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B. Glenn George

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Successorship and the Duty to Bargain*

B. Glenn George**

The National Labor Relations Act ("NLRA" or "the Act")¹ grants the privilege of exclusive representation to a union selected by a majority of the employees in an appropriate unit.² Majority rule and employee free choice form the foundation of all representation questions.³ In its fiftieth anniversary commemorative publication, the National Labor Relations Board ("the Board")⁴ describes as one of its "principal" functions the responsibility "to determine and implement, through secret-ballot elections, the free democratic choice by employees as to whether or not they wish to be represented by a union in dealing with their employers"⁵ The doctrine of "successorship," however, may provide a union with representative status without the necessity of winning an election. Indeed, in apparent contradiction of the Act's premise of majority rule, successorship principles permit union representation absent any demonstration of the union's majority support.⁶

Although the term "successor employer" is widely used in labor law, the label defies precise definition.⁷ The concept generally denotes an employer who has purchased or assumed a business and has inherited certain labor obligations from her predecessor.⁸ The difficulty of defining successorship stems, in part, from the almost unlimited variations of business transfers in which the issue can arise. At one end of the spectrum of ownership changes is a "simple" stock purchase without an intervening break or change in operations.⁹ Ongoing concerns also may be

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** Associate Professor of Law, Marshall-Wythe School of Law (College of William and Mary). B.A., 1975, University of North Carolina, Chapel Hill; J.D., 1978, Harvard Law School. I would like to thank Toni Massar and Gene Nichol for their help in making this article more readable.

1 29 U.S.C. §§ 151-168 (1982).

2 29 U.S.C. § 159(a) (1982).

3 See *infra* notes 145-48 and accompanying text.

4 See 29 U.S.C. § 153 (1982).

5 NLRB: THE FIRST 50 YEARS, THE STORY OF THE NATIONAL LABOR RELATIONS BOARD 1935-85 ix (U.S. Government Printing Office 1986).

6 Apart from the successorship doctrine or voluntary union recognition by the employer, a union can be designated as a bargaining representative without winning an election in only one other circumstance. The Board may issue a bargaining order (i.e., requiring an employer to recognize a union as the exclusive bargaining representative of her employees) as a remedy for the employer's extensive and egregious unfair labor practices. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610-16 (1969). As a prerequisite to such a remedy, however, the union must establish that it had attained majority status at an earlier date. See *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984); *Gourmet Foods, Inc.*, 270 N.L.R.B. 578 (1984).

7 The term can be especially confusing since it can be used for its common meaning (implying some kind of ownership change) or as a "term of art" suggesting certain legal obligations under the NLRA.

8 See generally, *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249 (1974), discussed at notes 44-62 and 68-78, *infra* and *NLRB v. Burns Int'l Sec. Services, Inc.*, 406 U.S. 272 (1972).

9 See, e.g., *Topinka's County House, Inc.*, 235 N.L.R.B. 72 (1978); *Western Boot & Shoe*, 205 N.L.R.B. 999 (1973). The Board sometimes considers a change in ownership by stock transfer no

purchased in other ways that result in little disruption of the day-to-day business. Merger or acquisition of a company's assets can result in more significant changes in the size, scope or direction of the enterprise.¹⁰ Finally, even in the absence of a transfer of assets, successor problems may occur when a franchise or service contract is assumed by a new employer, which merely substitutes one company's employees for those of another.¹¹

Successorship liability can involve an assortment of voluntarily assumed or legally imposed labor obligations. These obligations include the duty to bargain with the union which represented the predecessor's employees,¹² the duty to abide by the predecessor's collective bargaining agreement,¹³ the duty to arbitrate under the predecessor's labor contract,¹⁴ and the duty to remedy the predecessor's unfair labor practices.¹⁵ As noted by the Supreme Court, the question of whether an employer is a "successor" is meaningless in the abstract. "A new employer, in other words, may be a successor for some purposes and not for others."¹⁶

This discussion focuses on the duty of a successor employer to recognize and bargain with the union representative chosen by its predecessor

change at all insofar as the NLRA is concerned. Because the same corporate entity remains intact, the employer's responsibilities under the labor laws do not change. See *Morco, Inc.*, 258 N.L.R.B. 69 (1981); *TKB Int'l Corp. (Hendricks-Miller Typographic Co.)*, 240 N.L.R.B. 1082, 1083 n.4 (1979) (dicta) (distinguishing between a stock transfer and a successorship situation). These cases are not always clear cut, however. See *United Food and Commercial Workers v. NLRB (Spencer Foods)*, 768 F.2d 1463, 1471 (D.C. Cir. 1985), where the Board and the court applied a successorship analysis even though the ownership transfer was accomplished by a stock purchase and the employer's corporate identity remained unchanged, and *Cagle's, Inc.*, 218 N.L.R.B. 603 (1975), where the administrative law judge analyzed the case under the alter ego doctrine, while the Board considered the case a successorship problem.

The Board's use of the "alter ego" doctrine in some cases of ownership change complicates the area further. Unlike successorship principles, which recognize the separate existence of a predecessor employer and a successor employer, an alter ego employer shares the ownership and control of its predecessor as "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942), *reh'g denied*, 315 U.S. 827 (1942). The Board treats this "new" entity, usually created to avoid labor law obligations, as in fact the same employer subject to the same collective bargaining duties as if the ownership change had never occurred. See, e.g., *NLRB v. Herman Bros. Pet Supply*, 325 F.2d 68 (6th Cir. 1963); *Crawford Door Sales Co.*, 226 N.L.R.B. 1144 (1976) (enterprises with "'substantially identical' management, business purpose, equipment, customers and supervisors, as well as ownership" are alter egos). See also *Howard Johnson*, 417 U.S. at 259 n.5. See generally Note, *Bargaining Obligations After Corporate Transformations*, 54 N.Y.U. L. REV. 624, 638-50 (1979) (discussing and comparing the application of the alter ego and successorship doctrines).

10 See, e.g., *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459 (9th Cir. 1985).

11 See, e.g., *NLRB v. Burns Int'l Sec. Services, Inc.*, 406 U.S. 272 (1972); *International Ass'n of Machinists and Aerospace Workers v. NLRB*, 595 F.2d 664 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979); *Tom-A-Hawk Transit, Inc. v. NLRB*, 419 F.3d 1025 (7th Cir. 1969).

12 See, e.g., *Burns*, 406 U.S. at 281.

13 Such a duty can be imposed only if voluntarily assumed by the successor employer. *Id.* at 287-91.

14 See *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

15 See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *NLRB v. Jarm Enterprises, Inc.*, 785 F.2d 195 (7th Cir. 1986); *Perma Vinyl Corp.*, 164 N.L.R.B. 968 (1967), *enforced*, 398 F.2d 544 (5th Cir. 1968).

16 *Howard Johnson*, 417 U.S. at 262-63 n.9. See also *Dynamic Mach. Co. v. NLRB*, 552 F.2d 1195, 1204 (7th Cir.) ("the analysis undertaken in one type of successorship case, such as one involving the duty to bargain, may differ substantially from the analysis undertaken in another type of successorship case"), *cert. denied*, 434 U.S. 827 (1977).

sor's employees. Although the other successor obligations may be substantial, the new employer has greater control over whether she will be bound to a prior labor contract, subject to arbitration, or required to remedy her predecessor's unfair labor practices. The wholesale adoption of a predecessor's collective bargaining agreement can only be assumed voluntarily. The Board has no power to order adherence to the terms of a contract to which the successor was not a party.¹⁷ The Supreme Court has required a successor employer to arbitrate the extent of its obligations under a predecessor's collective bargaining agreement, but this requirement is limited to unusual and narrowly defined circumstances.¹⁸ Finally, the Board imposes a duty to remedy the predecessor's unfair labor practices only if the purchaser had knowledge of the outstanding charge or order against its predecessor. The purchaser who knows of the charge therefore can protect herself by demanding a reduction in the purchase price or including an indemnity clause in the sales agreement.¹⁹ The duty to bargain, however, remains a potential obligation regardless of the successor employer's best efforts to avoid that result.

The duty to bargain as a successor employer can arise by operation of law whenever an employer acquires an organized business and there is a "continuity of the business enterprise" between the old and the new.²⁰ The Board, guided by the courts, effectively divides its successorship analysis into two components, work force continuity and continuity in business operations.²¹ In practical application, the first component generally is determinative: absent unusual circumstances, the Board will order the new employer to bargain as a successor whenever a majority of her work force is composed of individuals previously employed by the predecessor.²² Moreover, even if only a portion of the new employer's work force has been hired, the Board may find that portion sufficiently "representative" of the anticipated full work force to make a determination of successorship obligations.²³ The successorship doctrine purports to satisfy the principle of majority rule by assuming in the first prong of the test that all employees of the old company hired by the new employer desire continued union representation. In reaching this conclusion, the Board builds upon a series of assumptions.²⁴ First, the Board assumes

¹⁷ *Burns*, 406 U.S. at 291.

¹⁸ *Wiley*, 376 U.S. at 550-51. See *Burns*, 406 U.S. at 285-87, and *Howard Johnson*, 417 U.S. at 255-64, distinguishing and limiting the effect of *Wiley*. See *infra* notes 56-58, 73-74 and accompanying text.

¹⁹ *Golden State Bottling*, 414 U.S. at 185; *Mary's Foundry Co.*, 284 N.L.R.B. No. 30 [Labor Relations] Lab. L. Rep. (CCH) § 19,153 (1987); *Perma Vinyl Corp.*, 164 N.L.R.B. at 969.

²⁰ See *infra* notes 44-53 and accompanying text. The duty to bargain arises by operation of law, as opposed to the usual election procedure for determining a union's representative status. A "successor" employer's failure to recognize and bargain with the predecessor employees' union constitutes an unfair labor practice under Section 8(a)(5) (29 U.S.C. § 158(a)(5) (1982) ("It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . .")).

²¹ See *infra* notes 80-84 and accompanying text.

²² See *infra* notes 83-84 and accompanying text.

²³ See *infra* notes 95-106 and accompanying text.

²⁴ See *infra* notes 149-55 and accompanying text.

that union support among the predecessor employees remains constant irrespective of employee turnover. Second, the Board assumes that all predecessor employees hired by the successor desire continued union representation. Finally, the Board assumes that the "representative sample" of existing employees accurately reflects the union sentiments of new employees to be hired by the successor employer in the future.

In the recent decision of *Fall River Dyeing & Finishing Corp. v. NLRB*,²⁵ the Supreme Court reconsidered the successorship doctrine for the first time in thirteen years. The case aptly illustrates the tension between successorship principles and the Act's fundamental concepts of majority rule and employee freedom of choice. In *Fall River Dyeing* the predecessor company closed its doors after almost 30 years of operation with an organized workforce. After purchasing many of the predecessor's assets, Fall River Dyeing initiated start-up production seven months later. Fall River Dyeing hired one shift of 55 employees during the first two months of operations. Over the next three months, production was expanded to two shifts of 107 employees. The predecessor employees were only a minority of the full work force but had constituted a majority when the first shift of 55 employees was filled. The Board selected the date when hiring was completed for the first shift as appropriate for measuring work force continuity. The Board ordered Fall River Dyeing to bargain with the predecessor union.²⁶ Few, if any, of Fall River Dyeing's employees had ever chosen the union as their bargaining representative.²⁷

Fall River Dyeing presented the Court with an opportunity to examine closely the multiple layers of assumptions the Board uses in reaching a conclusion of majority union support in the successorship context. Instead, the Court adopted without serious scrutiny both the Board's results and the Board's rationale.²⁸ In the interest of "industrial peace," the Court failed to acknowledge how far the successorship doctrine has drifted from the underlying premise of majority rule. The doctrine as currently applied may trample rather than foster the choice of the majority. There is no real evidence that the assumptions made have any connection with the reality of employee's desires.²⁹

Part I of this Article summarizes the development of the successorship doctrine, focusing on two Supreme Court decisions in 1972 and 1974 and the more recent interpretations of those decisions by the Board and the lower courts. The Article next examines *Fall River Dyeing* and its contribution to successorship principles. Following this discussion of the case law, Part II reconsiders the doctrine itself. The Article first identifies the assumptions on which successorship analysis is built. The validity and application of each assumption is then challenged, undermining the foundations of the successorship doctrine. Finally, Part III of the Article concludes that industrial peace and the requirement of majority rule

25 107 S. Ct. 2225 (1987).

26 *Id.* at 2229-31. See *infra* notes 121-28 and accompanying text.

27 See *infra* note 150 and accompanying text.

28 See *infra* notes 129-141 and accompanying text.

29 See *infra* notes 161-177 and accompanying text.

will be better served by testing the accuracy of the Board's assumptions through secret-ballot elections.

I. The Evolution of Successorship Principles

A. *The Development of Successorship Doctrine*

Basic concepts of successorship liability in labor law are almost as old as the Act itself. Where the "employing industry" remains unchanged or there is a "continuity of the business enterprise," the Board and the courts have not hesitated to burden a successor with certain labor obligations of its predecessor.³⁰ Although many of the earliest cases involved what the Board now labels "alter ego" situations,³¹ the Board recognized the bargaining obligation of a bona fide purchaser as early as the mid-1930s.³² In 1947, the Board first imposed on a successor employer joint liability for the unfair labor practice of its predecessor.³³ The Supreme Court guided the development of successorship doctrine in a series of four decisions between 1964 and 1974.³⁴

The Supreme Court's first successorship case, *John Wiley & Sons v. Livingston*,³⁵ gave unqualified approval to the Board's increasing willingness to bind successor employers to the labor obligations of their predecessors. *Wiley* arose in the context of a district court action under Section 301 of the Act to compel arbitration under a collective bargaining agreement.³⁶ Interscience was a small publishing company with approximately 80 employees, 40 of whom were represented by a union. Interscience ceased to exist as a separate enterprise when it merged with a much larger operation of 300 unorganized employees, John Wiley & Sons.³⁷ At the time of the merger, Interscience's union employees were covered

30 See, e.g., *NLRB v. Colten*, 105 F.2d 179, 183 (6th Cir. 1939) ("It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace.")

31 See, e.g., *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942); *Chas. Cushman Co.*, 15 N.L.R.B. 90 (1939). See *infra* notes 161-77 and accompanying text.

32 See *Simmons Eng'r Co.*, 65 N.L.R.B. 1373 (1946); *National Bag Co.*, 65 N.L.R.B. 1078, *enforced*, 156 F.2d 679 (8th Cir. 1946); *Syncro Machine Co., Inc.*, 62 N.L.R.B. 985 (1945).

33 *Alexander Milburn Co.*, 78 N.L.R.B. 747 (1947). This decision reversed the Board's earlier determination that such successor liability was inappropriate, *South Carolina Granite Co.*, 58 N.L.R.B. 1448, *enforced*, 152 F.2d 25 (4th Cir. 1945). The *Alexander Milburn* holding was overruled in *Symms Grocer Co.*, 109 N.L.R.B. 346 (1954) but was reinstated again in *Perma Vinyl Corp.*, 164 N.L.R.B. 968 (1967), *enforced*, 398 F.2d 544 (5th Cir. 1968).

34 These cases, *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), *NLRB v. Burns Int'l Sec. Services, Inc.*, 406 U.S. 272 (1972), *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), and *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249 (1974), have been discussed extensively in the literature and will be reviewed only briefly here to provide the context within which *Fall River Dyeing* must be evaluated. See generally Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach*, 57 MINN. L. REV. 1051 (1973); Note, *The Impact of Howard Johnson on the Labor Obligations of Successor Employer*, 74 MICH. L. REV. 555 (1976) [hereinafter Note, "The Impact of Howard Johnson"]; Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759 (1975) [hereinafter Note, "Bargaining Obligations"].

35 376 U.S. 543 (1964).

36 Section 301 provides that "[s]uits for violation of contracts between an employer and a labor organization . . . 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." 29 U.S.C. § 185(a) (1982).

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

by a collective bargaining agreement containing a arbitration provision. The union asserted that Wiley was responsible for certain "vested" rights under its labor contract with Interscience and sued to compel arbitration on that issue.³⁸

The Supreme Court unanimously affirmed Wiley's obligation to arbitrate the extent of its responsibilities under the Interscience collective bargaining agreement.³⁹ Emphasizing the importance of arbitration in national labor policy, the Court noted that corporate transition would be "eased and industrial strife avoided" if arbitration were available to resolve employee disputes.⁴⁰ The rights of employers to alter business arrangements, the Court stated, must "be balanced by some protection to the employees from a sudden change in the employment relationship."⁴¹ The implications of *Wiley* were potentially far-reaching in creating substantial labor obligations for successor employers.⁴² In 1972, however, the Court limited *Wiley* to its facts in *NLRB v. Burns International Security Services*.⁴³

In *Burns* the Supreme Court considered a successorship case with no transfer of capital or assets.⁴⁴ Wackenhut Corporation provided plant security services to Lockheed Aircraft with a recently certified unit of 42 guards.⁴⁵ When the service contract was due to expire, Lockheed solicited bids for its replacement. Lockheed advised all bidders of the existing collective bargaining agreement between Wackenhut and the United Plant Guards Union.⁴⁶ Burns International Security Services was awarded the contract; Burns began providing security with a unit of 42 guards, consisting of 27 former Wackenhut employees and 15 Burns employees transferred from other facilities.⁴⁷ Burns rejected a recognition demand from the United Plant Guards and instead recognized the American Federation of Guards, which represented Burns' employees at other

38 *Id.*, at 544-46.

39 *Id.* at 548. The collective bargaining agreement, by its terms, expired a week after the union initiated its action. The union sought only to compel arbitration under the contract as to certain "vested" rights, not to require wholesale adoption of the agreement by Wiley. *Id.* at 545-46.

40 *Id.* at 549.

41 *Id.*

42 Some circuit courts quickly extended *Wiley* to require arbitration in other types of successorship situations. See *Monroe Sander Corp. v. Livingston*, 377 F.2d 6 (2d Cir. 1967) (asset transfers between parent and subsidiary), *aff'g* 262 F. Supp. 129 (S.D.N.Y. 1966); *Wackenhut Corp. v. United Plant Guard Workers*, 332 F.2d 954 (9th Cir. 1964); *United Steelworkers of America v. Reliance Universal, Inc.*, 335 F.2d 891 (3d Cir. 1964). In addition to enforcing a duty to arbitrate, the Board held that a successor employer was required to bargain with the union before altering contractual employment terms. See *Valleydale Packer, Inc.*, 162 N.L.R.B. 1486 (1967), *enforced*, 402 F.2d 768 (5th Cir. 1968); *Overnite Transp. Co.*, 157 N.L.R.B. 1185 (1966), *enforced*, 372 F.2d 765 (4th Cir.), *cert. denied*, 389 U.S. 838 (1967). Finally, in its opinion in *Burns*, the Board held a successor bound to its predecessor's collective bargaining agreement in its entirety. *Wm. J. Burns Int'l Detective Agency, Inc.*, 182 N.L.R.B. 348 (1970), *rev'd*, *NLRB v. Burns Int'l Sec. Services Inc.*, 406 U.S. 272 (1972).

43 406 U.S. 272, 285-87 (1972).

44 Courts disagreed whether an exchange of assets was necessary to a finding of successorship liability. Compare *Tom-A-Hawk Transit, Inc. v. NLRB*, 419 F.2d 1025 (7th Cir. 1969) with *Tri State Maintenance Corp. v. NLRB*, 408 F.2d 171 (D.C. Cir. 1968). This issue was the focus of controversy in the Supreme Court as well. See *infra* note 62 and accompanying text.

45 *Burns*, 406 U.S. at 274-75.

46 *Id.* at 275.

47 *Id.*

locations.⁴⁸ In response to unfair labor practice charges filed by the United Plant Guards, the Board found violations of Section 8(a)(2),⁴⁹ for unlawful recognition and assistance to the American Federation of Guards, and Section 8(a)(5),⁵⁰ for failure to recognize the United Plant Guards, unilateral alteration of employment terms, and the refusal to honor the Wackenhut labor contract.⁵¹

Noting that the change in ownership occurred within the union's certification years,⁵² the Supreme Court agreed that Burns inherited a duty to recognize and bargain with the United Plant Guards when it took over security services at Lockheed. "[W]here the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation [of the Act] by ordering the employer to bargain with the incumbent union."⁵³

Burns further raised the issue of when the successor's duty to bargain with a predecessor's union accrued. Assuming a bargaining obligation is created, at what point in the transition does that duty begin? The Board had required Burns to bargain from the outset before changing any of Wackenhut's employment terms.⁵⁴ The Court disagreed. Until Burns became a "successor" by hiring a sufficient number of its predecessor's work force to constitute a majority of its own work force, Burns was free to set its own terms of hiring. Thus a successor employer is lawfully entitled to establish initial wages and benefits. Prior consultation with the union about employment terms is required, according to the Court, only when "it is perfectly clear that the new employer plans to retain all of the employees in the unit."⁵⁵

Burns' successor obligations did not extend, however, to Wackenhut's collective bargaining agreement. Section 8(d) of the Act, the Court held, prevents the Board from imposing substantive contract terms on an employer not a party to the agreement.⁵⁶ The Court firmly rejected the Board's reliance on *Wiley* to reach such a result. *Wiley* was distinguished on several grounds. First, *Wiley* arose in a court action to compel arbitration under Section 301, not in the context of an unfair labor practice proceeding, and involved the Act's special concern for the arbitration process. Second, *Wiley* dealt with a merger in a state whose law required that the surviving company was liable for any obligations of the merged

48 *Id.* at 276.

49 29 U.S.C. § 158(a)(2) (1982).

50 29 U.S.C. § 158(a)(5) (1982).

51 *Wm. J. Burns Int'l Detective Agency, Inc.*, 182 N.L.R.B. 348 (1970). Burns appealed only the Section 8(a)(5) violations. *Burns*, 406 U.S. at 276.

52 The term "certification year" refers to the year following the certification of an election won by the union. During that period, the union's majority status is irrebuttable. In other words, the employer must continue to recognize and bargain with the union regardless of any evidence that the union has lost majority support. See *Brooks v. NLRB*, 348 U.S. 96 (1954).

53 *Burns*, 406 U.S. at 281.

54 *Wm. J. Burns*, 182 N.L.R.B. at 348-49.

55 *Burns*, 406 U.S. at 294-95.

56 *Id.* at 281-84. Section 8(d) provides in relevant part that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (Supp. 1988).

corporation. Third, unlike *Wiley*, *Burns* involved no association or dealings between the predecessor and successor employers.⁵⁷

Four justices joined in a partial dissent in *Burns*.⁵⁸ The opinion by Justice Rehnquist opposed the imposition of a bargaining order on *Burns*. Justice Rehnquist challenged the majority's assumption that the United Plant Guards was the chosen representative of the *Burns*' employees. Although 27 of the 42 *Burns* guards had been Wackenhut employees, no evidence indicated that all 27 had supported the union.⁵⁹ The majority also failed, according to the dissent, to consider adequately the appropriateness of a unit limited to *Burns*' Lockheed guards.⁶⁰ Unlike Wackenhut, *Burns* had a history of bargaining with units of guards at multiple facilities. Although the Wackenhut unit at Lockheed was Board-certified, Wackenhut and the union had stipulated to the unit in a consent election agreement.⁶¹ Finally, noting *Wiley*'s concern with employee expectations, Justice Rehnquist would have limited the successorship bargaining obligation to those employers who acquired some of the predecessors' assets.⁶²

The third of the Supreme Court's successorship decisions appeared just one year later in 1973. In *Golden State Bottling Co. v. NLRB*,⁶³ the Court addressed a successor employer's liability for the unfair labor practice of its predecessor. The All American Beverages Corporation had purchased Golden State Bottling's bottling and distribution operations with full knowledge that Golden State had been ordered by the Board to reinstate with back pay an unlawfully discharged employee. In a subsequent enforcement proceeding against both All American and Golden State, the Board ordered All American to rehire the employee and made All American jointly liable for the back pay owed.⁶⁴ The Court relied on the Board's broad remedial power to uphold the order.⁶⁵ Elaborating on the concern for employee protection expressed in *Wiley*, the

57 *Id.* at 285-86. The impact of *Burns* and *Wiley* stimulated much discussion among the commentators. See, e.g., Morris & Gaus, *Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns*, 59 VA. L. REV. 1359 (1973); Note, *Contractual Successorship: The Impact of Burns*, 40 U. CHI. L. REV. 617 (1973). For a more complete discussion of this controversy see Note, *The Impact of Howard Johnson*, *supra* note 34, at 564-67. The full impact of *Burns* on the *Wiley* decision became clearer two years later when the Supreme Court addressed the issue again in *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249 (1974). See *infra* notes 71-74 and accompanying text.

58 Chief Justice Burger, Justice Rehnquist, Justice Brennan, and Justice Powell dissented in part. All but Chief Justice Burger were still sitting fifteen years later during the 1986-87 term and considered related issues in *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S. Ct. 2225 (1987). See *infra* notes 129-44 and accompanying text.

59 406 U.S. at 297 (Rehnquist, J., dissenting in part).

60 Section 9(a) of the Act provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives . . ." (29 U.S.C. § 159(a) (1982)), (emphasis added). In any representation proceeding, the Board is obligated to determine that the individuals who the union seeks to represent have sufficiently similar interests that they reasonably can be represented by one "spokesman." See 29 U.S.C. § 159(b) (1982). The key to such determinations is the community of interest among the employees to be represented. See *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134 (1962).

61 406 U.S. at 297-98 (Rehnquist, J., dissenting in part).

62 *Id.* at 305 (Rehnquist, J., dissenting in part).

63 414 U.S. 168 (1973).

64 *Id.* at 170-72.

65 *Id.* at 176-77.

Court stated that where a new employer continues her predecessor's operations, "those employees who have been retained will understandably view their job situations as essentially unaltered."⁶⁶ Thus, the employees legitimately may expect the new employer to remedy unfair labor practices of the predecessor. Otherwise, the new company's failure to take corrective action could be perceived as a continuation of the unlawful practices and result in industrial strife.⁶⁷

The Supreme Court again sought to clarify successorship obligations the following term in *Howard Johnson Co. v. Detroit Local Joint Executive Board*.⁶⁸ *Howard Johnson* focused on the appropriate criteria for determining successorship status, as opposed to the extent or limitation of successor employer obligations. Like *Wiley*, the case arose in the context of a court action under Section 301 to compel arbitration pursuant to the predecessor's collective bargaining agreement. Howard Johnson purchased a restaurant and motor lodge from its franchisee, the Grissoms. The Grissoms had employed a total of 53 employees covered by two separate collective bargaining agreements with the Hotel and Restaurant Employees and Bartenders International Union. Howard Johnson assumed operation of the facilities with 45 employees, only nine of whom had been employed by the Grissoms.⁶⁹ On the strength of *Wiley*, both the district court and the Sixth Circuit ordered Howard Johnson to arbitrate under the Grissoms' labor contracts.⁷⁰

The Supreme Court rejected any duty of Howard Johnson to arbitrate, further undermining *Wiley*'s continued viability. The Court refuted the distinction offered by the *Burns* Court⁷¹ between a Section 301 action and an unfair labor practice proceeding.⁷² The *Howard Johnson* Court acknowledged that the conflict between *Burns* and *Wiley* might be "irreconcilable" but declined to decide that issue in light of other distinguishing aspects of *Wiley*.⁷³ As suggested in *Burns*, *Wiley* involved a merger in a state whose law required the surviving corporation to assume the predecessor's obligations, thus alerting *Wiley* to its possible liability. Furthermore, unlike *Howard Johnson*, the original employer in *Wiley* disappeared as a result of the merger and no longer existed for the enforcement of any labor obligations. Finally, the successor employer in *Wiley* hired all of Interscience's employees, while Howard Johnson hired only a small percentage of the Grissoms' employees.⁷⁴ The Court's effort to distinguish *Wiley* is questionable, at best, and *Wiley* certainly must now be limited to its unusual factual circumstances.⁷⁵

⁶⁶ *Id.* at 184.

⁶⁷ *Id.* at 184-85.

⁶⁸ 417 U.S. 249 (1974).

⁶⁹ *Id.* at 250-52. All nine former employees worked in the restaurant unit of 33 employees. Howard Johnson hired 12 employees for the motor lodge. None had been employed by the Grissoms. *Id.* at 252.

⁷⁰ See *Howard Johnson v. Detroit Local Joint Executive Bd.*, 81 L.R.R.M. (BNA) 2329 (E.D. Mich. 1972), *aff'd*, 482 F.2d 489 (6th Cir. 1973).

⁷¹ *Burns*, 406 U.S. at 285-86.

⁷² *Howard Johnson*, 417 U.S. at 255-56.

⁷³ *Id.*

⁷⁴ *Id.* at 252.

⁷⁵ See Note, *The Impact of Howard Johnson*, *supra* note 34, at 565-66, 572-79.

The significance of *Howard Johnson* for present purposes, however, is the Court's discussion of continuity of work force. The *Howard Johnson* Court reaffirmed "continuity of identity in the business enterprise" as a prerequisite to imposing any successorship obligation. Critical to that prerequisite, the Court held, is "a substantial continuity in the identity of the work force across the change in ownership."⁷⁶ The Court noted that this requirement is consistent with the concerns expressed in *Wiley* for the protection of the employees from sudden changes and for the avoidance of industrial strife.⁷⁷ As part of its management prerogatives, Howard Johnson was free not to hire any of the Grissoms' employees, as long as the failure to hire those individuals was unrelated to their union membership.⁷⁸

B. Successorship Principles in Modern Application

From 1974 until *Fall River Dyeing & Finsishing Corp. v. NLRB*⁷⁹ in 1987, the lower courts and the Board were left to grapple with the permutations of successorship doctrine without further guidance from the Supreme Court. Even before *Burns*, the Board had developed a seven factor test to determine the necessary "continuity in the identity of the business enterprise." The criteria included:

- (1) whether there has been a substantial continuity of the same business operations; (2) whether the new employer uses the same plant; (3) whether the same or substantially the same work force is employed; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery, equipment, and methods of production; and (7) whether he manufactures the same product or offers the same services.⁸⁰

Although the Board purportedly continued to adhere to its seven factor analysis after *Burns* and *Howard Johnson*,⁸¹ the application of the criteria evolved into a two-part test considering first the continuity in the work force and second the continuity of business operations.⁸²

⁷⁶ *Howard Johnson*, 417 U.S. at 263.

⁷⁷ *Id.* at 264.

⁷⁸ *Id.* at 262 n.8. Discrimination on the basis of union membership would constitute an unfair labor practice under Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3) (1982)). See *Burns*, 406 U.S. at 280-81 n.5. See *infra* notes 107-09 and accompanying text.

⁷⁹ 107 S. Ct. 2225 (1987).

⁸⁰ *Georgetown Stainless Mfg. Corp.*, 198 N.L.R.B. 234, 236 (1972). See *Woodrich Industries, Inc.*, 246 N.L.R.B. 43, 43 (1979); *Miami Industrial Trucks, Inc.*, 221 N.L.R.B. 1223, 1224 (1975).

⁸¹ See, e.g., *United Food & Commercial Workers Local 152* (Spencer Foods, Inc.), 268 N.L.R.B. 1483, 1484-85 (1984), *enforcement granted in part and denied in part*, 768 F.2d 1463 (D.C. Cir. 1985); *Aircraft Magnesium (Grico Corp.)*, 265 N.L.R.B. 1344, 1345 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984); *Premium Foods, Inc.*, 260 N.L.R.B. 708, 714 (1982), *enforced*, 709 F.2d 623 (9th Cir. 1983); *Woodrich Indus., Inc.*, 246 N.L.R.B. 43 (1979); *L.A. Beefland, Inc.*, 232 N.L.R.B. 1189, 1191-92 (1977); *C.M.E., Inc.*, 225 N.L.R.B. 514 (1976), *enforced*, 601 F.2d 603 (9th Cir. 1979).

⁸² In fact, some courts explicitly approach successorship analysis as a two step inquiry. See, e.g., *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 463 (9th Cir. 1985).

1. Continuity in the Work Force

Given the decisive significance of work force continuity in *Burns* and *Howard Johnson*, the Board effectively applies a threshold criterion of predecessor employee majority status in evaluating successorship claims. Since 1972, the Board has never found successor liability unless a majority of the new employer's work force had been employed by the predecessor.⁸³ The majority requirement operates as a "threshold" factor because the Board rejects successor status in its absence even if the business otherwise remains virtually identical to that of the predecessor.⁸⁴ As articulated by one court, "[t]he key factor in determining whether an employer succeeds to an obligation to bargain with the incumbent union is the continuity in the identity of the work force."⁸⁵ Indeed, the work force continuity factor seems to be not only necessary, but almost determinative in establishing the successor's obligations.⁸⁶

A recognition and bargaining demand by the predecessor employees' union triggers the work force continuity inquiry. If the union delays

83 See, e.g., *Stewart Chevrolet, Inc.*, 262 N.L.R.B. 362 (1982); *General Processing Corp.*, 263 N.L.R.B. 86 (1982); *Roman Catholic Diocese of Brooklyn*, 222 N.L.R.B. 1052 (1976), *enforced in part*, 549 F.2d 873 (2d Cir. 1977), *overruled on other grounds*, U.S. Postal Service Marina Mail Processing Center, 271 N.L.R.B. 397 (1984); *Spruce-Up Corp.*, 209 N.L.R.B. 194 (1974). See also, Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw. U. L. Rev. 735, 794 (1969) (only two cases in 20 years where Board found successorship absent majority factor).

Initially, the language in *Howard Johnson* created confusion as to whether the new employer must hire a majority of the predecessor's former employees (see *Howard Johnson*, 417 U.S. at 263) or a majority of the new employer's work force must be predecessor employees (see *Burns*, 406 U.S. at 281). After some disagreement and speculation, the Board and most courts agreed that the *Burns* articulation was the correct one and the relevant inquiry is whether the predecessor employees constitute a majority of the new employer's work force. See, e.g., *International Ass'n of Machinists & Aerospace Workers v. NLRB*, 595 F.2d 664, 669-70 n.29 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979); *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 4 n.6 (1st Cir.), *cert. denied*, 429 U.S. 921 (1976); *United Maintenance & Manufacturing Co.*, 214 N.L.R.B. 529 (1974); *Spruce-Up Corp.*, 209 N.L.R.B. 194 (1974). *Contra* *Dynamic Mach. Co. v. NLRB*, 552 F.2d 1195, 1203 (7th Cir.), *cert. denied*, 434 U.S. 827 (1977); *NLRB v. Wayne Convalescent Center, Inc.*, 465 F.2d 1039, 1041-42 (6th Cir. 1972). The Board's interpretation has not been seriously questioned since the mid-1970's. The Court acknowledged the controversy in *Fall River Dyeing* but declined to resolve the issue since it was not presented. *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 107 S. Ct. 2225, 2237-38 n.12 (1987).

84 *Id.* See also *G. W. Hunt (Foremost Foods Distributing)*, 258 N.L.R.B. 1198 (1981); *W.Q.T., Inc.*, 254 N.L.R.B. 816 (1981).

85 *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 879 (2d Cir. 1977). *Accord*: *Saks & Co. v. NLRB*, 634 F.2d 681 (2d Cir. 1980); *Service, Hospital, Nursing Home & Public Employees Union Local 47 v. Cleveland Tower Hotel, Inc.*, 606 F.2d 684, 687 (6th Cir. 1979).

86 Since *Howard Johnson* and *Burns*, the Board has refused in only a few cases to find successorship in the face of continuity in the work force. One recent example is *United Food and Commercial Workers Int'l Union (Spencer Foods, Inc.)*, 268 N.L.R.B. 1483 (1984), where the new employer reopened its predecessor's plant following a complicated sales transaction and a year and a half hiatus in operations. Changes included new supervision, elimination of one shift, changes in products, and plant improvements which altered production and job assignments. *Id.* at 1485. This portion of the Board's decision was reversed on appeal, however. *United Food & Commercial Workers Int'l Union, Local 152 v. NLRB*, 768 F.2d 1463, 1469-74 (D.C. Cir. 1985). See also *Woodrich Industries, Inc.*, 246 N.L.R.B. 43 (1979) (no successorship where product change altered employee tasks); *Cagle's, Inc.*, 218 N.L.R.B. 603 (1975) (no successorship after year hiatus and substantially reduced operations). *Cf.* *United Mine Workers Local 1329 (Alpine Constr. Corp.)*, 276 N.L.R.B. 415 1158 (1985) (no successorship where substantial change in operations and absence of work force continuity), *vacated and remanded*, *United Mine Workers Local Union 1329 v. NLRB*, 812 F.2d 741 (D.C. Cir. 1987). *Compare* *Radiant Fashions, Inc.*, 202 N.L.R.B. 938 (1973) with *Fall River Dyeing Corp.*, 272 N.L.R.B. 839 (1984), *enforced*, *Fall River Dyeing & Finishing Corp. v. NLRB*, 775 F.2d 425 (1st Cir. 1985), *aff'd*, 107 S. Ct. 2225 (1987) (Board reached different results on successorship issue although facts are similar).

in making that demand, the Board determines the recognition duty only as of the demand date regardless of when the obligation otherwise matured.⁸⁷ If the union demand for recognition is premature, however, the Board does not require the union to repeat its demand in an attempt to guess when the new employer's obligation has ripened. Rather, the Board considers the demand continuing, and the employer must recognize the union when the facts indicate it is required to do so.⁸⁸

A second prerequisite for work force continuity is the existence of an appropriate bargaining unit.⁸⁹ In *Burns*, for example, the new employer argued unsuccessfully that the Lockheed plant employees should be included in Burns' larger unit of security guards not limited to a single location.⁹⁰ When operations continue essentially unchanged there is often little dispute that a unit previously certified by the Board remains appropriate. A reduction in the size of the unit generally will not invalidate that conclusion,⁹¹ but the consolidation of several operations could destroy the predecessor employees' majority status.⁹²

Assuming a timely recognition demand for an appropriate unit, the work force continuity factor may involve only a simple mathematical calculation. If the predecessor employer ceases operations on Friday afternoon, terminating her 50 employees, and the new employer resumes full operations on Monday morning with 50 employees, at least 26 of whom worked for the predecessor, the majority criterion is met.⁹³ Business transfer may take a variety of forms, however, and create a number of application problems. Assume the new employer delays resumption of operations for several weeks to alter and refurbish the plant. The new employer reduces the scope of the enterprise, makes changes in the operations, and gradually hires a total work force of 30 employees over the next three months. The difficulty is determining the point in this process at which work force continuity factor should be measured.

The *Burns* Court stated that "it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of employees in the unit

87 See, e.g., *Jeffries Lithograph Co.*, 752 F.2d at 467-68; *G. W. Hunt (Foremost Foods Distributing)*, 258 N.L.R.B. 1198 (1981).

88 See *Aircraft Magnesium*, 265 N.L.R.B. at 1345 n.9; *Spruce-Up Corp.*, 209 N.L.R.B. 194, 197 (1974).

89 See *NLRB v. Burns Int'l Sec. Services, Inc.*, 406 U.S. 272, 277-81 (1972); *supra* note 60.

90 *Id.* at 297-99 (Rehnquist, J., dissenting).

91 See, e.g., *Saks Co. v. NLRB*, 634 F.2d 681, 685 (2d Cir. 1980); *Louis Pappas' Restaurant, Inc.*, 275 N.L.R.B. 1519, 1519-20 (1985); *Stewart Granite Enterprises*, 255 N.L.R.B. 569, 573 (1981). See generally *Miles & Sons Trucking Serv. Inc.*, 269 N.L.R.B. 7 (1984) (discussing appropriate bargaining unit in successorship context). But see *Eberhard Foods, Inc.*, 269 N.L.R.B. 280 (1984) (no evidence that six store unit of meat department employees appropriate where unit had previously been part of 25 store unit).

92 See *Airport Bus Services, Inc.*, 273 N.L.R.B. 561 (1984).

93 Since an actual majority is required, an even 50% is insufficient. See *G.W. Hunt (Foremost Foods Distributing)*, 258 N.L.R.B. 1198 (1981) (no successorship where only four of eight union employees worked for predecessor). This rule is consistent with the Board's conduct of representation elections. The union loses the election if only 50% of employees voting select the union as their bargaining representative. See *NLRB Field Manual* 11452.1; 29 U.S.C. § 159(a) (1982).

...⁹⁴ Potential successor employers have relied heavily on this language to support an argument that the majority test must be delayed until all anticipated hiring is completed.⁹⁵

Long before the Board directly addressed the "full complement" problem in successorship circumstances, the same issue had arisen in two related contexts involving recognition. Employers have sought to delay representation elections on the ground that anticipated expansion would change the size and composition of the proposed unit.⁹⁶ Similarly, employers may run afoul of Section 8(a)(2)⁹⁷ by voluntarily recognizing a bargaining representative when hiring plans indicate an imminent and significant increase in the work force.⁹⁸ The competing concerns are the same in all three contexts. On the one hand, representation issues should be resolved quickly so that current employees are permitted desired representation as soon as possible. Those desires should not be frustrated by delays of months or years because an employer hopes business will improve and production will expand. On the other hand, all employees who will be bound by the representation decision should have the opportunity to participate in the process. When the delay is not unreasonably long and the certainty of substantial hiring is clear, the interests of the new employees may be better served by allowing a short delay so all affected workers can vote or be "counted."⁹⁹

The notion of a "representative complement" was devised as a compromise to balance the concerns of early representation and maximum participation. When the same problem arose in successorship cases, the courts and Board found the concept readily transferable.¹⁰⁰ Criteria that

94 *Burns*, 406 U.S. at 295.

95 See, e.g., *Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 627-28 (9th Cir. 1983); *NLRB v. Hudson River Aggregates, Inc.*, 639 F.2d 865, 870 (2d Cir. 1981); *NLRB v. Pre-Engineered Building Products, Inc.*, 603 F.2d 134, 135 (10th Cir. 1979); *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609, 612 (9th Cir. 1977). Obviously, the issue is disputed only in those cases where the predecessor employees were in the majority on the measuring date selected by the Board but later lost majority status due to subsequent hiring.

96 See *Wittman Steel Mills, Inc.*, 253 N.L.R.B. 320, 321 (1980); *Clement-Blythe Cos.*, 182 N.L.R.B. 502 (1970), *enforced*, 77 L.R.R.M. (BNA) 2373 (4th Cir. 1971).

97 29 U.S.C. § 158(a)(2) (1982). Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization"

98 See *Herman Brothers, Inc.*, 264 N.L.R.B. 439 (1982); *Hayes Coal Co., Inc.*, 197 N.L.R.B. 1162 (1972). In a somewhat different procedural context, the full complement issue also arises in contract bar questions. If the employer has signed a collective bargaining agreement with the union before her work force reaches full strength, the Board must determine whether that contract bars a representation petition by another union. See *General Extrusion Co., Inc.*, 121 N.L.R.B. 1165 (1958) (contract signed when company had hired 30% of anticipated complement in 50% of job classifications operated as election bar).

99 See *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 464 (9th Cir. 1985); *NLRB v. Pre-Engineering Bldg. Products, Inc.*, 603 F.2d 134, 136 (10th Cir. 1979); *Clement-Blythe Cos.*, 182 N.L.R.B. 502 (1970), *enforced*, 77 L.R.R.M. (BNA) 2373 (4th Cir. 1971).

100 The Board initially considered the *Burns* "full complement" language applicable only to the question of a successor's right to set initial terms and conditions of employment. See *Pacific Hide & Fur Depot, Inc.*, 223 N.L.R.B. 1029 (1976), *enforcement denied*, 553 F.2d 609 (9th Cir. 1977). In 1977, the Board stated that "evidence of the subsequent increase in the Respondent's work force is immaterial." *Pre-Engineered Building Products, Inc.*, 228 N.L.R.B. 841 n.1 (1977), *enforcement denied*, 603 F.2d 134 (10th Cir. 1979). With some guidance by the circuit courts of appeal, however, the Board soon adopted the "representative complement" approach with the apparent support of the lower courts. See *Pre-Engineered Building Products*, 603 F.2d at 136; *Pacific Hide & Fur Depot, Inc. v. NLRB*,

the Board and the courts consider to evaluate the existence of a representative complement include: (1) whether job classifications are "filled or substantially filled," (2) whether the business is in "normal or substantially normal production," (3) the size of the complement in comparison to the full complement anticipated, (4) the expected time lapse before a substantially larger complement will be hired, and (5) the "relative certainty" of the planned expansion.¹⁰¹

The cases are fact-specific so few general rules can be derived. The Board has permitted a delay as long as four to five months in an election case in which the employer expected a five-fold increase in the relevant unit.¹⁰² Eight months was considered too long in a successorship case, however, despite the employer's clear plans for expansion, where the company employed 45% of the anticipated complement on the day "normal production" began.¹⁰³ In another recent case, where the employer began normal operations with over 50% of the anticipated complement, the Board allowed a delay of two to three months to reach a full work force.¹⁰⁴ The courts have distinguished between a successor who attempts to rebuild a failed business and a successor who assumes an ongoing operation.¹⁰⁵ The courts permit a new employer who must rebuild the business some time to develop her work force, whereas the work force of a successor assuming an ongoing enterprise usually will be "measured" on the day the new employer starts normal production irrespective of plans for later expansion.¹⁰⁶

The union sometimes blames the absence of a predecessor employee majority in the work force on alleged discriminatory hiring by the new employer. Successorship obligations will not be imposed without that work force continuity. A savvy employer therefore may attempt to control her hiring to avoid reaching majority status.¹⁰⁷ The refusal to

553 F.2d 609, 612 (9th Cir. 1977); *Aircraft Magnesium (Grico Corp.)*, 265 N.L.R.B. 1344 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984); *Hudson River Aggregates, Inc.*, 246 N.L.R.B. 192 (1979), *enforced*, 639 F.2d 865 (2d Cir. 1981).

101 See *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 464 (9th Cir. 1985); *Premium Foods, Inc. v. NLRB*, 709 F.2d 623 (9th Cir. 1983). The factors listed by the Ninth Circuit were gleaned primarily from the Board's application of the representative complement concept in the context of representation elections, see *supra* note 100. See *Premium Foods*, 709 F.2d at 628, and Board decisions cited therein.

102 *St. John of God Hospital, Inc.*, 260 N.L.R.B. 905 (1982). Although the Board and courts regularly cite election cases in successorship decisions, the two situations arguably are distinguishable. The concern for protection of the employees during the transition of a business acquisition is missing in the election context.

103 *Jeffries Lithograph Co.*, 265 N.L.R.B. 1499 (1982), *enforced*, 752 F.2d 459, 467 (9th Cir. 1985).

104 *Meyers Custom Products, Inc. (Gibbons Enclosures)*, 278 N.L.R.B. No. 92, 121 L.R.R.M. (BNA) 1209 (1986).

105 See *Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 629 (9th Cir. 1983); *NLRB v. Hudson River Aggregates, Inc.*, 639 F.2d 865, 870 (2d Cir. 1981); *NLRB v. Pre-Engineered Building Products, Inc.*, 603 F.2d 134, 136 (10th Cir. 1979).

106 See, e.g., *NLRB v. Jeffries Lithograph Co.*, 752 F.2d at 466-68; *Lammert Industries v. NLRB*, 578 F.2d 1223, 1226 n.6 (7th Cir. 1978); *NLRB v. Ideal Laundry Corp.*, 422 F.2d 801, 804 (10th Cir. 1970); *Louis Pappas' Restaurant, Inc.*, 275 N.L.R.B. 1519, 1520 (1985); *Indianapolis Mack Sales and Service, Inc.*, 272 N.L.R.B. 690, 694 (1984).

107 See *International Ass'n of Machinists, Dist. Lodge 94 v. NLRB*, 414 F.2d 1135, 1138 (D.C. Cir.) (discussing danger of a new employer avoiding successorship obligations by not hiring predecessor employees), *cert. denied*, 396 U.S. 889 (1969). Such careful planning may be suggested by the facts of *Stewart Chevrolet, Inc.*, 262 N.L.R.B. 362 (1982), where the new employer commenced

hire an employee because of union membership or activity constitutes a violation of Section 8(a)(3).¹⁰⁸ If the union can prove that the failure to hire predecessor employees was discriminatory, the Board will order the usual remedy of reinstatement with back pay. In addition, the Board routinely requires the successor to bargain with a predecessor employee union that "should have" attained majority status but for the new employer's unlawful conduct.¹⁰⁹

Even assuming a bargaining demand at a time when the predecessor employees constituted a majority of the new employer's representative work force, successor employers have used at least one additional challenge to the Section (8)(a)(5) charge. The union in *Burns* was certified following an election just four months prior to the new employer's takeover of Lockheed's plant security.¹¹⁰ Employers have argued that the presumption of continuing employee support for the union is inappropriate in the absence of a recent election because many current employees did not participate in elections occurring before they were hired. Thus, the argument continues, those employees have never had the opportunity to voice their union sentiments.¹¹¹

The Board and the courts have dismissed such arguments, relying on the Board's well-established new hire presumption.¹¹² In the interest

operations with nine employees, four of whom had worked for the predecessor employer. The work force was expanded over a month and a half to a total of 23 employees but at no time did the predecessor employees outnumber other new hires, even though the new employer eventually hired seven of the predecessor employees. *Id.* at 364. Had the new employer started operations with those seven out of the nine initially hired, he indeed might have been required to recognize the union. See *NLRB v. Hudson River Aggregates, Inc.*, 639 F.2d 865 (2d Cir. 1981); *Lammert Indus. v. NLRB*, 578 F.2d 1223 (7th Cir. 1978); see also *supra* note 106. Similar facts can be found in *General Processing Corp.*, 263 N.L.R.B. 86 (1982), where the new employer initially hired five predecessor employees in a work force of eleven but gradually expanded to a work force of 85 with 35 predecessor employees.

108 29 U.S.C. § 158(a)(3) (1982). See *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 262 n.8 (1974); see also *supra* note 78 and accompanying text.

109 *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), *enforcing in relevant part* 245 N.L.R.B. 78 (1979); *NLRB v. Houston Distrib. Servs., Inc.*, 573 F.2d 260, 266-67 (5th Cir. 1978), *enforcing* 227 N.L.R.B. 960 (1977), *cert. denied*, 439 U.S. 1047 (1978); *K.B. & J. Young's Super Markets, Inc. v. NLRB*, 377 F.2d 463, 469 (9th Cir.), *cert. denied*, 389 U.S. 841 (1967), *enforcing* 157 N.L.R.B. 271, 277-79 (1966); *State Distributing Co. Inc.*, 282 N.L.R.B. No. 151, 124 L.R.R.M. (BNA) 1241 (1987); *Sherwood Trucking Co.*, 270 N.L.R.B. 445 (1984); *Mason City Dressed Beef, Inc.*, 231 N.L.R.B. 735 (1977), *enforcement denied in relevant part*, 590 F.2d 688 (8th Cir. 1978). Courts have held, however, that the successor employer must be permitted an opportunity to show that, even absent unlawful motive, not all of the predecessor employees would have been hired because of business-related reduction in the work force. See *Kallmann*, 640 F.2d at 1101-02; *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 602 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980).

In the recent case of *Shortway Suburban Lines, Inc.*, 286 NLRB No. 30, [5 Labor Relations] (CCH) § 19,057 (1987), the Board not only required the employer to bargain with the predecessor union as a remedy for discriminatory hiring, but also held that the new employer had lost the right to set initial terms and conditions of employment.

110 *Burns*, 406 U.S. at 274-75.

111 A similar argument could be made in *Burns* itself. It is mathematically possible that only seven of the 27 former Wackenhut employees hired by Burns (out of a total work force of 42) actually voted for the union. See Note, *Bargaining Obligations*, *supra* note 34, at 772 n.81. Cf. *Burns*, 406 U.S. at 297 (Rehnquist, J., dissenting in part).

112 See, e.g., *NLRB v. Edjo, Inc.*, 631 F.2d 604, 607 (9th Cir. 1980); *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 4 (1st Cir. 1976); *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1141 (7th Cir.), *cert. denied*, 419 U.S. 838 (1974); *Royal Vending Services*, 275 N.L.R.B. 1222, 1228-30 (1985); *Laystrom Mfg. Co.*, 151 N.L.R.B. 1482, 1484 (1965) ("The Board has long held that new employees will be presumed to support a union in the same ratio as those whom they have replaced."); *The National*

of industrial relations stability, the Board presumes that newly hired employees support the union in the same proportion as those employees who participated in the original representation decision. Although the employer can overcome this presumption if she has objective and reasonable bases for a good faith doubt about the union's continuing majority support, the employer cannot use employee turnover alone to justify such doubts.¹¹³

2. Continuity of Business Operations

Once continuity in the work force has been established, the second step in determining a new employer's duty to bargain is a finding of continuity in the business operations. Unlike the rigidity in the work force majority requirement, this second step offers a substantial flexibility. The Board and the courts have found successorship despite a variety of changes in production provided that work force continuity remains. The duty to bargain has been imposed regardless of substantial expansion,¹¹⁴

Plastics Products Co., 78 N.L.R.B. 699, 706 (1948). Until recently, the Board went so far as to apply the presumption even to striker replacements. *Pennco, Inc.*, 250 N.L.R.B. 716 (1980), *enforced*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982). That rule was overturned in *Buckley Broadcasting Corp.*, 284 N.L.R.B. No. 113, [5 Labor Relations] Lab. L. Rep. (CCH) § 18,828 (1987).

113 See *Edjo*, 631 F.2d at 607; *NLRB v. Tahoe Nugget*, 584 F.2d 293, 306 (9th Cir. 1978); *NLRB v. Crimptex, Inc.*, 517 F.2d 501, 503 n.3 (1st Cir. 1975); *NLRB v. Washington Manor, Inc.*, 519 F.2d 750, 753 (6th Cir. 1975). Cf. *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944); *Great Southern Trucking Co. v. NLRB*, 139 F.2 984, 985-86 (4th Cir. 1942). But see *Lockheed Engineering Co.*, 271 N.L.R.B. 119 n.2 (1984) ("Contrary to the judge, Members Hunter and Dennis would consider employee turnover a factor in determining the existence of objective considerations sufficient to justify withdrawal of recognition."); *Silver Spur Casino*, 270 N.L.R.B. 1067 n.2 (1984) (same); *Royal Vending Services*, 275 N.L.R.B. 1222 n.1 (1985) (refusing to rely on administrative law judge's ruling that employee turnover could not be considered as basis for employer good faith doubt of union's support). Cf. *NLRB v. Cott Corp.*, 578 F.2d 892 (1st Cir. 1978).

In 1981 the Board held that a successor, like an employer who voluntarily recognizes a union, must continue recognition for a "reasonable period" regardless of any evidence during that period that the union has lost its majority support. *Landmark Int. Trucks*, 257 N.L.R.B. 1375 (1981), *enforcement denied in pertinent part*, 699 F.2d 815 (6th Cir. 1983). That decision was reversed in 1985, and a successor employer now may withdraw recognition whenever she can establish the requisite basis for a good faith doubt as to continuing union support. *Harley-Davidson Transp. Co.*, 273 N.L.R.B. No. 192 (1985). If the new employer becomes a successor during the initial election year, however, the union's majority status is irrebuttable for the duration of the certification year. See *IMS Mfg. Co. v. NLRB*, 813 F.2d 113 (6th Cir. 1987), *enforcing* 278 N.L.R.B. No. 79, 122 L.R.R.M. (BNA) 1056 (1986). See also *infra* note 132 and accompanying text.

The withdrawal of recognition based on alleged good faith doubt as to the union's continuing majority status arises regularly in the successor context. See, e.g., *J & J Drainage Products Co.*, 269 N.L.R.B. 1163 (1984); *Lockheed Engineering & Management Services Co.*, 271 N.L.R.B. 119 (1984); *Royal Vending Services, Ltd.*, 275 N.L.R.B. 1222 (1985); *Sofco, Inc.*, 268 N.L.R.B. 159 (1983); *Pick-Mt. Laurel Corp.*, 239 N.L.R.B. 1257 (1979), *rev'd*, 625 F.2d 476 (1980). A full examination of this issue is beyond the scope of this article.

114 See, e.g., *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459 (9th Cir. 1985) (small printing company with 19 employees moved to new facility and expanded to large operation employing 65).

reduction in operations,¹¹⁵ changes in products manufactured,¹¹⁶ or a lengthy hiatus in resumption of operations by the successor.¹¹⁷

The Board weighs several factors in evaluating continuity of business operations, most of which appear in the Board's articulated multi-factor analysis for determining successorship status.¹¹⁸ Issues examined include: (1) substantial continuity of operations, (2) use of the same plant, (3) existence of the same jobs under the same working conditions, (4) presence of the same supervisors, (5) use of the same machinery and equipment, (6) production of the same product or service, (7) carryover of customers, and (8) hiatus in operations before the new employer begins production.¹¹⁹ Several courts of appeal have emphasized that changes in operations must be viewed from the employees' perspective. These courts assume that the employees' attitudes towards representation remain unchanged if the employees continue to perform essentially the same jobs under the same working conditions. "The focus . . . is not on the continuity of the business structure in general, but rather on the particular operations of the business as they affect members of the relevant bargaining unit."¹²⁰ Operational or business changes which have

115 See, e.g., *United Food & Commercial Workers Int'l Union v. NLRB*, 768 F.2d 1463, 1473 (D.C. Cir. 1985) (reduction to one shift); *Saks & Co. v. NLRB*, 634 F.2d 681 (2d Cir. 1980) (unit of alteration employees approximately half of previous unit); *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 4 (1st Cir. 1976) (reduction in work force), *cert. denied*, 429 U.S. 921 (1976); *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1142 (7th Cir.) (new employer ran individual store while predecessor was national chain), *cert. denied*, 419 U.S. 838 (1974); *Louis Pappas' Restaurant*, 275 N.L.R.B. 1519 (1985) (new employer took over only a portion of predecessor's operations).

116 See, e.g., *United Food & Commercial Workers Int'l Union v. NLRB*, 768 F.2d 1463, 1473 (D.C. Cir. 1985) (elimination of one product line); *Band-Age*, 534 F.2d at 4, 6 (changes in types of bandages manufactured). But see *Woodrich Industries, Inc.*, 246 N.L.R.B. 43 (1979) (no duty to bargain where change from uniforms to fashion garments altered employee duties).

117 See, e.g., *United Food & Commercial Workers Union v. NLRB*, 768 F.2d 1463, 1471-72 (D.C. Cir. 1985) (hiatus of a year and a half); *NLRB v. Daneker Clock Co.*, 516 F.2d 315, 316 (4th Cir. 1975) (eight month hiatus). The Board has stated that "a hiatus is only material in determining successorship status where there have been other substantial changes in operations." *Aircraft Magnesium (Grico Corp.)*, 265 N.L.R.B. 1344, 1346 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984).

118 See *supra* notes 80-81 and accompanying text.

119 See *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 463 (9th Cir. 1985); *United Food & Commercial Workers Int'l Union v. NLRB* (Spencer Foods), 768 F.2d 1463, 1470-74 (D.C. Cir. 1985); *Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 627 (9th Cir. 1983); *Great Lakes Chemical Corp.*, 280 N.L.R.B. No. 66, 122 L.R.R.B. (BNA) 1331 (1986); *Aircraft Magnesium (Grico Corp.)*, 265 N.L.R.B. 1344 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984); *Contract Carrier, Inc.*, 258 N.L.R.B. 353 (1981); *Cagle's, Inc.*, 218 N.L.R.B. 603, 605 (1975); *supra* note 80.

120 See *United Mine Workers Local 1329 v. NLRB*, 812 F.2d 741 (D.C. Cir. 1987); *NLRB v. Jarm Enterprises, Inc.*, 785 F.2d 195, 199 (7th Cir. 1986) ("As a successor an employer is deemed to be operating, from the employees' perspective, the same entity as the previous employer, thus justifying an assumption that the change in ownership has not affected employee attitudes towards union representation."); *Jeffries Lithograph Co.*, 752 F.2d at 464 ("the touchstone remains whether there was an 'essential change in the business that would have affected employee attitudes toward representation.'") (quoting *Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 627 (9th Cir. 1983)); *NLRB v. Zayre Corp.*, 424 F.2d 1159, 1162 (5th Cir. 1970) (cited with approval in *NLRB v. Burns Int'l Sec. Services, Inc.*, 406 U.S. 272, 281 (1972)). Accord: *Spencer Foods*, 768 F.2d at 1470; *Saks & Co. v. NLRB*, 634 F.2d 681, 687 (2d Cir. 1980); *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 4-6 (1st Cir.), *cert. denied*, 429 U.S. 921 (1976). Cf. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973) (where the Court stated, in the context of requiring a successor employer to remedy its predecessor's unfair labor practice, "When a new employer . . . has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations, those employees who have been retained will understandably view their job situations as essentially unaltered."). See generally Note, *Bargaining Obligations*, *supra* note 34, at 778 ("The protection of em-

little effect on the employees' day-to-day duties thus are of little consequence in evaluating "continuity in business operations."

C. *Fall River Dyeing*

Ending a thirteen year silence, the Supreme Court addressed the problems of the successorship doctrine in 1987 in *Fall River Dyeing & Finishing Corp. v. NLRB*.¹²¹ The predecessor employer, Sterlingwale Corporation, had operated a textile dyeing and finishing plant for over 30 years. During most of that period the United Textile Workers represented the Sterlingwale employees. Sterlingwale's business began to decline in the late 1970's. Production was reduced and finally ceased altogether in February, 1982, when all production employees were laid off. Sterlingwale's president tried to locate a new business partner and met with the union on several occasions in the months following the lay-off. By late summer, however, Sterlingwale acknowledged defeat and the company went out of business. The plant and equipment were assigned to creditors while the inventory was sold at an auction.¹²²

During Sterlingwale's final months, Sterlingwale's former vice-president for sales created a new corporation in partnership with the president of one of Sterlingwale's major customers. The customer acquired the plant and machinery from Sterlingwale's creditors and, in turn, conveyed the property to the newly formed corporation of Fall River Dyeing & Finishing. Fall River Dyeing also purchased some of Sterlingwale's inventory at the auction. In September of 1982, Fall River Dyeing began hiring and initiated start-up operations. The new company planned to start with one shift of 55 to 60 employees and then expand to a second shift as business permitted. The hiring goal of one full shift was reached in mid-January, 1983, with 36 former Sterlingwale employees in the group of 55 employees hired. All twelve supervisors had worked for Sterlingwale, although three had not been supervisors with Sterlingwale. Fall River Dyeing continued hiring for a second shift and employed 107 production workers by mid-April. At that time only 52 or 53 of the employees had previously worked for Sterlingwale.¹²³

Fall River Dyeing made some alterations in the business. Sterlingwale had engaged in converting and commission work. Fall River Dyeing performed only commission work. Although both processes involved identical dyeing and finishing, in converting work the company purchased the fabric and sold a finished product; commission dyeing was performed to specifications with the customer's fabric. Fall River Dyeing used only one of the three buildings previously occupied by

employee expectations is the central impetus behind imposing a duty to bargain upon a successor employer.")

There is some evidence that the Board agrees with this approach. See *Fall River Dyeing Corp.*, 272 N.L.R.B. 839, 839 (1984) ("from an employee's viewpoint the production process . . . was the same.") (A.L.J. opinion adopted by Board), *enforced*, 107 S. Ct. 2225 (1987); *Premium Foods, Inc.*, 260 N.L.R.B. 708, 714 (1982) (A.L.J. opinion adopted by Board), *enforced*, 709 F.2d 623 (9th Cir. 1983).

¹²¹ 107 S. Ct. 2225 (1987).

¹²² *Id.* at 2229-30.

¹²³ *Id.* at 2230-31.

Sterlingwale, but the machinery, production processes, and job functions remained unchanged. Sterlingwale's former customers accounted for over half of Fall River Dyeing's business.¹²⁴

The Textile Workers demanded recognition and bargaining by letter on October 19, 1982. Fall River Dyeing had only 21 employees at that time, including 18 former Sterlingwale employees. Following Fall River Dyeing's refusal to accede to the demand, the union filed an unfair labor practice charge on November 1, alleging violations of Sections 8(a)(1) and (5).¹²⁵ The administrative law judge upheld the charge and rejected Fall River Dyeing's claim that successorship status could not be measured until mid-April when two full shifts had been hired. Instead, the administrative law judge ruled that the new employer became a successor in mid-January when Fall River Dyeing had hired a representative complement.¹²⁶ The Board, with one member dissenting, adopted the administrative law judge's findings and conclusions with only a footnote of commentary.¹²⁷ The First Circuit Court of Appeals affirmed the decision.¹²⁸

A divided Supreme Court considered four questions presented in *Fall River Dyeing*.¹²⁹ The first was whether the holding in *Burns* was limited to circumstances involving recent certification. This issue called into question the Board's new hire presumption in the successorship context. The second question articulated by the Court was whether Fall River Dyeing was a successor to Sterlingwale.¹³⁰ Third, the Court addressed the Board's representative complement rule. Finally, the fourth question for review was the Board's "continuing demand" principle, which permitted the union's November 1 demand to remain in effect until mid-January.

Consistent with opinions of the Board and the lower court,¹³¹ the Court agreed that the *Burns* holding was not tied to the union's recent certification in that case. The Board has developed two post-certification presumptions of a union's continuing majority status, the Court explained. For a one year period following certification, the union enjoys an irrefutable presumption of majority support.¹³² After the initial year,

124 *Id.*

125 *Id.* at 2231.

126 *Id.* See also *Fall River Dyeing Corp.*, 272 N.L.R.B. 839 (1984).

127 *Id.*

128 *NLRB v. Fall River Dyeing & Finishing Corp.*, 775 F.2d 425 (1st Cir. 1985).

129 107 S. Ct. at 2229. Justice Blackmun delivered the opinion for the majority, joined by Justices Brennan, Marshall, Stevens, and Scalia. Justice White joined only that part of the majority opinion which considered the last three of the four issues presented. Justice Powell filed a dissenting opinion, joined by Chief Justice Rehnquist and Justice O'Connor.

130 *Id.* The Court's articulation and treatment of this question seems somewhat inconsistent with its admonition in *Howard Johnson* that the issue of "successorship" is meaningless in the abstract. See *supra* note 16 and accompanying text. Nonetheless, the Court's treatment is consistent with that of many lower courts since the initial question is usually whether the new employer can be a successor for any purpose.

131 See *supra* notes 110-113 and accompanying text.

132 *Brooks v. NLRB*, 348 U.S. 96, 98-99 (1954). Following voluntary recognition by the employer, the union is entitled to a "reasonable" period of an irrebuttable presumption of majority status. See *Brown & Connolly, Inc.*, 237 N.L.R.B. 271, 275 (1978), *enforced*, 593 F.2d 1373 (1st Cir. 1979); *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583, 587 (1966); *supra* note 113.

the employer can rebut the presumption of majority support by establishing objective bases for a good faith doubt about continuing support for the union.¹³³ These presumptions, the Court noted, are derived not from "an absolute certainty that the union's majority status will not erode" but from the NLRA's "overriding policy" of industrial peace.¹³⁴ The union is free to develop a stable bargaining relationship without the distraction that it will lose majority support unless it quickly reaches a favorable agreement. The Court found the presumption "particularly pertinent" in the successorship context as a counterbalance to employee disruption during a change in ownership.¹³⁵

The Board prevailed again on the question of whether Fall River Dyeing was a "successor" employer. The Court endorsed the approach of several lower courts emphasizing the employees' perspective in assessing continuity between the two employers.¹³⁶ When employees perceive their jobs as unaltered, the Court reasoned, their expectations of union representation continue. Frustrating those expectations could lead to labor unrest.¹³⁷ The Court considered Fall River Dyeing's operational changes inconsequential. "[F]rom the perspective of the employees, their jobs did not change."¹³⁸ The hiatus in operations, although a relevant factor, also was insufficient to overcome the successorship finding under the "totality of the circumstances."¹³⁹

The Court next addressed the representative complement problem. The Board found an adequate complement of employees to determine successorship in mid-January, while Fall River Dyeing contended the work force should have been measured in mid-April when Sterlingwale employees no longer constituted a majority. The Court approved the Board's attempt to balance the desire for immediate representation with the concern for maximum employee participation. Requiring a full complement before recognition, the Court agreed, would place too great a burden on existing employees who may feel a particular need for union representation during the unsettling transition of a change in ownership.¹⁴⁰

Finally, the Court quickly dispatched the employer's objections to the Board's "continuing demand" rule. The employer, the Court held, can easily verify the existence of a bargaining demand once she decides a

133 *Celanese Corp.*, 95 N.L.R.B. 664, 672 (1951).

134 *Fall River Dyeing*, 107 S. Ct. at 2233.

135 *Id.* at 2233-34. The Court stated that the new employer could not properly claim an unfair burden since the duty to bargain as a successor results from the employer's own decision to take advantage of its predecessor's trained work force. *Id.* at 2234-35.

136 *See supra* note 120 and accompanying text.

137 *Fall River Dyeing*, 107 S. Ct. at 2236.

138 *Id.*

139 *Id.* at 2237.

140 *Id.* at 2239. The Court was unsympathetic with the employer's claimed dilemma of risking a Section 8(a)(5) violation if she delays too long in recognizing the union or risking a Section 8(a)(2) violation if she recognizes the union too soon before a "representative" complement is present. The employer is in the best position to know when a representative complement exists, the Court stated, and the rule is not necessarily more difficult to apply than a full complement standard would be. *Id.* at 2239-40. Finally, even if the employer violated Section 8(a)(2) in good-faith, "only" a remedial order would be imposed. *Id.* at 2240 n.18.

representative complement has been hired. Without access to the new employer's plans, the union cannot fairly bear the burden of determining when that point has been reached. The Court thus upheld the "continuing demand" principle as a reasonable corollary to the representative complement rule.¹⁴¹

Justice Powell's dissent, joined by Chief Justice Rehnquist and Justice O'Connor, presented two challenges to the majority's findings. First, Justice Powell disagreed with the conclusion of "substantial continuity" between the two companies due to the "complete and extensive" break in operations.¹⁴² Justice Powell relied on a variety of facts to support his conclusion. Fall River Dyeing did not initiate operations for seven months. The two enterprises had no contractual or business connection. Fall River Dyeing purchased Sterlingwale's assets on the "open market," and any overlap in customers evidently resulted solely from Fall River Dyeing's own efforts. Considering the employee's perspective upon which the majority so heavily relied, Justice Powell concluded that the Sterlingwale employees would have had little expectation of continuity when the company ceased operations, the collective bargaining agreement expired, and the assets were sold.¹⁴³

Assuming continuity in the business operations, however, Justice Powell rejected the Board's application of the representative complement rule to the facts presented. Justice Powell asserted that the Board failed to appreciate fully two of its own criteria for determining a representative complement, that is, the length of time before expansion is expected to be completed and the certainty of the expansion plans. By mid-January, Fall River Dyeing had already begun its hiring for a second shift. The short delay until April for the completion of the imminent expansion would not have unduly hampered the employees' expectations. Instead, the Board's application deprived the 50 employees hired subsequently of any voice in the representation decision.¹⁴⁴

II. Successorship Reconsidered

A. *Examining the Premises*

The successorship doctrine rests on two premises — the principle of majority rule inherent in all representation determinations and the presumptions of continuing majority support that permit the majority rule to be satisfied. Underlying these premises is the Act's "overriding policy" of industrial peace.

¹⁴¹ *Id.* at 2241.

¹⁴² *Id.* at 2244 (Powell, J., dissenting).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2244-46. The employer also presented evidence that the second shift was not only planned but necessary since finishing work cannot be completed in an eight hour shift. *Id.* at 2245 n.7. See *Fall River Dyeing & Finishing Corp. v. NLRB*, No. 85-1208, Jt. Appendix at 227 (testimony by Fall River Dyeing's Vice-President that a second shift was required to finish the wet goods dyed during the first shift).

1. Principle of Majority Rule

A finding of successorship hinges on a preliminary finding that a majority of the new employer's work force were employees of the predecessor. The democratic principle of majority rule has been a cornerstone of the NLRA from its inception. Section 9(a) of the NLRA provides explicitly that "[r]epresentatives designated or selected . . . by the majority of the employees . . . shall be the exclusive representatives of all the employees in such unit"¹⁴⁵ Section 7 of the Act, as amended in 1947, grants to employees the rights both to form and join labor organizations and to refrain from such activities.¹⁴⁶ Senator Wagner stated during the Act's consideration by Congress in 1935 that, "[d]emocracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered."¹⁴⁷ The principle of majority rule coupled with employee freedom of choice lies at the heart of any representation question.¹⁴⁸ In the successorship context, the transfer of majority status between the old employer and the new employer must be established before union representation property can continue.

2. Assumptions of Majority Support in Successorship Doctrine

The necessary link of majority support between the predecessor employees and the employees of the purported successor rests on a structure of three layered assumptions. The first floor of this structure concerns the sentiments of the predecessor employees while still employed by the old company. Occasionally, the successorship issue arises shortly after an election and certification.¹⁴⁹ In those cases, one can assume with relative certainty that the employees desire union representation. More commonly, however, the representation issue was determined at a more distant point in the past. Many of the employees who participated in the decision may have been replaced. In a case like *Fall River Dyeing*, for example, where the union had been in place for almost 30 years, few of the employees present when representation was chosen were likely to be still on the payroll when Sterlingwale collapsed.¹⁵⁰

145 29 U.S.C. § 159(a) (1982) (NLRA, ch. 372, § 9(a), 49 Stat. 449, 453 (1935)).

146 29 U.S.C. § 157 (1982) (Labor Management Relations Act, ch. 120, § 101, 61 Stat. 136, 140 (1947)). This right is modified to some extent by the employer's and union's authority to enter into a union security agreement with the employer whereby all employees are required to become union members within 30 days of hire. See 29 U.S.C. §§ 158(a)(3) and 158(b)(2) (1982). Of course the union may negotiate such an provision only after being selected as the collective bargaining representative by a majority of the employees. 29 U.S.C. § 158(a)(3) (1982).

147 79 Cong. Rec. 7571 (1935).

148 The importance of majority rule to the Act's scheme has been the topic of extensive discussion in at least two recent cases concerning the Board's authority to issue a bargaining order as a remedy for egregious unfair labor practices. See *Conair Corp. v. NLRB*, 721 F.2d 1355, 1377-84 (D.C. Cir. 1983) and *Gourmet Foods, Inc., v. NLRB*, 578 (1984) (holding that the grant of a bargaining order is beyond the Board's authority unless the union can establish majority support at some earlier date). Cf. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

149 See, e.g., *NLRB v. Burns Int'l Sec. Services, Inc.*, 406 U.S. 272 (1972).

150 See *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S. Ct. 2225, 2229 (1987).

The Supreme Court rejected any distinction between successorship determinations involving recent certifications and those involving long-term representation.¹⁵¹ In the interest of industrial peace and collective bargaining stability, the Board traditionally has presumed that newly hired employees support union representation in the same ratio as those employees being replaced.¹⁵² In the successorship context, the first step in reaching the goal of majority support is the assumption that once a majority of the predecessor employees select a union, that numerical majority remains at the time of the takeover irrespective of intervening turnover or expansion.¹⁵³

The second layer of the structure is an assumption concerning the representation sentiments of the predecessor employees once they have been hired by the new employer. As applied by the courts and the Board, the requirement of work force continuity in successorship analysis demands a simple numerical majority.¹⁵⁴ If at least 26 of the new employer's 50 production employees worked for the predecessor, the work force continuity threshold is met. The courts and the Board therefore assume that *every* predecessor employee hired supports union representation and desires continued representation.

The third assumption made to reach the conclusion of majority support concerns the union sentiments of employees who have not yet been hired. The "representative complement" rule includes the implicit assumption that the union support of existing employees is "representative" of employees who will be hired in the future.¹⁵⁵ This supposition resembles the Board's new hire presumption and involves some of the same concerns of industrial peace.

3. Achieving Industrial Peace

The articulated rationale underlying successorship doctrine is the furtherance of industrial peace. Avoidance of industrial strife is one of the central purposes of the NLRA referenced in the Act's preamble.¹⁵⁶ The Supreme Court has described "industrial peace" as the Act's "over-riding" policy in the successorship context.¹⁵⁷ Requiring continued union recognition by a successor employer, the Court has asserted, will reduce employee unrest which may result from the uncertainty and tran-

151 *Id.* at 2233-34. See *supra* notes 131-35 and accompanying text.

152 See *supra* notes 112-13 and accompanying text.

153 New employers have sometimes challenged this presumption with evidence that the initial recognition by the predecessor was unlawful. Such a claim generally arises where the predecessor voluntarily recognized the union without an election and the union allegedly did not have majority support. See, e.g., *Marin Operating, Inc.*, 279 N.L.R.B. No. 70, 123 L.R.R.M. (BNA) 1334 (1986) (successor's claim of unlawful recognition by predecessor 12 years earlier barred by statute of limitations); *Pick-Mt. Laurel Corp.*, 239 N.L.R.B. 1257 (1979), *rev'd*, 625 F.2d 476 (1980). (Board considered evidence of unlawful recognition by predecessor two years earlier as evidence of good faith doubt justifying withdrawal of recognition by successor). Cf. *Lockheed Eng'g and Management Serv. Co.*, 271 N.L.R.B. 119 n.9 (1984).

154 See *supra* note 93 and accompanying text.

155 See *supra* notes 83-93 and accompanying text.

156 29 U.S.C. § 151 (1982).

157 *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S. Ct. 2225, 2233 (1987).

sition surrounding a transfer of business ownership.¹⁵⁸ Indeed, the Court has acknowledged candidly that the Board's presumptions of majority support offer no guarantee that such support actually exists. Instead, the Court is concerned primarily with furthering industrial peace by protecting employees' interests.¹⁵⁹ To achieve this goal, the courts have focused largely on the purported plight of the employees whose bargaining expectations might be frustrated by the sale of their employer's business.

This concern with employee expectations permeates both parts of successorship analysis. In determining work force continuity, the assumptions of continuing majority support are designed to fulfill employees' alleged desires for uninterrupted union representation. In evaluating continuity of business operations, the courts consider business alterations only as they affect the employees' jobs. If the employees are performing substantially the same duties under the same working conditions, the courts assume the employees' attitudes toward representation remain unchanged.¹⁶⁰

B. *Assumptions of Majority Support and Industrial Peace: Faulty Foundations*

1. New Hire Presumptions

In day-to-day industrial relations outside of the successorship situation, the new hire presumption provides necessary stability. In its absence, an employer potentially could withdraw recognition whenever employee turnover resulted in the numerical possibility that the union had lost majority support.¹⁶¹ The employer, in fact, might be encouraged to accelerate employee turnover and delay collective bargaining to speed up the process. The constant fear of losing its support combined with the threat of employer unfair labor practices would severely hamper the union's ability to engage in aggressive collective bargaining for the maximum benefit of its members.¹⁶² Furthermore, the employees in nonsuccessor circumstances have chosen representation

158 See *id.*; *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 264 (1974); *NLRB v. Burns Int'l Sec. Services, Inc.*, 406 U.S. 272, 300 (1972) (Rehnquist, J., concurring in part and dissenting in part); *John Wiley & Sons v. Livingston*, 376 U.S. at 549 (1964). See also *Tom-A-Hawk Transit, Inc. v. NLRB*, 419 F.2d 1025, 1027 (7th Cir. 1969); *NLRB v. Colten*, 105 F.2d 179, 183 (6th Cir. 1939).

159 *Fall River Dyeing*, 107 S. Ct. at 2233 ("These presumptions are based not so much on an absolute certainty that the union's majority status will not erode following certification, as on a particular policy decision. The overriding policy of the NLRA is 'industrial peace.'") See Note, *Bargaining Obligations*, *supra* note 34, at 772. ("A standard of continuity in the workforce is not to be selected because it ensures that at least a majority of the employees in the new unit have expressed their support for the incumbent union. The obligation of a successor to bargain is not founded upon so precise a calculus, but rather on a resolution of the employees' interests in protection during a transition period and free choice in the selection of a union representative.") Cf. *Wiley*, 376 U.S. at 549 (right of employer to alter business must "be balanced by some protection to the employees from a sudden change in the employment relationship").

160 See *supra* notes 120, 136-39 and accompanying text.

161 If a union won an election by 60% of the vote, for example, an employer might argue that majority support could be gone once 10% of the work force was replaced.

162 See *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 U.S. 2225, 2233 (1987). Should the employees desire to terminate representation, they may file a decertification petition, subject to the Board's usual election bar rules.

based on their uninterrupted experience with a single employer. The assumption that other employees would make the same choice under the same conditions is not unreasonable. In the successorship context these assumptions are not so easily transferable.

An emphasis on the dissection of the new hire presumption arguably is misplaced in successorship analysis. As indicated, the Court concedes that the Board's presumptions provide no certainty of majority support but justifies their use as necessary for industrial peace. Industrial peace is achieved by protecting the employees' expectations and desires for continued union representation with their new employer. The Court, however, adds its own assumption. The Court's reasoning implicitly supposes that the employees will feel "protected," as opposed to burdened, by continued representation.¹⁶³ To examine the validity of such assumptions, one must consider the reasons employees choose a bargaining representative.

Why employees join or support unions is a question which never can be answered fully. An employee's decision to vote for a union may involve a variety of factors ranging from peer pressure to union promises of higher wages. Students of labor relations often agree, nonetheless, that poor communications between employer and employees frequently prompts organization.¹⁶⁴ Empirical studies suggest that the "voice" which a union provides may be its most significant function. Professors Freeman and Medoff, for example, conducted their own study and examined other studies on the effect of unionization on employee turnover. By controlling for wage differentials, they concluded that the union's "voice effect" has a substantially greater impact on the number of employee quits.¹⁶⁵ One can infer that employees like their jobs better when a union is available to furnish a channel of communication.

The perceived importance of communication in labor relations is reflected further in studies of companies' responses to organizing drives. Professors Freeman and Medoff report that 90 percent of the nonunion grievance systems they examined were initiated to prevent unionization. Another study by the National Industrial Conference Board revealed that 63 percent of the companies surveyed who defeated union organization immediately introduced new communications systems in response. Fur-

163 In some successorship cases, these assumptions actually have been tested by Board elections. Unions have responded to the successor's refusal to bargain by filing an election petition, potentially a much more expedited procedure than an unfair labor practice hearing (*see infra* note 184). *See, e.g.,* Agri-International, Inc., 271 N.L.R.B. 925 (1984), where the Board found the employer was a "successor" but the presumption of majority support was rebutted when the union lost the election.

164 *See, e.g.,* A COX, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 11, (10th ed. 1986) ("[U]nions helped to give employees a sense of participation in the business enterprises of which they are part—a function of labor unions which became important as organization spread into mass production industries."); R. LEWIS & W. KRUPMAN, WINNING N.L.R.B. ELECTIONS: MANAGEMENT STRATEGY AND PREVENTIVE PROGRAMS 17 (2d ed. 1979) ("A major cause of unsatisfactory employee relations is poor communications or no communications at all.").

165 *See* R. FREEMAN AND J. MEDOFF, WHAT DO UNIONS DO? 94-107 (1984) and studies cited therein.

thermore, companies with some type of grievance system were much more likely to win union elections.¹⁶⁶

If indeed the communication channel provided by union representation is one of the most important factors in employee union support, the wholesale transfer of the new hire presumption to successorship circumstances is inappropriate. Even when a new employer purchases an ongoing business with little or no change in operations, at least one critical factor has changed — the employer. To the extent the predecessor employees supported the union as a needed spokesman, that need may disappear when a new party is introduced into the relationship. A new employer, with potentially different attitudes and employee relations policies, may open a satisfactory line of direct communication with the employees without the union as a “middleman.” A more harmonious employer/employee relationship under such circumstances might enhance industrial peace, while the presence of a union fighting for control could result in increased industrial strife.

For those employees who supported organization in hopes of obtaining more tangible economic benefits, a change in employers is equally significant. A successor employer “is ordinarily free to set initial terms” of employment.¹⁶⁷ The wages and benefits offered by the successor might satisfy the employees and alleviate any perceived need for union representation. Even if the successor’s wages and benefits are similar to those of the predecessor, the employees may perceive the fairness of the employment terms differently when a new employer with distinct financial circumstances is involved.

Definitive proof of employees’ reasons for choosing union representation is unavailable. At a minimum, however, the evidence suggests that the courts and the Board should examine more closely the new hire presumption in successorship cases. The underlying justifications for the presumption do not necessarily remain valid when a new employer is introduced.¹⁶⁸

2. Union Support of Predecessor Employees Hired

Even if one accepts the validity of the new hire presumption in successorship analysis, that presumption cannot adequately support the second presumption which follows. The new hire presumption postulates that new employees support the union in the same *ratio* as those being replaced.¹⁶⁹ Yet when measuring work force continuity, the courts and the Board presume 100 percent support by the predecessor employees

166 *Id.* at 108, citing E. Curtin, *White-Collar Unionization: Personnel Policy Study No. 220* (New York: National Industrial Conference Board, 1970). Firms with a formal “appeals system” won union elections 79% of the time, and companies with “open door” policies won 51% of the elections. Companies without such policies defeated the union only 44% of the union elections.

167 *NLRB v. Burns Int’l Sec. Services, Inc.* 406 U.S. 272, 294 (1972). *See supra* notes 54-55 and accompanying text.

168 *Cf. Bargaining Obligations, supra* note 34, at 763 (“employees’ choice of a union representative may often be strongly influenced by their perception of the employer, and a change in owners may alter employees’ sentiments with respect to various labor organizations.”).

169 *Laystrom Mfg. Co.*, 151 N.L.R.B. 1482, 1484 (1965). *See supra* notes 114-15 and accompanying text.

hired. Assume the union won a representation election with 75 percent support of the employees. At a later date, a new employer purchases the company and hires 40 of the predecessor employees in a total unit of 70 employees. Under the new hire presumption, the Board considers only 30 of the predecessor employees union supporters.¹⁷⁰ Once hired by the new employer, however, successorship doctrine dictates that all 40 continue to desire union representation. Although the Supreme Court has approved the rationale underlying the Board's new hire presumption, it has offered no additional justification for what appears to be the imposition of a bargaining representative supported by only a minority of the employees.

A possible rebuttal, analogous to comparable arguments made by the courts,¹⁷¹ is that successorship principles distinguish between employee desires and employee expectations. The focus, the argument continues, should be the employees' expectations. Whether the employees actually support union representation is secondary to their expectation that the union will continue to represent them in a working environment that remains essentially the same. The analogy is flawed. The courts rely on unchanged circumstances as the basis for concluding that employee "attitudes" towards representation also are unchanged.¹⁷² In fact, substituting one employer for another changes the circumstances dramatically. Expectations about changes in union representation may follow.

The question of employee expectations deserves closer scrutiny. In his dissent in *Fall River Dyeing*, Justice Powell argued persuasively that the Sterlingwale employees could have had "little hope" of return when the company ceased operations in February, 1982. Any remaining expectations surely evaporated when Sterlingwale's assets were sold in August. The good fortune of a new employer with job vacancies was announced through newspaper advertisements. The jobs offered by Fall River Dyeing involved a smaller operation with more hours per shift.¹⁷³ To the extent one can put oneself in the shoes of those employees, the question is whether a reasonable person would expect everything to return to what it was before.

The distinction between the old and the new was particularly pronounced in *Fall River Dyeing* due to the seven month hiatus in operations and the liquidation of the predecessor. Even when the successorship issue involves the purchase of an ongoing business, however, one suspects that the employees fully anticipate change unless they have been assured otherwise.¹⁷⁴ Few employees would be surprised if told that their new

¹⁷⁰ This conclusion assumes that union supporters and non-supporters are hired proportionately, since any discrimination in hiring on the basis of union sentiment would be unlawful under Section 8(a)(3) (29 U.S.C. § 158(a)(3) (1982)).

¹⁷¹ See *supra* notes 120, 159-60 and accompanying text.

¹⁷² See *supra* note 120.

¹⁷³ *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S. Ct. 2225, 2244 (1987) (Powell, J., dissenting).

¹⁷⁴ In an informal survey, the author has talked with several individuals who worked for companies being sold or about to be sold as ongoing enterprises. When asked how the change in ownership would affect their jobs, these individuals invariably replied, "I don't know," or "I'll have to wait and see."

employer had different policies and procedures. Although they may "hope" for unaltered continuity in the employment relationship, their expectations likely include apprehensions of change. The desire for union representation cannot be tied exclusively to the work performed. The employee usually makes the representation decision in the context of working for a particular employer. When a new employer is introduced, new sentiments about union representation also may be substituted.¹⁷⁵

3. The Representative Complement

Although the representative complement issue does not arise in all successorship cases, it is an integral part of successorship doctrine. The rule was adopted from the representation elections context with only limited consideration of its transferability to successorship problems.¹⁷⁶ Two critical distinctions exist between the two situations. When a union wins a representation election held with a representative complement of employees, the Board is certain that a majority of the existing employees want union representation. In contrast, when a successor employer is required to bargain based on a representative complement, the Board presumes majority support based on the questionable assumptions about predecessor employees' union sentiments.

To the extent a representative complement is intended to be "representative" of the desires of future employees, the election and successor circumstances are equally distinguishable. After an election, the employer will add new employees under essentially identical circumstances as those currently employed. Employees who participated in the election therefore are a valid sample of the expanding work force. In the successorship context, however, the representative complement cannot be characterized so comfortably as a sample of the full work force to be hired. First, the requirement of recognition is based on the tenuous assumption that all predecessor employees support the union. Second, the predecessor employees have experienced union representation under similar working conditions with the prior employer, whereas new employees hired by the successor lack that experience. These new employees accept jobs with a new employer without past exposure to union representation under comparable circumstances. The difference in perspectives may indicate a difference in attitudes towards representation. Unlike the election context, the predecessor employees are less likely to

¹⁷⁵ In *Fall River Dyeing*, for example, the new employer attempted to offer as evidence at the hearing testimony of conversations between the president and a number of employees expressing dissatisfaction with the union. *Fall River Dyeing & Finish Corp. v. NLRB*, No. 85-1208, Jt. Appendix at 212-14. The Board has considered a successor employer's withdrawal of recognition based on such evidence as employee petitions (*see Sofco, Inc.*, 268 N.L.R.B. 159, 165 (1983)), expressed dissatisfaction by employees (*see id.*; *Pick-Mt. Laurel Corp.*, 239 N.L.R.B. 1257 (1979), *rev'd*, 625 F.2d 476 (1980)); and declining union membership (*see J & J Drainage Products Co.*, 269 N.L.R.B. 1163 (1984)). *See supra* note 115. Although this type of evidence cannot always be trusted since it may be improperly "encouraged" by the new employer, the cases may be some support for the proposition that a change in employers can change attitudes towards representation.

¹⁷⁶ *See supra* notes 93-100 and accompanying text.

be "representative" of an equal proportion of new employees subsequently hired.

This is not to suggest that the concept of a "representative complement" has no place in successorship doctrine. The Board's concern that existing employees be permitted representation as quickly as possible is legitimate.¹⁷⁷ A successor should not be allowed to delay its bargaining obligations while completing a five year plan for expansion. The unique aspects of successorship suggest, however, that the Board needs to weigh maximum employee participation more heavily when balancing participation with the concern for immediate representation. In *Fall River Dyeing*, the Board measured the new employer's work force in mid-January when the company already had begun a second shift.¹⁷⁸ A short delay until mid-April would have permitted the fifty additional employees a chance to be "counted." At that point the Sterlingwale employees constituted only a minority of the workforce. The Textile Workers would have been forced to petition for an election, thus ensuring faithfulness to the fundamental principle of majority representation.

C. Resolution

The successorship doctrine is not well supported by the pyramid of assumptions used to justify the new employer's bargaining obligation. The assumptions are questionable when examined independently; they are completely unsatisfactory as an integrated theory to address the representation question in the successorship context. With each step of the process, the Board and the courts seem to stray further and further from both reality and the Act's premise of majority rule. The resolution is simple. Rather than building on assumptions of employee sentiment, an election can ascertain the employees' desires with certainty.

To obtain an election, the Act requires only the existence of a question of representation affecting commerce¹⁷⁹ and a petition supported by a "substantial number of employees."¹⁸⁰ By regulation, the Board requires a 30 percent showing of employee support.¹⁸¹ In the successorship context, however, the language of the Act is certainly broad enough to permit a showing of "substantial" support by established successorship criteria. The Board could accept as valid any election petition where the employer's successorship status could be demonstrated.

Consistent with past application, the Board's primary inquiry would be work force continuity. The procedure need not involve a full trial comparable to the kind of showing required for the General Counsel to establish a Section 8(a)(5) violation under traditional successorship

¹⁷⁷ See *supra* note 99 and accompanying text.

¹⁷⁸ *Fall River Dyeing*, 107 S. Ct. at 2245-46.

¹⁷⁹ 29 U.S.C. § 159(c)(2) (1982).

¹⁸⁰ 29 U.S.C. § 159(c)(1)(A) (1982). An employer presented with a claim for recognition also can file a petition. 29 U.S.C. § 159(c)(1)(B) (1982).

¹⁸¹ NLRB Rules and Regulations and Statements of Procedure, Series 8, 29 CFR § 101.18 (1967).

law.¹⁸² The only question is whether an election should be ordered; any doubts thus should be resolved in favor of allowing the employees a chance to vote. As past cases suggest, an election generally would be ordered as long as the predecessor employees constitute a majority of the new employer's work force. In most cases, this question can be answered easily. Problems of an appropriate bargaining unit and a representative complement would be resolved by hearing, just as those same issues are now resolved for non-successor election petitions.¹⁸³

The advantages of an election are numerous. The Board no longer will be relying on speculative and ill-founded assumptions about employees' desires for union representation. By testing the accuracy of those assumptions, the principle of majority rule will be realized more fully. Elections better serve the Court's concerns for industrial peace and employee protection. The election potentially would resolve the successor representation question faster than the current system. Elections generally are held within a matter of weeks, while unfair labor practice proceedings typically involve months and years of delay.¹⁸⁴

Employee frustration, and consequently unrest, is likely to be greatly diminished when an election is imminent. Once an election is set, the employees know that within a matter of weeks they will be given an opportunity to make a representation decision. The employees of Fall River Dyeing, by contrast, waited almost two years for a Board order and over four years for the final judicial resolution of the union's representative status.¹⁸⁵ The courts unquestionably are correct when they characterize this transition as a time of uncertainty. A few weeks of uncertainty awaiting the results of an election, however, should be substantially less

182 Since successorship status is now tested through an unfair labor practice charge under Section 8(a)(5), the Board's usual procedures for litigating unfair labor practice charges must be followed. See 29 U.S.C. § 160 (1982).

183 *Id.* § 102.62(a) and (b). See generally J. FERRICK, H. BAER & J. ARFA, *NLRB REPRESENTATION ELECTIONS—LAW, PRACTICE & PROCEDURE* (1980). Although the use of the representative complement rule for an election does not address all of the problems raised with the standard, see *supra* notes 176-77 and accompanying text, it does resolve the most important criticism. An election will at least confirm whether or not the predecessor employees in fact wish to continue union representation with their new employer.

184 The General Counsel reported for the 1986 fiscal year a median of 47.7 days between the time a petition is filed and the time an election is held. In contested cases, Regional Directors issued decisions in a median of 42 days after the hearings. In unfair labor practice proceedings, by contrast, a median of 45 days was needed to issue the complaint. *General Counsel's Report Summarizing Operations in Fiscal 1986*, 124 L.R.R.M. (BNA) 158, 160 (1987). The wait for a hearing before an administrative law judge, with possible appeals to the Board and the circuit court, can delay a final resolution for years.

The election alternative may result in a brief delay for some employees now getting immediate representation. An employer who believes she qualifies as a successor under current law may concede her legal obligations upon acquisition of the business. Nothing in the current proposal prevents her from voluntarily recognizing the union under similar circumstances, yet she might choose instead to demand an election if it is available. While these employees arguably are "worse off," any disadvantages of the short delay involved are overcome by the benefit of giving all the employees a right to vote rather than assuming away any active participation in the decision.

185 *Fall River Dyeing* provides an appropriate example. The union filed an unfair labor practice on November 1, 1982. The hearing before an administrative law judge was six months later on May 2, 1983. He issued his decision nine months after that on January 27, 1984. The Board took another nine months to affirm his findings. Even without subsequent court appeals, the total delay for a final Board order was almost two years. 272 N.L.R.B. 839.

troubling than the indeterminate wait for the resolution of unfair labor practice charges.

More importantly, *all* of the employees are better protected by an accurate measure of their sentiments toward union representation. The successorship doctrine as currently applied protects only the imagined desires of the predecessor employees based solely on their status as predecessor employees. No one asks the individuals affected whether those assumptions are correct. At worst, an election trades a few weeks delay for the replacement of doubtful speculation with confirmed reality. At best, the election provides both predecessor and non-predecessor employees with the opportunity to voice their opinions and participate in a critical decision that will affect almost every aspect of their working lives. Nothing could be more fundamental to the principle of majority rule.

Finally, the availability of an election will eliminate some of the current system's incentives for unlawful practices by successor employers. As suggested earlier, an employer hoping to avoid successor obligations might control her hiring to avoid employing a majority of predecessor employees.¹⁸⁶ Although the employer violates Section 8(a)(3) by refusing to hire any individual because of union membership, such unfair labor practices can be hard to prove if hiring practices are carefully constructed. To discourage union support and enhance her arguments against continuity in the business enterprise, a new employer could delay unnecessarily the reopening of the plant to create a substantial break in operations. Successor employers also may subtly encourage employees to resign from the union or may circulate anti-union petitions to provide evidence upon which recognition can be withdrawn.¹⁸⁷ These possible Section 8(a)(1) violations similarly may be difficult to prosecute.

If a new employer knows that the union must seek an election, much of this potentially unlawful behavior becomes unnecessary and counterproductive from the employer's perspective. Unfair labor practices can delay an election and even result in a bargaining order if sufficiently egregious.¹⁸⁸ Once given an opportunity to campaign against the union, the employer may be satisfied to allow the employees to make the decision. Indeed, the new employer might even benefit from a quick election during a "honeymoon" period when the employees are more willing to give their new boss a chance to operate without union "interference." Depending on the circumstances of the takeover, this could be a time during which the employees are particularly disgruntled with a union unable to save their jobs with the predecessor employer.

III. Conclusion

The Supreme Court's interest in protecting the employees during the uncertainty of a business acquisition is understandable and commendable. In search of that goal, however, the Court threatens to undermine seriously the Act's basic premise of majority rule determined by

¹⁸⁶ See *supra* note 107 and accompanying text.

¹⁸⁷ See *supra* notes 113, 175.

¹⁸⁸ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610-16 (1969).

employee free choice. The pyramid of assumptions created by the Board in successorship doctrine is at best a poor substitute for reality and at worst an affirmative burden on employees who never supported the union or are disillusioned with union representation. Although these assumptions may serve necessary functions in other contexts, neither their rationales nor their goals survive in successorship circumstances. The thwarting of actual employee sentiment ultimately could encourage illegal employer conduct and lead to more industrial unrest, not less. Finally, in its effort to protect the predecessor employees, the Court ignores entirely the interests of other employees in the unit.

Protection of all employees following ownership changes is best achieved by permitting employees a voice in deciding the representation issue. A secret-ballot election would eliminate the reliance on questionable presumptions of employee support and would involve at most a minimal delay. In many, if not most, cases, the election will expedite the representation determination. The certainty of an election is likely to be far more reassuring to the employees than uncertainty about the employer's obligations and how the employer will respond to the union's recognition demand. Furthermore, an election ensures that all employees will have a chance to join in the debate, not just those who worked for the predecessor. The election has long been recognized as the "preferred" method of resolving representation questions.¹⁸⁹ The denial of the election procedure to the parties in successorship cases is both unnecessary and in conflict with the Act's fundamental scheme.

189 *Id.* at 602; *Aaron Brothers*, 158 N.L.R.B. 1077 (1966).