enjoins completion of sale to purchaser who refuses to be bound by collective bargaining agreement).

76. See *Burns*, 406 U.S. at 287-91.

prior collective bargaining agreement.⁷⁷ The prior collective bargaining agreement is not a constraint on the transfer unless it is voluntarily accepted by the purchaser.⁷⁸ Assuming that the contract is not accepted, the new employer must bargain as a result of hiring the employees of the predecessor.⁷⁹ The value of the employees' organization is protected while the employer gets the value of a trained and available work force and the ability to set or negotiate new terms of employment.⁸⁰

77. This is particularly relevant when an attempt is made to revitalize a business. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); see also *supra* note 69 and *infra* note 80. However, once the employees accept unfavorable terms in order to keep their jobs, how likely are they to strike in order to regain their prior benefits? See Silverstein, *supra* note 1, at 164. But see *Martin Podany Assocs.*, 84-2 Lab. Arb. Awards (CCH) ¶ 8469 (1984) (Gallagher, Arb.) (Arbitrator awarded damages and back pay to be paid by predecessor to employees who went on strike against successor, with successor subsequently closing business.); *Martin Podany Assocs.*, 80 Lab. Arb. (BNA) 658 (1983) (Gallagher, Arb.).

78. See *Burns*, 406 U.S. at 280 n.5; see also Comment, *Merging the RLA and the NLRA for Eastern Air Lines: Can It Fly?*, 44 U. MIAMI L. REV. 539, 588 (1989).

79. However, because the duty to bargain depends on whether the employees are hired by the new employer, the bargaining power of the employees is low. Following *Howard Johnson*, the new employer need not hire the employees of the predecessor. *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 262, 264 (1974). Therefore, if the new employer is inclined to believe that the employees of the predecessor may be too demanding, the duty to bargain may be avoided merely by not hiring those employees. See Comment, *The Unenforceable Successorship Clause: A Departure from National Labor Policy*, 30 UCLA L. REV. 1249, 1251 (1983); see also Silverstein, *supra* note 1, at 164. Professor Silverstein notes the constraints on employers provided by market forces that operate to protect incumbent employees:

Presumably, a successor will not turn a profitable wallet manufacturing plant into an unproven shoe production facility to avoid imposition of the duty to arbitrate; nor will a successor continue a marginal operation unchanged solely to secure the beneficial terms of its predecessor's contract. Employee interests in continued employment on favorable terms are recognized, but the security of the workers, like that of the enterprise, is tied to the strength of the acquired business in the market.

Id. at 161.

80. The Court's decision in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), concerned a successor's duty to bargain. By extending the definition of successor, the Court may have acted counter to its interest in the free flow and transfer of capital. See *Burns*, 406 U.S. at 287-88 (The binding of a new employer to the former collective bargaining agreement may make organizational changes impossible and discourage and inhibit the transfer of capital.). This dilemma cannot be easily resolved. At the time that the predecessor, Sterlingwale, began operations, Massachusetts was one of the leading textile producing areas of the United States. Today, the textile industry in the area is moribund, a victim of changing economic conditions. Textile production has moved to other, non-unionized areas of this country, or simply out of this country, to developing nations in the Far East. See *Fall River*, 482 U.S. at 30-31. In *Burns*, the Court was concerned with preventing the discouragement of the transfer of capital. *Fall River*, however, is not about the transfer of capital per se, but rather about investment, and an attempt to revive a struggling industry in a depressed geographic area. By making it easier for a purchasing company to be found to be a successor, the Court's decision in *Fall River* may well inhibit the investment of capital in attempts to revitalize dying or struggling industries in which there are trained and available union

As the primary means of dispute resolution in labor relations, arbitration thus has become the focal point regarding the capacity and ability of unions to obtain a clause guaranteeing wages and other working conditions when transfers of businesses and capital are made.⁸¹ The enforceability of these successor clauses may directly impact on the value of the business being sold. The following analysis of arbitrations attempts to discern how arbitrators have used and applied both levels of successorship doctrine in resolving disputes between unions and sellers or purchasers of a business enterprise.⁸²

workforces. This would seem to run counter to the Court's professed interest in the free flow and transfer of capital.

In the alternative, the Court, by stretching the definition of successor, recognized the value to a new employer of a trained and available workforce as well as the value to employees of union organization. Further, the impact of *Fall River* on a successor may be limited because the Court imposed only a duty to bargain, rather than a contractual obligation that would bind a new employer to the former collective bargaining agreement. Those employees that are hired must accept work at the terms offered by the successor. Therefore, following *Fall River*, a successor still has the ability to reduce wages, change work rules, or substitute technology unhindered by the collective bargaining agreement, in an effort to improve efficiency.

The outer boundary and ultimate expansion of the *Fall River* holding would be to find a duty to bargain in a situation in which a new enterprise, with a new plant and facilities, is set up in a location precisely because there were unemployed, yet trained workers of a stagnant industry, and those formerly organized workers are hired. In that case, there would be a duty to bargain even if there were no contact of any nature between the new enterprise and the defunct company. Such an application of *Fall River* would seem to be in accordance with the hint of at least one commentator that employees may have an expectation against employers in the employing industry. See Friedman & Griesbach, *Labor Law Issues in Plant Acquisitions*, 37 PROC. N.Y.U. ANN. NAT'L CONF. ON LABOR § 7, at 7-32 (1984). In his dissent in *Fall River*, Justice Powell dismissed the expectation theory by stating that:

When all of the production employees were laid off indefinitely . . . there could have been little hope—and certainly no reasonable expectation—that [the employer] would ever reopen. Nor was it reasonable for the employees to expect that [the employer's] failed textile operations would be resumed by a corporation not then in existence.

482 U.S. at 57 (Powell, J., dissenting). Justice Rehnquist, who joined Justice Powell's dissent in *Fall River*, had earlier argued in *Burns* against such an expansion of the doctrine, and cautioned "against extending successorship, under the banner of industrial peace, step by step to a point where the only connection between the two employing entities is a naked transfer of employees." *Burns*, 406 U.S. at 306-07 (Rehnquist, J., concurring in part and dissenting in part).

81. Another means of transferring business is by relocating plants or subcontracting. In such cases, capital mobility considerations are equally as critical. Professor Klare has noted that "[t]he effort to shelter capital investment decisions . . . from employee participation has manifested a cancerous growth in American labor law in recent times." Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1402 (1982). For an analysis of arbitration and subcontracting, see Comment, *Arbitral Treatment of Subcontracting After Milwaukee Spring II: Much Ado About Nothing?*, 44 U. MIAMI L. REV. 371 (1989).

82. A review of arbitration decisions published in *Labor Arbitration Reports* (BNA) and *Labor Arbitration Awards* (CCH) has not yet revealed any cases that refer to *Fall River*. Accordingly, all of the arbitrations referred to in Section III of this Comment predate the *Fall River* decision.

III. SUCCESSORSHIP DOCTRINE: ARBITRATIONS

There exists an incongruity concerning the use of successorship doctrine in arbitrations that must be emphasized before examining arbitration decisions. The Supreme Court cases relied upon for the basic doctrine concern whether a "successor" employer actually is a successor with an obligation to either bargain or arbitrate with a union.⁸³ Arbitrators often use the doctrine, however, not to decide whether there is a duty to bargain or arbitrate, but rather to determine seniority rights,⁸⁴ vacation rights,⁸⁵ and layoffs.⁸⁶ Thus, arbitrators use the doctrine in a context other than the one in which it was developed, in order to ascertain the intent of employers and unions when they used the term "successor" in a contract clause.

For the purposes of this Comment, two lines of "successorship" arbitrations will be distinguished: those against predecessor companies and those against successor companies. As the Supreme Court suggested in *Howard Johnson*, when a predecessor breaches a collective bargaining agreement by failing to obtain an assumption of the agreement by a successor, remedies remain available to the union against the predecessor.⁸⁷ Thus, arbitrations against predecessor companies generally are of two types: an attempt to prevent or enjoin a proposed sale; or an attempt to recover damages from the predecessor following a sale to a successor company. The resulting decisions in both situations have a critical impact on the free transfer of capital. These arbitrations often require an analysis of the parties' expectations and sense of entitlements⁸⁸ running back to the time when the

83. Neither of the collective bargaining agreements at issue in *Wiley* or *Burns* had successorship clauses. See Comment, *Successorship Clauses in Collective Bargaining Agreements*, 1979 B.Y.U. L. REV. 99, 103, 108. There was, however, a successor clause in *Howard Johnson*. 417 U.S. at 266 n.1.

84. *Standard Beverage Co.*, 80-1 Lab. Arb. Awards (CCH) ¶ 8022 (1979) (Thornell, Arb.).

85. *Universal Mack Sales & Serv., Inc.*, 86-2 Lab. Arb. Awards (CCH) ¶ 8536 (1986) (Chance, Arb.).

86. *Little Rose Coal Co.*, 85 Lab. Arb. (BNA) 1103 (1985) (Feldman, Arb.).

87. *Howard Johnson*, 417 U.S. at 257-58.

88. See, e.g., Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Calabresi and Melamed, in defining entitlement, state:

The first issue which must be faced by any legal system is one we call the problem of "entitlement." Whenever a state is presented with the conflicting interests of two or more people, or two or more groups of people, it must decide which side to favor. Absent such a decision, access to goods, services, and life itself will be decided on the basis of "might makes right" — whoever is stronger or shrewder will win. Hence the fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail.

Id. at 1090 (footnote omitted). Calabresi and Melamed also point out that there are three types of entitlements: entitlements protected by property rules, entitlements protected by lia-

contracts were negotiated.⁸⁹

Arbitrations against successor companies are more varied than those against predecessors. In the typical successor case, an employer retains employees and willingly arbitrates whether there are obligations that run back to the predecessor seller's agreement with the union.⁹⁰ The issues may concern union recognition,⁹¹ seniority rights—including recall rights,⁹² vacation time,⁹³ the merger of seniority lists,⁹⁴ medical plan contributions,⁹⁵ or even such seemingly mundane matters as whether a union can maintain a bulletin board for its members on the employer's premises.⁹⁶ Although each of these issues have obvious cost considerations, the impact of capital mobility considerations on these arbitrations is minimal. The apparent intent of the parties in these arbitrations is to clean up and clarify unsettled issues remaining from the sale of the company so that the parties will be able to coexist peaceably in the future.⁹⁷

bility rules, and inalienable entitlements. *Id.* at 1092. An entitlement is protected by a property rule if it may be voluntarily bought and sold for value. *Id.*

89. Parties are entitled to the benefits of contract clauses if actual bargaining occurred concerning the clauses. Some contract language is often included in a contract as a matter of course, with no real bargaining over the terms. If there has been no real bargaining, then neither party may be able to claim to be entitled to the benefit of the clause. This may sometimes produce harsh results for the union. *See, e.g.,* Wyatt Mfg. Co., 82 Lab. Arb. (BNA) 153 (1983) (Goodman, Arb.) (Arbitrator placed the burden on the union to prove that a successor clause which appeared in a collective bargaining agreement for twenty-five years had been the subject of negotiations.). For a discussion of placing a value on entitlements in collective bargaining negotiations, see D. LESLIE, *CASES & MATERIALS ON LABOR LAW: PROCESS AND POLICY* 371-72 (2d ed. 1985). *See also* Wachter & Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1364-77 (1988).

90. *See, e.g.,* Don Lee Distrib., Inc., 85-1 Lab. Arb. Awards (CCH) ¶ 8272 (1984) (Stieber, Arb.); Allied Employers, Inc., 83 Lab. Arb. (BNA) 297 (1984) (Armstrong, Arb.); Standard Beverage Co., 80-1 Lab. Arb. Awards (CCH) ¶ 8022 (1979) (Thornell, Arb.).

91. United Food & Commercial Workers, 86-2 Lab. Arb. Awards (CCH) ¶ 8525 (1986) (Lesnick, Arb.).

92. Seam Coal, Ltd., 86-1 Lab. Arb. Awards (CCH) ¶ 8041 (1985) (Duff, Arb.).

93. Custom Janitorial Serv., 84-1 Lab. Arb. Awards (CCH) ¶ 8060 (1983) (Phelan, Arb.).

94. Burnside-Graham Ready Mix, Inc., 86-1 Lab. Arb. Awards (CCH) ¶ 8214 (1986) (Wren, Arb.).

95. Tri-State Asphalt Corp., 72 Lab. Arb. (BNA) 102 (1979) (LeWinter, Arb.).

96. Maul Technology Corp., 83-1 Lab. Arb. Awards (CCH) ¶ 8295 (1983) (Ipavec, Arb.).

97. This is consistent with the argument that arbitrators are really only setting terms that the parties could not have agreed upon because of the infinite variety of situations that are unanticipated when a contract is negotiated. St. Antoine, *Deferral to Arbitration and Use of External Law in Arbitration*, 10 INDUS. REL. L.J. 19, 20 (1988). This is particularly cogent in the context of successor arbitrations precisely because the parties in arbitration—the union and the successor—obviously were not the parties who negotiated the collective bargaining agreement that is in dispute.

A. Predecessor Arbitrations

1. PRE-SALE

In most instances of the sale of a company, the union only learns of the sale after the deal is done. It is the rare situation in which an attempt can be made, through arbitration, to protect the rights of employees from collective bargaining agreement violations before the sale is consummated.⁹⁸ For example, in *Hosanna Trading Co.*,⁹⁹ an employer declared its intention to sell or transfer its business to another firm that would not recognize either the collective bargaining agreement or the union.¹⁰⁰ Relying solely on the language of the collective bargaining agreement, the arbitrator prohibited the sale, transfer, or assignment of the business, either directly or indirectly, unless the seller obtained an express written assumption of the collective bargaining agreement from the potential purchaser.¹⁰¹ The arbitrator stated that any other decision would deny the employees the protective rights and economic benefits that had been achieved through collective bargaining and union representation.¹⁰²

Similarly, in *Sexton's Steak House, Inc.*,¹⁰³ the arbitrator enjoined the sale of a restaurant when a purchaser refused to be bound by the collective bargaining agreement and the predecessor

98. See *Gallivan's, Inc.*, 82-2 Lab. Arb. Awards (CCH) ¶ 8411 (1982) (Gallagher, Arb.); *Sexton's Steak House, Inc.*, 76 Lab. Arb. (BNA) 576 (1981) (Ross, Arb.); *Hosanna Trading Co.*, 74 Lab. Arb. (BNA) 128 (1980) (Simons, Arb.).

In some cases, the union is forced to go to court to enjoin a potential sale and obtain an order requiring the seller company to arbitrate with the union. See *Local Lodge No. 1266, Int'l Ass'n of Machinists v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981). In *Panoramic*, a "status quo injunction" restraining an employer from completing a sale of corporate assets pending arbitration was properly issued, and upheld. The union had successfully argued that the issue of whether the sale violated the collective bargaining agreement because the seller did not require the purchaser to assume the collective bargaining agreement should be decided by an arbitrator. *Id.* at 279. The court of appeals agreed, noting that the interpretation of the successor clause in the contract was a function of the arbitrator, not the courts. *Id.* at 288; see also *Gallivan's, Inc.*, 82-2 Lab. Arb. Awards (CCH) ¶ 8411 (1982) (Gallagher, Arb.).

99. 74 Lab. Arb. (BNA) 128 (1980) (Simons, Arb.).

100. *Id.* at 129.

101. *Id.* at 131. Paragraph 68 of the labor agreement provided that:

The parties agree that this agreement shall be binding upon the Association, the members of the Association and the Union and their respective transferees, successors and assigns, and that they will faithfully comply with its provisions.

In the event that a member of the Association sells or transfers the business or the shop, such member shall nevertheless continue to be liable for the complete performance of this agreement until the purchaser or transferee expressly agrees in writing with the Union that it is fully bound by the terms of this agreement.

Id.

102. *Id.* at 131-32.

103. 76 Lab. Arb. (BNA) 576 (1981) (Ross, Arb.).

employer had not required the purchaser to assume the labor agreement.¹⁰⁴ As in *Hosanna*, the collective bargaining agreement contained a clause that obligated the selling employer to require as a condition of any transfer or sale that the successor be bound by the labor agreement.¹⁰⁵ The arbitrator distinguished the Supreme Court's decisions in *Burns* and *Howard Johnson* as inapposite because they determined the obligations of a purchaser under a collective bargaining agreement executed by a predecessor.¹⁰⁶ Nevertheless, the arbitrator applied what is essentially the *Wiley* test of "substantial continuity" to find that the prospective purchaser was a successor as defined in the collective bargaining agreement.¹⁰⁷ Therefore, the clause in the labor agreement requiring the employer to bind a potential successor to the agreement was applicable and the sale was enjoined to prevent a breach of the collective bargaining agreement.¹⁰⁸

In *Gallivan's, Inc.*,¹⁰⁹ however, the arbitrator held that a restaurant owner did not violate the collective bargaining agreement when it agreed to sell the business without obtaining assumption of the labor agreement.¹¹⁰ The arbitrator stated that the successor language in the contract was too general in nature to bind the parties,¹¹¹ and that stronger language was rejected during the collective bargaining negotiations.¹¹² Although prior arbitrations do not necessarily have precedential value,¹¹³ the arbitrator cited both *Hosanna* and *Sexton's* as

104. *Id.* at 579.

105. *Id.* at 577. Section 26 of the collective bargaining agreement stated: "This Agreement shall be binding on any and all successors and assigns of the Employer, whether by sale, transfer, merger, acquisition, consolidation or otherwise. The Employer shall make it a condition of transfer that the successor or assigns shall be bound by the terms of this Agreement." *Id.*

106. *Id.* at 578. *Burns* and *Howard Johnson* determined the legal, rather than contractual, obligations of purchasers or successors to arbitrate or bargain with a union, while the instant case was concerned with the obligations of the vendor of the business. *Id.*

107. *Id.* at 578-79. Arbitrator Ross did not cite *Wiley* or make the distinction that it also was a determination of a successor's obligations to arbitrate. Therefore, it was equally as inapposite as *Burns* or *Howard Johnson*.

108. *Id.* at 579.

109. 82-2 Lab. Arb. Awards (CCH) ¶ 8411 (1982) (Gallagher, Arb.). The union earlier had filed an action in federal court to enjoin the sale pending arbitration. On the same day, however, the action was suspended when the parties stipulated that the closing would not occur until after the arbitration. *Id.* at 4835.

110. *Id.* at 4840.

111. *Id.* at 4842. Article 17, Section 1 of the contract provided that "[t]he terms and provisions . . . shall bind all of the sublessees, assignees, purchasers or other successors to the business to such terms and provisions, to which the employees are and shall be entitled to under this Agreement." *Id.* at 4835.

112. *Id.* at 4840-42.

113. See generally F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 414-36 (4th ed. 1985). Prior arbitration awards, although not binding in the sense that legal decisions are,

examples of contract language sufficient to bind a predecessor in obtaining an assumption of the agreement from a successor.¹¹⁴ The arbitrator stated that a seller's obligation to obtain an assumption of the labor agreement from a purchaser must be unambiguous for the clause to be enforced.¹¹⁵ The arbitrator reasoned that because the obligation may be imposed only if set out in express terms, a general statement of a binding effect on successors should not be considered as an actual expression of an intent to obligate sellers to obtain a purchaser's assumption of the collective bargaining agreement.¹¹⁶

2. POST-SALE

The more typical arbitration against a predecessor or selling employer occurs after the sale has been completed. The union in these situations attempts to obtain damages because of the predecessor's failure to obtain assumption of the labor agreement as a condition of the sale.¹¹⁷ As in the pre-sale cases, the post-sale situation usually turns on the relative specificity of the contract requirements imposed upon the predecessor to obtain assumption of the collective bargaining agreement by a successor.¹¹⁸ Contract language merely binding all successors, assigns, or purchasers often is found to be insufficient to sustain a grievance against a predecessor¹¹⁹ unless there is also explicit language obligating the seller to obtain an assumption of the labor agreement from the purchaser.¹²⁰ In making this determination, arbitrators look at both the contract and the history of the

do have persuasive authority. *Id.* at 421. Prior awards aid arbitrators by enabling them to see how other arbitrators have solved similar problems. *Id.* at 416, 430; *see also infra* note 241.

114. *Gallivan's*, 82-2 Lab. Arb. Awards (CCH) ¶ 8411, at 4840; *see also* *Sexton's Steak House, Inc.*, 76 Lab. Arb. (BNA) 576 (1981) (Ross, Arb.); *Hosanna Trading Co.*, 74 Lab. Arb. (BNA) 128 (1980) (Simons, Arb.).

115. *Gallivan's*, 82-2 Lab. Arb. Awards (CCH) ¶ 8411, at 4840. Is this the equivalent of a "clear and convincing" burden of proof standard, as compared with the mere "preponderance of the evidence" standard in civil cases? Or is the arbitrator applying this standard because there is a potential injunction?

116. *Id.* at 4842-43. The arbitrator emphasized that the union could have obtained protection for its grievance by persisting in its proposal for more explicit contractual terms during the negotiations of the agreement.

117. *See* *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 257-58 & n.3 (1974).

118. *See, e.g.,* *Martin Podany Assocs.*, 80 Lab. Arb. (BNA) 658 (1983) (Gallagher, Arb.); *High Point Sprinkler Co.*, 67 Lab. Arb. (BNA) 239 (1976) (Connolly, Arb.).

119. *See, e.g., Gallivan's*, 82-2 Lab. Arb. Awards (CCH) ¶ 8411, at 4839-40.

120. *Id.* As noted by the arbitrator in *Gallivan's*:

The obligation to require assumption is imposed if it is set out in express terms; it is not imposed if the clause is nothing more than a recitation that successors are to be bound. . . . [T]he general recitation of a binding effect on successors may reflect nothing more than the inclusion of "boiler plate" by the contract drafters, having no specific significance.

negotiations concerning a successor clause.¹²¹

In *Decatur Herald & Review, Inc.*,¹²² for example, the arbitrator stated that, in the absence of a successor or assigns clause requiring a purchaser to assume the collective bargaining agreement, the company could sell its business without requiring the successor to assume the obligations of the union contract. This was irrespective of the fact that the successor employer published the same newspaper and employed some of the same employees. The arbitrator noted that there was no discussion during the contract negotiations of a successor clause, and even suggested an example of a suitable clause.¹²³

In *Wyatt Manufacturing Co.*,¹²⁴ the arbitrator followed the rationale of *Gallivan's*, and required an express statement of an obligation by an employer to obtain assumption of a labor agreement from the purchaser.¹²⁵ To sustain the grievance, the arbitrator held that the union must show that the company obligated itself in a provision of the collective bargaining agreement to insure that a buyer would assume the collective bargaining agreement. Comparing successorship clauses to a guarantee, the arbitrator rejected what he termed "the notion that a guarantor status, or what amounts to that status, can somehow be achieved through implication."¹²⁶ Thus, the arbitrator concluded that the seller should not be made accountable for the decisions and actions of the buyer unless the agreement identified that responsibility in no uncertain terms. Although the language at issue appeared in the contract for more than twenty-five years, the arbitrator placed the burden on the union to demonstrate the intent of the provision as originally negotiated.¹²⁷

Id. at 4840; *see also* *Decatur Herald & Review, Inc.*, 73 Lab. Arb. (BNA) 745 (1979) (Jones, Arb.); *Wyatt Mfg. Co.*, 82 Lab. Arb. (BNA) 153 (1983) (Goodman, Arb.).

121. *See, e.g., Decatur*, 73 Lab. Arb. (BNA) at 748; *Gallivan's*, 82-2 Lab. Arb. Awards (CCH) ¶ 8411, at 4840; *Wyatt*, 82 Lab. Arb. (BNA) at 159-60.

122. 73 Lab. Arb. (BNA) 745 (1979) (Jones, Arb.).

123. The arbitrator proposed as a successors and assigns clause:

If, during the life of this contract, the ownership of any firm (or firms) signatory to this contract changes in any manner whatsoever, such successor or successors shall be bound by the provision of this contract until the expiration date thereof, or until a new contract, mutually agreed upon, is signed by both parties.

Id. at 748. However, if one examines this clause in light of *Gallivan's*, *supra* notes 109-16 and accompanying text, and *Wyatt*, *infra* notes 124-32 and accompanying text, it seems likely that the arbitrators in those two cases probably would have held this clause to be ineffective in imposing liability on the predecessor for a failure of the buyer to assume the contract.

124. 82 Lab. Arb. (BNA) 153 (1983) (Goodman, Arb.).

125. *Id.* at 162.

126. *Id.* at 163.

127. *Id.* at 159-60. Article II of the contract provided:

[T]his Agreement shall be binding upon the Company and its successors and assigns and all of the terms and obligations herein contained shall not be affected

Although cognizant that similar clauses have been sustained in other arbitrations,¹²⁸ the *Wyatt* arbitrator characterized the union's position as a "fascinating theory."¹²⁹ The arbitrator stated that adopting the union's position, that the successor clause obligated the predecessor to find a buyer who would be bound by the collective bargaining agreement, would be equivalent to prewarning potential sellers that a business may not be sold unless a buyer can be found who is willing to accept the collective bargaining agreement.¹³⁰ The arbitrator stated that following the union's reasoning would grant unions an enormous economic arsenal to use against predecessor employers, particularly in light of the Supreme Court decision in *Howard Johnson*.¹³¹ The arbitrator noted that although *Howard Johnson* enables some successor companies to avoid union efforts at contract enforcement by refraining from hiring substantial numbers of the employees of the predecessor, it also warns of remedies that nevertheless remain open against the predecessor seller.¹³²

Arbitrators, however, do not universally adopt the capital mobility views expressed in *Wyatt*. In *High Point Sprinkler Co.*,¹³³ contract language similar to that in *Wyatt* was held binding on the predecessor following an assignment of assets.¹³⁴ The arbitrator stated that, although the predecessor company hardly was in a financial position to insist that the non-union assignee be bound by the labor agreement,

or changed in any respect by the consolidation, sale, transfer or assignment of any of the company, or any or all of its property, or affected or changed in any respect by any change in legal status, ownership, or management of the Company.

Id. at 153.

128. *Id.* at 160-61. The arbitrator cited to *Martin Podany Assocs.*, 80 Lab. Arb. (BNA) 658 (1983) (Gallagher, Arb.); *High Point Sprinkler Co.*, 67 Lab. Arb. (BNA) 239 (1976) (Connolly, Arb.); *Sexton's Steak House, Inc.*, 76 Lab. Arb. (BNA) 576 (1981) (Ross, Arb.); *Hosanna Trading Co.*, 74 Lab. Arb. (BNA) 128 (1980) (Simons, Arb.).

129. *Wyatt*, 82 Lab. Arb. (BNA) at 161.

130. *Id.*; see also *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 287-88 (1972) (Transfer of capital may be inhibited if new employer is to be saddled with old collective bargaining agreement.).

131. 417 U.S. 249 (1974).

132. *Wyatt*, 82 Lab. Arb. (BNA) at 161. This case can be read as suggesting that free capital mobility is critical to the survival of a business. If a union does not renegotiate or give up contract rights to a successor, neither the business nor the jobs may survive. For an example of this type of situation, see *Martin Podany Assocs.*, 84-2 Lab. Arb. Awards (CCH) ¶ 8469 (1984) (Gallagher, Arb.); *Martin Podany Assocs.*, 80 Lab. Arb. (BNA) 658 (1983) (Gallagher, Arb.).

133. 67 Lab. Arb. (BNA) 239 (1976) (Connolly, Arb.).

134. Article 3 of the agreement provided: "This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. It is understood that the parties hereto shall not use any sale, transfer, lease, assignment, receivership, or bankruptcy to evade the terms of this Agreement." *Id.* at 240.

the company nevertheless had a duty and an obligation to require such an assumption.¹³⁵ Recognizing the economic benefit to the union, the arbitrator concluded that the company's weakness in negotiating with the assignee could not be used to deprive the union of the protection conferred upon it by the successor clause.¹³⁶

A more specific clause was found to be binding on a predecessor company in *Martin Podany Associates*.¹³⁷ In *Martin Podany*, an employer notified all of its employees that they would be fired after an impending sale of the company, but that they could apply for employment with the new owner.¹³⁸ The wages and benefits offered by the successor company, however, were less than those paid by the predecessor.¹³⁹ The successor company opened for business on the next business day. All of the successor's employees had worked for the predecessor with the exception of its president. Shortly thereafter, the union filed grievances against both the predecessor and the successor and went on strike.¹⁴⁰ Following a court order directing arbitration, the successor company dissolved. The court then directed that the grievances be arbitrated with the predecessor company.¹⁴¹

The arbitrator noted that the Court in *Howard Johnson* had stated that a remedy might have been available against the seller in situations in which none were available against the buyer.¹⁴² After reviewing prior arbitration decisions,¹⁴³ the arbitrator ruled that the language of the successor clause in the collective bargaining agreement was unambiguous. Thus, the arbitrator concluded, the

135. *Id.* at 248.

136. *Id.* The arbitrator saw this as the only logical conclusion one could make of the successorship language in the agreement. "There would be no need for this clause if it were otherwise." *Id.*

137. 80 Lab. Arb. (BNA) 658 (1983) (Gallagher, Arb.). Article 36 of the labor agreement provided that: "The Employer agrees that all obligations under this contract, and the performance thereof, by the buyer, lessee, transferee or assignee, become a condition of sale, transfer, lease, or assignment." *Id.* at 659.

138. *Id.*

139. *Id.*

140. *Id.*; see also *Martin Podany Assocs.*, 84-2 Lab. Arb. Awards (CCH) ¶ 8469, at 5048 (1984) (Gallagher, Arb.).

141. 80 Lab. Arb. (BNA) at 659.

142. *Id.* at 661. In *Howard Johnson*, few of the employees of the predecessor had been hired by the successor. *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 252 (1974). In *Martin Podany*, however, all of the former employees were hired, albeit at lower wages. 80 Lab. Arb. (BNA) at 659.

143. *Martin Podany*, 80 Lab. Arb. (BNA) at 661-62. The arbitrator reviewed *Gallivan's, Inc.*, 82-2 Lab. Arb. Awards (CCH) ¶ 8411 (1982) (Gallagher, Arb.); *Sexton's Steak House, Inc.*, 76 Lab. Arb. (BNA) 576 (1981) (Ross, Arb.); *Hosanna Trading Co.*, 74 Lab. Arb. (BNA) 128 (1980) (Simons, Arb.); and *High Point Sprinkler Co.*, 67 Lab. Arb. (BNA) 239 (1976) (Connolly, Arb.).

employer breached the agreement when the business was sold without obtaining the buyer's assumption of the agreement.¹⁴⁴ In a subsequent arbitration, damages were awarded to the union and the employees.¹⁴⁵ The predecessor company had to pay back wages and contribute to the pension, retirement and disability, and health and welfare funds of the union. These amounts were awarded from the time the predecessor sold the business until the date of the closing of the business by the successor, despite the fact that the union employees were on strike for most of that time.¹⁴⁶ In effect, the employees were not penalized for striking, thus breaking the general labor rule of "work first, grieve later,"¹⁴⁷ and the general contractual duty to mitigate damages. The arbitrator stated that the right to strike supersedes the duty to work for the successor, so that the duty to mitigate the damages must give way.¹⁴⁸

Similar results are found in *Marley-Wylain Co.*¹⁴⁹ Marley-Wylain sold the business and assets of one of its divisions to a buyer that refused to assume the collective bargaining agreement. The buyer terminated the employees but then rehired them as new employees.¹⁵⁰ A new contract subsequently was negotiated with the successor that diminished the benefits available to the rehired workers.¹⁵¹ The union then filed a grievance against the predecessor seller,

144. 80 Lab. Arb. (BNA) at 663.

145. Martin Podany Assocs., 84-2 Lab. Arb. Awards (CCH) ¶ 8469 (1984) (Gallagher, Arb.).

146. *Id.* at 5051.

147. See Gross & Greenfield, *Arbitral Value Judgments in Health and Safety Disputes: Management Rights over Workers' Rights*, 34 BUFFALO L. REV. 645, 648 (1985) (discussing Ford Motor Co., 3 Lab. Arb. (BNA) 779, 781 (1944) (Shulman, Arb.)). Professor Feller, however, disagrees with the necessity of mitigating damages in the arbitral context. Feller, *The Remedy Power in Grievance Arbitration*, 5 INDUS. REL. L.J. 128, 144-45 (1982) ("There is, indeed, no duty to 'mitigate damages' because the arbitrator does not award damages. There is, or should be, therefore, no requirement that the employee seek other employment, and no deduction from the employee's back pay because of his failure to do so.") Professor Feller's thesis is that the arbitrator should function merely as a contract reader for the parties, rather than as a court. *Id.* He notes that arbitrators do not have to follow what courts will do in a similar situation. For example, although courts normally include interest in damage awards for breach of an employment contract, arbitrators rarely award interest. *Id.* at 145. Thus, there is no necessity for an arbitrator to mimic what a court would do, and require the mitigation of damages. *Id.* at 145-46.

148. *Martin Podany*, 84-2 Lab. Arb. Awards (CCH) ¶ 8469, at 5051. Lest the impression be given that this arbitrator is exceedingly pro-labor, this is the same arbitrator who refused to give effect to a successor clause in *Gallivan's, Inc.*, 82-2 Lab. Arb. Awards (CCH) ¶ 8411 (1982) (Gallagher, Arb.).

149. 87-1 Lab. Arb. Awards (CCH) ¶ 8293 (1987) (Jacobowski, Arb.).

150. *Id.* at 4257.

151. *Id.*

claiming a breach of a duty to bind the buyer to the contract.¹⁵²

The arbitrator in *Marley-Wylain* examined *Wiley*,¹⁵³ *Burns*,¹⁵⁴ and *Howard Johnson*,¹⁵⁵ and found that the purchaser was a "successor" because there was continuity of the business and a majority of the employees were rehired.¹⁵⁶ The arbitrator then held that the language of the collective bargaining agreement was sufficiently specific to bind the predecessor seller.¹⁵⁷ Although other arbitrators had held less specific language to be ineffective, the arbitrator noted that in this case there was a significant history of bargaining by the parties over the text of the successor language.¹⁵⁸ Noting that the company previously had been sold more than once without labor problems, the arbitrator stated that the potential stability and harmony created by the successor clause may have facilitated the profitable resale of the company.¹⁵⁹

Finally, the arbitrator relied upon past practice to reinforce his decision: In each of the prior sales of the company, the successor company followed the prior contract.¹⁶⁰ Thus, the prior sales raised an expectancy on the part of the employees that in the event of a future sale the contract would similarly be followed. In this sale, however, the seller knew that the successor would not follow the contract, but did not notify the union.¹⁶¹ By withholding notice of the sale, the seller apparently delegated the termination to the buyer, and

152. *Id.*

153. 376 U.S. 543 (1964).

154. 406 U.S. 272 (1972).

155. 417 U.S. 249 (1974).

156. *Marley-Wylain*, 87-1 Lab. Arb. Awards (CCH) ¶ 8293, at 4261.

157. *Id.* at 4262. Article 1.1 of the agreement was effective "between . . . Marley-Wylain Company, its successors or assigns." *Id.* at 4257. Compare this language with the language from the contract in *Gallivan's*, 82-2 Lab. Arb. Awards (CCH) ¶ 8411, at 4835, and *Wyatt*, 82 Lab. Arb. (BNA) at 153. See *supra* notes 111 & 127. However, Article 1.4 of the labor agreement also stated: "[E]ach of the parties acknowledges and accepts responsibility for fulfillment of their respective obligations under this Agreement . . ." *Marley-Wylain*, 87-1 Lab. Arb. Awards (CCH) ¶ 8293, at 4257.

158. *Marley-Wylain*, 87-1 Lab. Arb. Awards (CCH) ¶ 8293, at 4262.

159. *Id.* This rationale may be interpreted as an economic efficiency counterpoint to the "fascinating theory" argument offered by the arbitrator in *Wyatt*. For a discussion of *Wyatt*, see *supra* notes 129-31 and accompanying text. Although Arbitrator Jacobowski in *Marley-Wylain* discusses mutual benefits because of the successor language, there is no discussion of the price paid for the company. Did Marley-Wylain receive a higher price from the purchaser because of the purchaser's refusal to accept or assume the contract than it would have received if the contract were to be assumed? If so, then an award of damages to the union would theoretically reduce the price that Marley-Wylain actually received. See *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 287-88 (1972); *supra* notes 39-40 and accompanying text; see also J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 166-67 (1983).

160. *Marley-Wylain*, 87-1 Lab. Arb. Awards (CCH) ¶ 8293, at 4263.

161. *Id.*

thereby deprived the union of any opportunity to preserve the contract before the sale was completed.¹⁶²

Thus, arbitrators in predecessor cases primarily rely on the interpretation of specific language of the collective bargaining agreement,¹⁶³ and secondarily on prior arbitrations for guidance—despite their supposed lack of precedential effect.¹⁶⁴ Most arbitrators try to recognize their role as that of a “‘contract reader’ for the parties, rather than a learned interpreter of public statutes.”¹⁶⁵ This role as “contract reader” is particularly crucial in the successorship context because public law does not give unions entitlements in this area.¹⁶⁶ When forced to give meaning to words in a contract, such as who is a successor, arbitrators depend upon the successor doctrine as elaborated in *Wiley*,¹⁶⁷ *Burns*,¹⁶⁸ and *Howard Johnson*.¹⁶⁹ In many instances, the most relevant application of the doctrine to predecessor cases comes from the suggestion in *Howard Johnson* that other remedies are available to the unions to use against the seller when a successor fails to hire the seller’s employees and has not otherwise expressly assumed the labor agreement in contravention of a collective bargaining agreement.¹⁷⁰ This remedy implicitly allows capital to be mobile between predecessor and successor, with the union then left hoping for a recovery against the predecessor.

B. Successor Arbitrations

Successor arbitrations between a union and a successor company

162. *Id.*

163. The predecessor arbitrations are particularly unusual because the clauses often appear in the contract for years, almost as a matter of course, without any significant negotiation or bargaining as to the wording. Only if the company is sold do these dormant clauses come to life, and require interpretation. At least one commentator has urged that negotiators for management avoid any reference to successor language in collective bargaining agreements because of the potential loss of business opportunities that may occur if a sale is enjoined. Irving, *Closing and Sales of Businesses: A Settled Area?*, 33 LAB. L.J. 218, 229 (1982); see also Emanuel, *The Management Perspective*, 10 INDUS. REL. L.J. 66, 75-76 (1988).

164. For a discussion of the role of precedent in arbitrations, see *supra* note 113 and *infra* note 241.

165. *Arco Metals Co.*, 88 Lab. Arb. (BNA) 1209, 1212 (1987) (Berkowitz, Arb.).

166. United States labor laws give virtually no substantive rights to workers beyond minimum wage and maximum hour legislation. Siskind, *Employer Instability and Union Decline: Problems in the Law of Successorship*, 39 PROC. N.Y.U. ANN. NAT’L. CONF. ON LABOR § 8, at 8-3 (1986). Labor laws do confer procedural rights such as the right to organize into unions, and the union’s right to engage in collective bargaining. *Id.* at 8-4. More substantive employee rights and entitlements must be negotiated in collective bargaining. *Id.*

167. 376 U.S. 543 (1964).

168. 406 U.S. 272 (1972).

169. 417 U.S. 249 (1974).

170. See *id.* at 257-58 (1974); see also *supra* notes 59-60 and accompanying text.

arise in a different context than do the predecessor arbitrations. In a predecessor arbitration, there is little or no expectation of a continuing relationship between the union and the company. The union is either seeking an injunction to force the employer to obtain assumption of the collective bargaining agreement from the successor, or is attempting to obtain damages for an employer's failure to do so. In either case, the contractual relationship between these two parties is at an end,¹⁷¹ and there is no incentive for the parties to maintain a pretense of cooperative labor-management relations. On the other hand, a successor arbitration takes place in an atmosphere in which both the union and the company have an expectation that their relationship will continue. Thus, the particular arbitration usually involves an issue of contract interpretation of a prior collective bargaining agreement in which the successor company has replaced the original employer.¹⁷² Therefore, it generally is in the interest of both the company and the union that the pretense of good labor-management relationships be maintained in the successor context.¹⁷³

171. This also signals the end of any further opportunity for the arbitrator to be chosen by these two particular parties again. This does not, however, remove all constraints on the arbitrator. Although he or she may not be chosen again by these two particular parties, his or her record on arbitrations surely will be examined by other parties, in other arbitrations, as they decide who will arbitrate their dispute. One commentator has pointed out the critical importance of an arbitrator's prior decisions in the selection of an arbitrator by the parties to a dispute. Jones, "His Own Brand of Industrial Justice": *The Stalking Horse of Judicial Review of Labor Arbitration*, 30 UCLA L. REV. 881, 889-91 (1983). As Professor Jones notes, there are commercial services which categorize and summarize the decisions issued by a particular arbitrator in order to facilitate this selection process. *Id.*; see also Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979). As pointed out by Professor Getman, arbitral independence is essential to the integrity of the arbitration process. *Id.* at 927-28. Yet the close examination of an arbitrator's prior decisions by the parties before choosing an arbitrator often cuts against this independence. *Id.* Getman also notes that some commentators castigate arbitration because of the arbitrator's financial dependence on the parties to the dispute. *Id.* at 928; see also P. HAYS, *LABOR ARBITRATION: A DISSENTING VIEW* 59-67, 112 (1966). Judge Hays argues that because arbitrators are appointees of the parties, they are inevitably subjected to political pressures from those who control their appointment. *Id.* at 60. Therefore, an arbitrator's preoccupation with maintaining acceptability to the parties may distort the resulting decisions in arbitrations. *Id.* at 61.

172. Although many successor arbitrations concern issues that affect all of the union members, as in arbitrations with predecessors, many involve contract interpretation affecting only a few, or even one employee. See, e.g., *Little Rose Coal Co.*, 85 Lab. Arb. (BNA) 1103 (1985) (Feldman, Arb.); *Seam Coal, Ltd.*, 86-1 Lab. Arb. Awards (CCH) ¶ 8041 (1985) (Duff, Arb.); *Don Lee Distrib., Inc.*, 85-1 Lab. Arb. Awards (CCH) ¶ 8272 (1984) (Stieber, Arb.); *Custom Janitorial Serv.*, 84-1 Lab. Arb. Awards (CCH) ¶ 8060 (1983) (Phelan, Arb.).

173. The nature of the relationship between the union and the employer also may influence the way the arbitrator reasons in order to demonstrate the legitimacy of the opinion. In any arbitration, the arbitrator must be sensitive to the continuing nature of the collective bargaining relationship from which the grievance has arisen. See Jones, *supra* note 171, at 884. It is a common characteristic of collective bargaining agreements that they are for relatively short terms: one to three years. *Id.* at 896. Thus, as Professor Jones has noted, it is the usual

*Standard Beverage Co.*¹⁷⁴ illustrates the application of the doctrine in a post-sale successor arbitration. Standard purchased assets, inventory, and beer distribution rights from another distributor, Roper Distributing.¹⁷⁵ When Roper ceased operations, it terminated all six of its employees. Standard immediately thereafter hired four of the six, giving no credit for their former seniority with Roper.¹⁷⁶ The employees that were hired, as well as the union, filed a grievance based on the loss of seniority.¹⁷⁷ The two employees that were not hired also filed a grievance claiming that they should be recalled to active employment with backpay.¹⁷⁸

The arbitrator relied on the doctrine of *Wiley*,¹⁷⁹ *Burns*,¹⁸⁰ and *Howard Johnson*¹⁸¹ to find that Standard was a successor to Roper. The arbitrator pointed out that there was continuity in the work force, in the business, and in the appropriateness of the bargaining unit. There was also no hiatus in operations.¹⁸² He characterized the successorship language in the contract as "somewhat more encompassing than many other contracts."¹⁸³ The arbitrator sustained the grievance of the employees who were hired, and required recognition of their seniority status by the successor,¹⁸⁴ but denied the grievance of the two former employees not hired by the successor. The arbitrator stated that he could not find authority for requiring a successor to

expectation of collective bargainers that the result of an occasional aberrant arbitration decision will be returned to the same process of negotiation that created the arbitrator's authority in the first place. *Id.* Therefore, it is common for vexatious arbitration awards to be effectively modified or vacated in the negotiations for a new contract. *Id.* This is particularly relevant within the successor arbitrations where there is an expectation of a continuing relationship. In contrast, in the predecessor arbitrations, the relationship between the union and the former employer effectively is at an end, at least for the particular bargaining unit.

174. 80-1 Lab. Arb. Awards (CCH) ¶ 8022 (1979) (Thornell, Arb.).

175. *Id.* at 3078.

176. *Id.* at 3079.

177. *Id.*

178. *Id.*

179. 376 U.S. 543 (1964).

180. 406 U.S. 272 (1972).

181. 417 U.S. 249 (1974).

182. *Standard*, 80-1 Lab. Arb. Awards (CCH) ¶ 8022, at 3080-81.

183. *Id.* at 3080. The arbitrator did not cite or otherwise refer to any other arbitrations in making this assertion. The pertinent language appeared in Article XVI, Section 7, of the contract, and stated:

In the event any Employer covered by this Agreement goes out of business or the unit covered by this Agreement is acquired, purchased by or merged with another Employer, whether or not covered by this Agreement, any successor Employer shall automatically become a party to this Agreement and be bound by the Agreement and the Union shall be bound to the successor as it was to the previous Employer.

Id. at 3079.

184. *Id.* at 3081.

hire the predecessor's employees.¹⁸⁵

The *Standard* arbitrator's view of management prerogative sharply contrasts with the employee protection provided in *Don Lee Distributor, Inc.*¹⁸⁶ In *Don Lee*, a collective bargaining agreement provision had been negotiated with the predecessor, giving employees the right to continued employment with a transferee company. Pursuant to this agreement, the transferee company had to accept a worker who was an admitted alcoholic.¹⁸⁷ The arbitrator granted that the company could not be faulted if it did not hire an alcoholic as a new employee.¹⁸⁸ The grievant, however, was not being considered for employment as a new hire.¹⁸⁹ Accordingly, the arbitrator reasoned that the grievant had a right to continued employment.¹⁹⁰ If the company wanted to fire him as an established employee, it would need just cause.¹⁹¹

Seniority issues, such as the right to recall after layoff, or vacation time, are the most frequently arbitrated successor issues. For example, in *Little Rose Coal Co.*,¹⁹² a coal mining business ended operations and placed its employees on layoff.¹⁹³ Two days later, a new company, Little Rose Coal, began mining operations at the same site.¹⁹⁴ The workers protested and asked for their jobs back, maintaining that Little Rose was nothing more than a continuation of the

185. *Id.* It is true that there is no authority requiring the hiring of the employees of a predecessor. See *Howard Johnson*, 417 U.S. at 261 (citing *Burns*, 406 U.S. at 280 n.5). Nevertheless, the arbitrator's analysis is inconsistent. First, he uses the doctrine from *Wiley*, *Burns*, and *Howard Johnson* that, narrowly interpreted, can be read not to apply, because technically those cases concerned the duty to arbitrate or bargain, which is not the case here. Then he ignores the doctrine, and in particular, *Howard Johnson*, in holding that the two unhired employees need not be hired. *Howard Johnson* makes clear that if a purchaser does not hire the predecessor employees, then he is not a successor, at least as far as an obligation to arbitrate. Here, the arbitrator is both using and ignoring the implications of the doctrine at the same time, for he could have held that because Standard hired four of the six employees, it was a successor, and was therefore obligated to hire all of them. It is not clear from the facts of the case whether the seniority of the two grievants who were not hired was greater than, or less than, the seniority of the four employees who were hired by Standard. Assuming that either of the two non-hired grievants had more seniority than those that were hired, how can the arbitrator obligate Standard to recognize seniority acquired previously, but not hire or recall workers from the predecessor on the basis of their acquired seniority?

186. 85-1 Lab. Arb. Awards (CCH) ¶ 8272 (1984) (Stieber, Arb.).

187. There was no evidence that the employee's work had ever been adversely affected by his condition. *Id.* at 4126.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. 85 Lab. Arb. (BNA) 1103 (1985) (Feldman, Arb.).

193. *Id.* at 1104.

194. *Id.*

former operator at the site.¹⁹⁵ The arbitrator placed the burden on the union as the moving party to show a connection between the two successive operators that would enable the arbitrator to consider the second company to be a successor.¹⁹⁶ The union was unable to meet the burden. Relying on the fact that there was no direct transaction between Little Rose and the former operator, the arbitrator ruled that the companies did not have a predecessor-successor relationship. Therefore, the employees were not entitled to recall.¹⁹⁷

Seniority arbitrations also arise when a company is merged into a larger entity.¹⁹⁸ In *Burnside-Graham Ready Mix, Inc.*,¹⁹⁹ a joint venture took over the operations of several consolidated cement companies.²⁰⁰ The union and the company disagreed over which employees should be laid off or transferred, and over which collective bargaining agreement was controlling.²⁰¹ The arbitrator stated that formalistic differences were not critical in determining which of the companies was a predecessor or successor because both companies had identical successor clauses in their collective bargaining agreements.²⁰² Citing the Supreme Court's statement in *Wiley* that the "flexible procedures" of arbitration may fashion a remedy without disrupting labor relations,²⁰³ the arbitrator decided to merge the two seniority lists.²⁰⁴

195. *Id.* at 1104-05.

196. *Id.* at 1106.

197. *Id.* However, there was some connection in that the two operators were leasing the land on which the mine was located from the same corporation. *Id.* at 1104. There was also some evidence that Little Rose acquired equipment from an individual who had been affiliated with the prior operation. *Id.*; see also *Seam Coal, Ltd.*, 86-1 Lab. Arb. Awards (CCH) ¶ 8041, at 3167 (1985) (Duff, Arb.) (burden of proving successorship falls on the union—a viable connection or linkage between the two employers must be shown by clear and convincing evidence). *But see* *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) (where direct transactions between companies were unnecessary to consider the new employer as a successor, at least in a duty to bargain context).

198. This was a major point of contention in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

199. 86-1 Lab. Arb. Awards (CCH) ¶ 8214 (1986) (Wren, Arb.).

200. *Id.* at 3902. In 1983, Burnside Concrete Company and Graham Lumber Company consolidated their ready mix concrete operations as Burnside-Graham Ready Mix, Inc. *Id.* All parties agreed that the employees would be represented by the same union local. *Id.* In 1984, Burnside-Graham entered discussions with a competitor, Hi Hill Ready Mix, Inc., about merging some of their operations in Columbus, Indiana. *Id.* The Hi Hill workers were represented by the same union local as the Burnside-Graham employees. *Id.* This merger, operating as a joint venture, began in 1985. *Id.*

201. *Id.* at 3904.

202. *Id.*

203. *Id.* at 3905 (citing *Wiley*, 376 U.S. at 551 n.5).

204. *Id.* at 3907. Unlike *Wiley*, however, in which the Wiley employees had not been organized, this case presented the arbitrator with an easier decision. All of the employees of the predecessor companies were unionized, and in fact were represented by the same union. *Id.* at 3902. Thus, the arbitrator essentially was resolving a competitive conflict among the

The issue of vacation pay in the context of successor arbitrations generally arises when the successor company shortens or refuses to recognize vacation entitlements that employees would have received from the predecessor employer. In *Universal Mack Sales & Service, Inc.*,²⁰⁵ the successor company refused to allow carryover employees to take vacations during their first year of employment, even though the collective bargaining agreement of the predecessor had been assumed, and then renegotiated.²⁰⁶ Rather than acknowledge that the carryover employees had many years of service with the predecessor, the successor wanted to treat each as a new hire who would normally not be entitled to vacation until after one year of employment.²⁰⁷ The arbitrator required the employer to adhere to the vacation entitlements earned with the predecessor.²⁰⁸ In doing so, he held that continuous service for purposes of vacation entitlement ran from the date of hire by the predecessor employer, while continuous service for determining seniority ran from the date of employment with the successor employer.²⁰⁹ The arbitrator relied on the fact that during negotiations between the union and the successor over modifications to the contract, the employer had not expressly identified vacation time as an area of the agreement that it wished to change. Without such an identification during contract negotiations, the arbitrator refused to confer upon the employer an after-the-fact reduction in employee entitlements.²¹⁰

The critical nature of negotiations to determine carryover entitle-

employees, rather than between the union and the employer. See also *Peter F. Mitchell Corp.*, 85-1 Lab. Arb. Awards (CCH) ¶ 8118 (1984) (Davis, Arb.) (Two companies employing the same workers interchangeably and having the same collective bargaining agreements with the union were ordered to merge seniority lists.).

205. 86-2 Lab. Arb. Awards (CCH) ¶ 8536 (1986) (Chance, Arb.).

206. *Id.* at 5255.

207. *Id.* at 5256.

208. *Id.* at 5257-58.

209. *Id.*

210. *Id.* at 5257; see also *Custom Janitorial Serv.*, 84-1 Lab. Arb. Awards (CCH) ¶ 8060 (1983) (Phelan, Arb.) (An employee on sick leave when a successor acquires his employer is not a new employee, and is entitled to vacation time based on amount of seniority and service with predecessor employers.); *Metropolitan Contract Servs., Inc.*, 82-2 Lab. Arb. Awards (CCH) ¶ 8596 (1982) (Thornell, Arb.) (Company conducting business at same location, with same employees, and with little or no hiatus in operations is a successor employer so that the employees are entitled to vacation time based on their seniority with the predecessor company.). But see *RRS, Inc.*, 86-1 Lab. Arb. Awards (CCH) ¶ 8213 (1985) (Redel, Arb.). In *RRS*, non-union employees of a successor company organized and negotiated a contract. The arbitrator held that such a contract will be read strictly, so that seniority for vacation time will be based upon continuous service with the successor employer, even if vacation time prior to collective bargaining had been based upon continuous service with both the successor employer and the predecessor. *Id.* at 3901.

ments is also apparent in *Allied Employers, Inc.*,²¹¹ where the arbitrator relied upon *Burns*²¹² and *Howard Johnson*²¹³ for doctrine concerning the duty to bargain and arbitrate. Following a partial sale of assets, the successor terminated all employees and then rehired certain of the employees and negotiated a new contract.²¹⁴ During these negotiations, the rehired employees gave up certain seniority rights that were earned during their tenure at the predecessor in return for higher wages.²¹⁵ The arbitrator relied upon the economic efficiency and transfer of capital arguments of *Burns*, ruling that the workers could exchange some of their contract rights for higher compensation.²¹⁶ Consequently, although the employees who were rehired were being paid more than before, the company theoretically could function more efficiently and profitably because those who were chosen had the most efficient performance.²¹⁷

One of the more complicated issues in successor arbitrations is the liability of the successor for the acts of the predecessor.²¹⁸ In *Schneider's Finer Foods, Inc.*,²¹⁹ a unionized company purchased the assets and liabilities of a second unionized company that had a clause in its collective bargaining agreement binding successors for the full term of the agreement. The purchase agreement, however, specifically stated that the purchaser would not be bound by the existing labor contracts of the seller. All of the former employees were hired by the purchasing company.²²⁰ Although the parties had stipulated that the purchasing company was a successor, the arbitrator proceeded to analyze the situation in the light of *Wiley*, *Burns*, and *Howard Johnson*.²²¹ He construed those decisions as meaning that a potential successor may avoid both the predecessor's labor agreement

211. 83 Lab. Arb. (BNA) 297 (1984) (Armstrong, Arb.).

212. 406 U.S. 272 (1972).

213. 417 U.S. 249 (1974).

214. *Allied Employers*, 83 Lab. Arb. (BNA) at 300.

215. *Id.* at 301.

216. *Id.* For a discussion on the valuation of entitlements in collective bargaining negotiations, see generally Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245 (1987). Professor Schwab points out that unions may exchange higher wages in return for not insisting on entitlements negotiated in prior contracts, or for legal entitlements. *Id.* at 277.

217. *Allied Employers*, 83 Lab. Arb. (BNA) at 301.

218. For the Supreme Court's approach to this issue, see *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). See also *supra* notes 42-50 and accompanying text.

219. 72 Lab. Arb. (BNA) 881 (1979) (Belkin, Arb.).

220. The union previously had obtained a restraining order enjoining the sale. The parties thereafter entered into negotiations and reached an agreement under which the successor had to hire all of the predecessor's employees and pay them their former rate of pay pending a determination of their status through negotiation. *Id.* at 883.

221. *Id.* at 885.

and its duty to bargain with the employees "if it chooses not to hire a majority of the predecessor's employees."²²² The arbitrator stated, however, that the circumstances of the sale must be examined when a successor does hire or retain a majority of its predecessor's employees.²²³ In addition to the usual factors of continuity of work place, operations, and nature of the work, the arbitrator added an analysis of the viability of the predecessor.²²⁴ Further, the arbitrator noted that the former owner of the predecessor company was now a corporate officer and substantial stockholder in the successor company.²²⁵ Thus, as in *Wiley*, the transaction resembled a merger more than a mere purchase of the predecessor. The arbitrator then ruled that the successor was liable for the predecessor's breach of the successorship clause in its labor agreements.²²⁶

Noting the discretion given to arbitrators to fashion realistic and workable solutions, the arbitrator fashioned a remedy imposing liability on the successor in the areas of wages, pensions, and fringe benefits for the former employees of the predecessor.²²⁷ The arbitrator specifically took into account such factors as the future contractual relationship of the parties and the impact of successorship upon all of the employees of the successor.²²⁸ Moreover, the arbitrator expressed concern over the long-term impact of the decision on the work force, and concluded that restoration of the positive aspects of the pre-existing labor-management relationship had been a goal of the

222. *Id.* at 886.

223. *Id.*

224. *Id.* Of course, the suggestion in *Howard Johnson Co. v. Detroit Local Joint Executive Board.*, 417 U.S. 249 (1974), of potential remedies against the predecessor is useless unless there is some viable entity to proceed against. In *Howard Johnson*, there was a viable entity against which to proceed. *Id.* at 258.

225. *Schneier's*, 72 Lab. Arb. (BNA) at 886.

226. *Id.* at 887. Although the arbitrator does not mention *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), his reasoning follows that of the Court in that case. The successor's knowledge and notice of the predecessor's liability was an important issue in both cases: an outstanding NLRB order in *Golden State* and the successor clauses in the predecessor's contracts in *Schneier's*. 72 Lab. Arb. (BNA) at 887.

227. *Schneier's*, 72 Lab. Arb. (BNA) at 888-89. Arbitrators arguably are merely supposed to interpret the collective bargaining agreement. See Cox, *Reflections upon Labor Arbitration in the Light of the Lincoln Mills Case*, 12 PROC. NAT'L ACAD. OF ARB. 24, 37-38 (1959). Nevertheless, the propensity and ability of arbitrators to "fashion" remedies has been criticized by some commentators. Professor Cox has stated that "arbitrators frequently fashion remedies for breach of a collective agreement without a shred of contract language to guide them." *Id.* Professor Feller has also pointed out that some arbitrators see their mission as doing what seems right in a particular situation without regard either to law or to the contract. See Feller, *supra* note 147, at 152.

228. *Schneier's*, 72 Lab. Arb. (BNA) at 888-89.

arbitration.²²⁹

In summary, successor arbitrations are usually conducted in a more cooperative atmosphere than predecessor arbitrations. As in the predecessor cases, arbitrators rely on the doctrine expressed in *Wiley*,²³⁰ *Burns*,²³¹ and *Howard Johnson*²³² in defining a successor. The solutions to issues such as vacation rights, seniority, scholarships for children, or health insurance may turn on interpretation of contract language, negotiations, or past practice. Although there are certainly cost considerations in these issues, there is little likelihood that these factors will actually affect whether there is a sale or transfer of the company. Capital mobility considerations are consequentially minimal, and only seldom expressed by arbitrators.²³³

IV. ARBITRAL VALUES AND PROCESSES

There are several themes and recurrent patterns in arbitration decisions that must be examined in order to more fully understand the decisions. These run the gamut from interpretation of Supreme Court doctrine to contract interpretation principles, and from collective bargaining history to transfer of capital theories. Not all are present in every arbitration decision. Foremost is the arbitrators' reliance on Supreme Court doctrine as elucidated in *Wiley*,²³⁴ *Burns*,²³⁵ and *Howard Johnson*.²³⁶ This doctrine may be used by an arbitrator to determine whether a purchaser is a successor and whether there exists a duty to either arbitrate or bargain.²³⁷ Arbitrators generally are faithful to the doctrine expressed by the Court: the *Wiley* test of "substan-

229. *Id.* This is perhaps one of the clearest examples of an arbitrator actually explaining his underlying motives or values.

230. 376 U.S. 543 (1964).

231. 406 U.S. 272 (1972).

232. 417 U.S. 249 (1974).

233. For example, the amount of vacation time to which employees are entitled during their first year of work with the successor certainly has an economic cost to the successor. It seems unlikely, however, that this cost alone would be determinative in controlling a potential purchaser's decision to purchase a company. Thus, the impact on capital mobility is minimal.

234. 376 U.S. 543 (1964).

235. 406 U.S. 272 (1972).

236. 417 U.S. 249 (1974).

237. The basic doctrine is concerned with the duty to arbitrate or bargain. *See, e.g., Wiley*, 376 U.S. 543; *Burns*, 406 U.S. 272. Although some arbitrators discuss the cases to justify their "jurisdiction" (*see, e.g., Allied Employers, Inc.*, 83 Lab. Arb. (BNA) 297 (1984) (Armstrong, Arb.); *Negco Enters.*, 68 Lab. Arb. (BNA) 633 (1976) (Helfeld, Arb.); *American Petrofina, Inc.*, 63 Lab. Arb. (BNA) 1300 (1975) (Marlatt, Arb.)), in most cases jurisdiction is not the central issue. Yet the arbitrators impliedly use the doctrine to ground their decisions on some type of theory or rationale. The doctrine is most frequently used as a tool to define disputed terms in the collective bargaining agreement, most usually the term "successor."

tial continuity";²³⁸ the *Burns*²³⁹ decision that successors are free not to hire the employees of the predecessor, but incur a duty to bargain when they do; and the *Howard Johnson*²⁴⁰ suggestion that alternative remedies may be sought against the seller.

Arbitrators do not, however, rely solely on court cases for precedential doctrine. Although arbitral decisions generally apply only to the specific facts of a particular grievance, arbitrators frequently refer to, and interpret, prior arbitrations between other parties.²⁴¹ This is particularly evident in arbitrations that concern the obligations of a predecessor to require a purchaser to assume the existing collective bargaining agreement.²⁴² In predecessor cases, where the relationship between the union and the employer has broken down, arbitrators often cite the same familiar litany of arbitrations as doctrine on which to rely. Because arbitrators do not always agree on the interpretation of these prior arbitrations, however, one may surmise that in some instances the cases are cited merely as a canvas upon which the arbitrator can paint his own values or view. Arbitrators also need to legitimize their decisions. Thus, they typically attempt to find something concrete in the unique factual situation before them on which they

238. 376 U.S. 543 (1964).

239. 406 U.S. 272 (1972).

240. 417 U.S. 249 (1974). There is a related problem of interpreting disputed clauses to decide who is a successor. If the clauses are truly negotiated, then the union is usually making some concession in return for greater job security. Yet, a strict reading of *Wiley*, *Burns*, and *Howard Johnson* enables an employer to avoid liability to the union for his unilateral actions. The employer, by controlling whether there is "substantial continuity" or whether he hires employees of the predecessor, also controls whether he is a successor. What then has the union actually gained in the negotiations?

241. Getman, *supra* note 171, at 920 n.18. Although "[t]heoretically, the doctrine of stare decisis does not apply in labor arbitration, . . . in fact arbitrators follow precedent at least as carefully as courts do." *Id.* Professor Getman believes that precedent serves a useful purpose in establishing guidelines for management to follow in administering the labor contract. In addition, the use of precedent serves to reduce grievances and encourages settlement of those that are filed without the necessity of going to arbitration. *Id.* at 920. Professor Shulman also advocates the use of prior arbitrations as a form of precedent and stare decisis. Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1020 (1955). However, he conditions this use on interpretation of the same contract between the same parties, that is "successive decisions within the same enterprise." *Id.* He states that the use of precedent for recurring cases within the same enterprises does not mean that a decision affecting United States Steel should be used by an arbitrator in a General Motors arbitration. *Id.* Notwithstanding Professor Shulman's comments, precedent does enable arbitrators to examine what others have done in similar circumstances, which in the long term should make arbitration decisions more consistent with one another. *See also supra* note 113.

242. *See* Marley-Wylain Co., 87-1 Lab. Arb. Awards (CCH) ¶ 8293 (1987) (Jacobowski, Arb.); Wyatt Mfg. Co., 82 Lab. Arb. (BNA) 153 (1983) (Goodman, Arb.); Martin Podany Assocs., 80 Lab. Arb. (BNA) 658 (1983) (Gallagher, Arb.); Gallivan's, Inc., 82-2 Lab. Arb. Awards (CCH) ¶ 8411 (1982) (Gallagher, Arb.); Schneier's Finer Foods, Inc., 72 Lab. Arb. (BNA) 881 (1979) (Belkin, Arb.).

can hang their hats, and their opinions.²⁴³ For example, arbitrators occasionally delve into the collective bargaining history of the parties.²⁴⁴ In one particular case, the arbitrator held that a clause lacked sufficient specificity because the union could not provide historical support clarifying why a successor clause first appeared in the collective bargaining agreement some twenty-five years earlier.²⁴⁵

Arbitrators also consider past practice as an important, though not controlling, element to be considered in making a decision.²⁴⁶ For example, past practice was weighed in determining what could be posted on a union bulletin board after a successor took control,²⁴⁷ whether a scholarship program for employees' children must continue,²⁴⁸ whether a successor was required to continue making medical insurance payments during periods of seasonal layoffs,²⁴⁹ and whether a successor was bound to assume a pre-existing collective bargaining agreement solely because workers' expectations were sufficiently raised by prior takeovers that included assumption of the

243. This is particularly important in those cases where the stakes may be highest: predecessor cases with the potential for disrupting a sale of a business or an award of damages. Professor Shulman has commented that an arbitrator's award and opinion must assure the parties that it is based on reason. Shulman, *supra* note 241, at 1019. The arbitrator must demonstrate that he "comprehend[s] the parties' contentions" and that he "informs himself fully and does not go off half-cocked; and that his final judgment is the product of deliberation and reason." *Id.*

244. See, e.g., Universal Mack Sales & Serv., Inc., 86-2 Lab. Arb. Awards (CCH) ¶ 8536 (1986) (Chance, Arb.); Allied Employers, Inc., 83 Lab. Arb. (BNA) 297 (1984) (Armstrong, Arb.); High Point Sprinkler Co., 67 Lab. Arb. (BNA) 239 (1976) (Connolly, Arb.); American Petrofina, Inc., 63 Lab. Arb. (BNA) 1300 (1975) (Marlatt, Arb.). However, "offers and counter-offers made during the process of negotiation are sometimes unsafe guides to the meaning of the contract." Ahner, *Arbitration: A Management Viewpoint*, 11 PROC. NAT'L ACAD. OF ARB. 76, 84 (1958). Such practice might even hinder the negotiating process by making the parties afraid that their efforts during negotiations will be held against them in future arbitrations. *Id.* at 84-85.

245. See *Wyatt*, 82 Lab. Arb. (BNA) 153 (1983) (Goodman, Arb.); see also *supra* note 127 and accompanying text. One can only speculate whether the arbitrator merely was taking a hard line against the union position or whether he was looking to see if the item actually was negotiated so that an expectancy was created on the part of the union.

246. Past practice may set up an expectancy of entitlement on the part of one of the parties. See, e.g., *Marley-Wylain*, 87-1 Lab. Arb. Awards (CCH) ¶ 8293 (1987) (Jacobowski, Arb.). Past practice entitlements can also be set up through clauses negotiated into the contract. See Goldberg, *Management's Reserved Rights: A Labor View*, 9 PROC. NAT'L ACAD. OF ARB. 118, 126-27 (1956). Professor Shulman, however, is critical of contract clauses incorporating past practice, stating that "in many enterprises the execution of a collective agreement would be blocked if it were insisted that [the contract] contain a broad provision that 'all existing practices . . . shall be continued . . . unless changed by mutual consent.'" This is particularly so because there is commonly a conflicting understanding as to what in fact are the existing practices. See Shulman, *supra* note 241, at 1012-13.

247. Maul Technology Corp., 83-1 Lab. Arb. Awards (CCH) ¶ 8295 (1983) (Ipavec, Arb.).

248. American Petrofina Co., 65 Lab. Arb. (BNA) 947 (1975) (Stephens, Arb.).

249. Tri-State Asphalt Corp., 72 Lab. Arb. (BNA) 102 (1979) (LeWinter, Arb.).

contract.²⁵⁰

In *Burns*,²⁵¹ the Supreme Court noted that harsh restrictions on successor companies might discourage purchasers and inhibit the transfer of capital.²⁵² Although one might suspect that this logic is pervasive in arbitrations, it actually is not. Arbitrators seldom discuss economic theory. Nevertheless, at least one arbitrator has acknowledged that "it is an economic fact of life today that great flexibility in the ownership of industry has been recognized as a necessity to survive in a nightmare of soaring inflation, scarce capital, and capricious taxation, considerations that never vexed Andrew Carnegie or John D. Rockefeller."²⁵³ In another instance, an arbitrator termed the notion of preventing a predecessor from selling a business unless the purchaser agreed to be bound by a collective bargaining agreement a "fascinating theory," and warned that it would grant an enormous economic arsenal to unions.²⁵⁴

The "free transfer of capital" rationale is closely related to the "management rights" and "economic efficiency" arguments. Although not explicitly stated, the doctrine of "management rights" underlies arbitrations in which the union has the burden of showing clear and convincing evidence to sustain its grievance.²⁵⁵ This place-

250. *Marley-Wylain Co.*, 87-1 Lab. Arb. Awards (CCH) ¶ 8293 (1987) (Jacobowski, Arb.).

251. 406 U.S. 272 (1972).

252. *Id.* at 288.

253. *American Petrofina, Inc.*, 63 Lab. Arb. (BNA) 1300, 1306-07 (1975) (Marlatt, Arb.) (union waived potential rights to severance pay potentially due from predecessor in exchange for successor's assumption of contract and certain obligations of seniority).

Actually, it may not be surprising that arbitrators rarely discuss capital mobility. One can posit that if the underlying premise, that any infringement on capital mobility interferes with the potential restructuring of a business, is taken as true, then there is no need to discuss it. The importance of capital mobility thereby becomes an unstated assumption informing arbitrators' decisions. Professor Silverstein similarly notes that very few commentators even bother to analyze the claim concerning capital mobility. Silverstein, *supra* note 1, at 174 n.81.

254. *Wyatt Mfg. Co.*, 82 Lab. Arb. (BNA) 153, 161 (1983) (Goodman, Arb.). *Wyatt* is a pointed example of how values concerning the free flow of capital inform the manner in which an arbitrator approaches a successor clause. *But see Marley-Wylain Co.*, 87-1 Lab. Arb. Awards (CCH) ¶ 8293, at 4262 (1987) (Jacobowski, Arb.), (noting that there was mutual benefit to both the union and the employer because of successor language in the collective bargaining agreement). The ultimate question concerning successor language in a contract is whether a union could effectively bargain for a contract clause setting out the remedy for the employer's failure to obtain assumption of the contract or hiring of the employees by a purchaser. *But see Irving*, *supra* note 163.

The potential of any successorship clause to cause havoc to a seller is clear. *See, e.g., Local Lodge No. 1266, Int'l Ass'n of Machinists v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981). In *Panoramic*, a sale of a company was enjoined pending arbitration. "Although the company ultimately prevailed in arbitration," the sale fell through because of the delays entailed by the litigation and arbitration. Miller & Lindsay, *Mergers and Acquisitions: Labor Relations Considerations*, 9 EMPLOYEE REL. L.J. 427, 440 (1983).

255. *See Gallivan's, Inc.*, 82-2 Lab. Arb. Awards (CCH) ¶ 8411 (1982) (Gallagher, Arb.).

ment of the burden is based on an acceptance that the rights of management pre-date the existence of the union or the collective bargaining negotiations.²⁵⁶ The union's rights are therefore limited to those that have been relinquished by management,²⁵⁷ and the union must show that the rights it claims to possess actually have been won at the negotiating table.

V. CONCLUSION

Successorship arbitrations fall into two general categories: arbitrations against predecessor companies and those against successors. An analysis of arbitral decisions reveals that arbitrators approach these categories differently. Judicially created doctrine plays an important role in defining this difference. The first issue in a predecessor arbitration often is whether a purchasing or merging company actually is a "successor." In making this determination, arbitrators tend to rely on the public law doctrine reflected in *Wiley*, *Burns*, and *Howard Johnson*. In contrast, successor arbitrations rely less frequently on these cases because usually there already has been a determination or admission that the succeeding company is a successor.

Although expositions on economic theory and the free transfer of capital are rarely seen in arbitration opinions, it is possible to detect hints of such views in predecessor arbitrations, rather than in successor arbitrations. This is not surprising, however, because only predecessor arbitrations entail the possible interference with the sale that makes transfer of capital theories relevant. These large monetary issues may occasion the loss of a business opportunity or the payment of substantial damages. The underlying and unstated assumption is that capital mobility is necessary to ensure entrepreneurial flexibility. Thus, with the unstated assumption as background, arbitrators often require explicit language or circumstances before enforcing a successorship clause in a predecessor arbitration.

Capital mobility considerations are less important in successor arbitrations. Monetary issues often give way to common sense. The potential costs that may be incurred by the successor as a result of an arbitrator's decision are likely to be minimal in relation to the cost of the purchase of the enterprise. Such costs, therefore, are not determi-

256. Gross, *Value Judgments in the Decisions of Labor Arbitrators*, 21 INDUS. & LAB. REL. REV. 55, 58 (1967). For a general discussion of management rights from opposing perspectives, see Phelps, *Management's Reserved Rights: An Industry View*, 9 PROC. NAT'L ACAD. OF ARB. 102 (1956), and Goldberg, *supra* note 246.

257. This view requires that an arbitrator interpret a contractual silence in favor of management. Therefore, the union can only arbitrate violations of explicit contractual provisions. Stone, *supra* note 3, at 1549.

native in whether or not the purchase or investment is made. Successor arbitrations more closely resemble the traditional model of labor arbitration as contract interpretation, focused on concrete issues such as seniority or recall rights. The grievance often may affect only one or two workers, and the real parties to the dispute, the employer and the union, generally understand that they must continue to have a relationship. Consequently, the need is merely to clean up the sale or merger transaction, and fill in contractual gaps or redefine certain terms in the context of the new relationship. Arbitrators also understand the dynamics of this ongoing relationship, and are more comfortable in resolving these disputes than they are in predecessor arbitrations, in which the relationship between the union and the employer has broken down or ended. Thus, in successor arbitrations, the arbitrator may fashion a remedy that neither party is happy with, but that ultimately is acceptable to both.

The viability of arbitration as a dispute resolution process ultimately rests on a perception of fairness. Obviously, the parties' compliance with a decision depends to some extent on it being viewed as fair. Arbitrators, many of whom earn a significant income from arbitration, also depend upon this perception, as they cannot hope to be chosen again as arbitrators if their decisions are not perceived as fair and reasonable.²⁵⁸ In order to reinforce the perception of fairness, an arbitrator may cite Supreme Court doctrine, prior arbitrations, the negotiating history and past practice of the parties, or even an economic theory as the basis for his opinion. Although arbitrators may differ to some extent in their interpretations of prior court cases or arbitrations, they generally are consistent in attempting to ground their decisions within narrowly defined principles and rationales. They may not be arbitrary, or appear to be arbitrary. "In the last analysis, what is sought [from arbitrators] is a wise judgment."²⁵⁹ Given the limitations of arbitration as a dispute resolution process bounded by a collective bargaining agreement, the specific facts of an employer-employee conflict, and, in some instances, public law doctrine, such a judgment is usually received.

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258. See P. HAYS, *supra* note 171, at 60-61, 112.

259. Shulman, *supra* note 242, at 1016.