

3-1-1979

Successorship Clauses in Collective Bargaining Agreements

Jay D. Pimentel

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Contracts Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Jay D. Pimentel, *Successorship Clauses in Collective Bargaining Agreements*, 1979 BYU L. Rev. 99 (1979).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1979/iss1/7>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Successorship Clauses in Collective Bargaining Agreements

I. INTRODUCTION

In structuring the sale of a business, counsel for the seller and the buyer must be sensitive to potential labor law complications. The tax, antitrust, and corporate problems generated by an acquisition or merger can so fully occupy an attorney's time and attention that it is "easy to overlook labor problems that can result from such transactions."¹ To be thorough, counsel should determine whether any unexpired collective bargaining agreement of the seller (predecessor) contains a successorship clause and, if so, under what circumstances the clause is enforceable to bind the buyer (successor) to the terms of the existing agreement.²

This Comment discusses the effect of successorship clauses on the parties to the sale of a business. The applicability and enforceability of these clauses against successor employers will be viewed in light of a successorship doctrine that Supreme Court Justices have admitted is already "shrouded in somewhat impressionist approaches."³ The applicability of successorship clauses to predecessor employers will be analyzed together with the remedies available to enforce the clause against a predecessor employer's breach.

While a plethora of articles have been published on labor law successorship in general,⁴ the impact of successorship clauses has been rarely and only briefly mentioned⁵ despite the fact that such clauses are fairly common in collective bargaining agreements.⁶

1. Coughlin & Van de Kerckhove, *Labor Problems in Mergers and Acquisitions*, Wis. B. BULL., Oct. 1974, at 29.

2. See *id.* at 42 app. (Checklist, Acquisitions and Mergers, Labor Assets).

3. NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272, 299 (1972) (Rehnquist, J., concurring in part, dissenting in part, joined by Burger, C.J., Brennan & Powell, JJ.) (quoting Machinists Dist. Lodge 94 v. NLRB, 414 F.2d 1135, 1139 (D.C. Cir. 1969) (Leventhal, J., concurring)).

4. See 4 T. KHEEL, *LABOR LAW* § 17.01 n.33 (1978) (listing over 50 articles on the subject).

5. See Severson & Willcoxon, *Successorship Under Howard Johnson: Short Order Justice For Employees*, 64 CALIF. L. REV. 795, 838-39 (1976); Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach*, 57 MINN. L. REV. 1051, 1076-78 (1973).

6. In a Bureau of National Affairs (BNA) study in 1975, 22% of all collective bargaining agreements sampled contained a successorship clause. The "clauses were more common in nonmanufacturing (31 percent) than in manufacturing (17 percent) contracts." In

The principles of law in this area are found primarily in decisions by federal courts, the National Labor Relations Board (NLRB), and arbitrators of labor disputes—all of whom have had to proceed without the aid of statutory guidance.⁷ These bodies have attempted to balance the equities in labor law successorship⁸ by asking (1) whether it is equitable to bind a successor to the terms of a labor contract entered into by other parties simply because a successorship clause exists, and (2) whether it is just for a predecessor to ignore a successorship clause by selling its business without requiring assumption of an unexpired collective bargaining agreement.

II. BACKGROUND

A. *Types of Successorship Clauses*

The specific wording of a successorship clause may take one of two general approaches. The clause can be aimed directly at successors: "The provisions of this Agreement shall be binding upon the Company and its successors and assigns by merger, consolidation or otherwise."⁹ Or it may be more indirect and provide:

The Company agrees that, if at any time during the life of this Agreement, it were to sell, lease, transfer or otherwise dispose of all or substantially all of its business, it will require the successor to its interest to assume and agree to be bound by all the terms and provisions of this Agreement so long as the successor continues operations on the Company's premises.¹⁰

Other successorship clauses are usually variations or a combination of these two approaches.¹¹

The applicability and enforceability of a successorship clause against a successor or predecessor employer in a specific case, however, does not seem to turn on the wording of the particular clause. Either of the above approaches is sufficient to require

three industries, "[m]ore than half of the contracts [had] successorship clauses: transportation (61 percent), utilities (60 percent), and services (53 percent)." BNA, BASIC PATTERNS IN UNION CONTRACTS 8 (8th ed. 1975).

7. See Slicker, *supra* note 5, at 1053.

8. See generally Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759, 759-60 (1975).

9. 2 COLLECTIVE BARGAINING NEGOTIATIONS & CONT. (BNA) 70:182 (1976) (Raytheon Co. and Electrical Workers (IBEW)).

10. *Id.* (Park Drop Forge Div. and Boilermakers).

11. See *id.* at 70:181-82 (National Master Freight Agreement and Teamsters).

careful consideration of the duties possibly imposed by a successorship clause. Mere reference in the recitals of a collective bargaining agreement to "successors and assigns," however, may not constitute a successorship clause because the active language imposing a duty is absent.¹²

A milder type of successorship clause attempts to impose on a successor employer only the duty to recognize and bargain with the predecessor's union, not the duty to abide the substantive terms of the contract.¹³ However, since the Supreme Court has held that these successorship clauses are implied in every collective bargaining agreement and are enforceable if the majority of the successor employer's work force consists of employees of the predecessor,¹⁴ they are outside the scope of this Comment.

The language the NLRB regularly inserts in its unfair labor practice awards to make an award binding on the offending employer, "its officers, agents, successors and assigns"¹⁵ demonstrates another type of successorship clause extraneous to the coverage of this Comment. These successorship clauses are enforceable against successors who have knowledge of a predecessor's unfair practice,¹⁶ but will usually be binding only on a suc-

12. *In re Rattray & Co.*, 35 Lab. Arb. & Disp. Settl. 676, 679 (N.Y. Sup. Ct. 1960).

13. See, e.g., *International In-Flight Catering Co. v. National Mediation Bd.*, 555 F.2d 712, 715 (9th Cir. 1977); *NLRB v. United Indus. Workers of the Seafarers Int'l Union*, 422 F.2d 59, 62 (5th Cir. 1970); *Reynolds v. International Ass'n of Machinists*, 74 Lab. Cas. 16,750, 16,750 (M.D.N.C. 1973); *Long Island R.R. v. System Fed'n No. 156*, 53 Lab. Cas. 16,429, 16,431 (E.D.N.Y.), *aff'd*, 368 F.2d 50 (2d Cir. 1966).

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

15. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 170 (1973). Some have argued that successorship clauses in NLRB awards should be enforceable regardless of the enforceability of other types of successorship clauses to deny the successor the fruits of a predecessor's unfair labor practice. 4 J. JENKINS, *LABOR LAW* 218 (Supp. 1974). Also, it is not a private party inserting the successorship clause in unfair labor practice awards, but a governmental body "'obligated to effectuate the policies of the [National Labor Relations] Act.'" 414 U.S. at 177 (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956)).

16. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 170 (1973). The NLRB had vacillated on the issue for many years. See *Perma Vinyl Corp.*, 164 N.L.R.B. 968 (1967) (holding a successor with notice liable for an unfair labor practice of the predecessor), *enforced sub nom.* *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968); *Symns Grocer Co.*, 109 N.L.R.B. 346 (1954) (successor not liable); *Alexander Milburn Co.*, 78 N.L.R.B. 747 (1947) (successor liable); *South Carolina Granite Co.*, 58 N.L.R.B. 1448 (1944) (successor liable for own but not predecessor's unfair labor practices), *enforced sub nom.* *NLRB v. Blair Quarries, Inc.*, 152 F.2d 25 (4th Cir. 1945). The Supreme Court held that the broad remedial powers of the NLRB under § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) (1976), were sufficient to validate the successorship clause in the Board's order in *Golden State Bottling*. 414 U.S. at 176-77. See *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945); *NLRB v. Ozark Hardwood Co.*, 282 F.2d 1, 5 (8th Cir. 1960). The Court also held that enforcement of the NLRB's succe-

cessor who has purchased the predecessor's going business¹⁷ and has retained essentially the same work force.¹⁸ However, even a wholesale takeover with identical operations and adoption of the predecessor's labor contract will not bind a successor to an unfair practice award against the predecessor if the successor has no notice.¹⁹

B. Reasons Successorship Clauses Exist

During collective bargaining, the union typically demands a successorship clause and the employer generally opposes it.²⁰ A union will push for a successorship clause to give its members a greater sense of job security,²¹ especially when the collective bargaining agreement is considered to be favorable to employees. While it is theoretically possible for a successorship clause to enhance the sale value of a business covered by a pro-employer labor contract,²² most cases indicate that the existence of a successorship clause will discourage buyers.²³

Since the NLRB has held that it constitutes a mandatory subject of bargaining,²⁴ an employer must seriously consider a union's demand for a successorship clause. If the employer does not contemplate selling the business during the term of the labor agreement or recognizes the clause's dubious enforceability, there may be little incentive to actively oppose inclusion of a successorship clause.²⁵ However, as long as a successorship clause is argua-

sorship clause would not contravene the policy underlying Rule 65(d) of the Federal Rules of Civil Procedure. 414 U.S. at 180.

17. See Slicker, *supra* note 5, at 1073. This accords with the necessarily narrow definition of successor for successorship clauses in collective bargaining agreements. See text accompanying notes 32-39, 109-16 *infra*.

18. See UAW v. NLRB, 442 F.2d 1180, 1183 (9th Cir. 1971).

19. UAW Local 6 v. Saga Foods, Inc., 407 F. Supp. 1247, 1253-54 (N.D. Ill. 1976).

20. Some employers have even bargained for an anti-successorship clause prohibiting a carryover of seniority if a successor buys the company. *E.g.*, Sidney Wanzer & Sons v. Teamsters Local 754, 46 Lab. Arb. & Disp. Settl. 426 (1966) (Dolnick, Arb.); *cf.* Greengate Mall, Inc., 209 N.L.R.B. 37 (1974) (provision in contract to sell business that successor not hire predecessor's employees).

21. See 32 CHI.-KENT L. REV. 170, 173 (1954).

22. *Cf. id.* (employer's advantage to be able to transfer labor agreement to successor and hold the union bound to it).

23. *E.g.*, Teamsters Local 5 v. Pharmacies, Inc., 84 L.R.R.M. 2453 (M.D. La. 1973). See also text accompanying notes 145-51 *infra*.

24. UMW (Lone Star Steel Co.), 231 N.L.R.B. 573 (1977).

25. The same NLRB decision that held successorship clauses to be a mandatory subject of bargaining explicitly reserved "the issues of whether a union may lawfully act to compel compliance with such a provision or whether a successor employer would be bound by the terms of such an agreement." *Id.* at 575 n.13.

bly enforceable, predecessors will have an incentive to make adoption of the labor contract a condition of sale. Similarly, successors may comply voluntarily with a successorship clause or adopt a similar agreement in order to avoid disruption of their new businesses. In *Keeley v. Refiners Transport & Terminal Corp.*,²⁶ for example, the existence of a successorship clause was the specific reason given for "retain[ing] all past seniority and benefits accrued" under the predecessor's collective bargaining agreement.²⁷

Successorship clauses, unfortunately, have been abused. In *Embry-Riddle Aeronautical University v. Ross Aviation, Inc.*²⁸ the successor was badgered by the predecessor and the union about the predecessor's successorship clause after the successor had won a service contract by underbidding the predecessor. The clause was clearly unenforceable in this case,²⁹ but the persistent bad faith harassment led to the successor's default on the service contract, permitting the predecessor to recover the contract. After four years of litigation, the successor finally obtained a judgment for treble damages against the predecessor and the union for their misconduct.³⁰ A better understanding of the enforceability of successorship clauses should prevent such occurrences in the future.

III. EFFECT ON SUCCESSOR EMPLOYERS

By express language most successorship clauses purport to bind the successor or purchaser of a business to the unexpired collective bargaining agreement of the predecessor. If a successorship clause is both applicable to and enforceable against a particular successor, all of the predecessor's employees would need to be retained and compensated by the successor as set forth in the collective bargaining agreement for the full term of the agreement. The degree to which successorship clauses are enforceable against successor employers seems to depend primarily on the "successorship doctrine"—a doctrine developed in successorship cases involving agreements not containing successorship clauses.³¹

26. 60 Lab. Cas. 16,722 (E.D. Mich. 1969).

27. *Id.* at 16,724.

28. 504 F.2d 896 (5th Cir. 1974).

29. See *Emerald Maintenance, Inc. v. NLRB*, 464 F.2d 698 (5th Cir. 1972) (discussed in text accompanying notes 46-48 *infra*).

30. The court found that the predecessor employer and its union had violated § 1 of the Sherman Act by their misuse of the successorship clause. 504 F.2d at 905.

31. Depending on the degree of continuity from the predecessor's operation, the suc-

A. *Applicability to Successor*

The Supreme Court has admitted that "[t]here is and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others."³² Within the wide range of "successors" for successorship *doctrine* purposes, only a narrow band can be considered "successors and assigns" for successorship *clause* purposes. The successorship doctrine has been applied to almost every form of transferring a business,³³ and in most cases hiring a large portion of a predecessor's employees has been persuasive evidence of successorship within the general federal labor law doctrine.³⁴

For a new employer to fall within the narrow category of successors to whom successorship clauses apply, it must be a "successor or assign" of the entire going business of the predecessor. The purchase of less than all assets and assumption of only some of a predecessor's fixed obligations does not bring the suc-

cessorship doctrine may impose a duty to arbitrate with the union or a duty to recognize and bargain with the union. These two major strands of the successorship doctrine are discussed in greater detail below in text accompanying notes 58-95 *infra*.

32. *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 262 n.9 (1974).

33. *Valleydale Packers, Inc.*, 162 N.L.R.B. 1486, 1490 (1967). Successorship can be found in a reorganization of company ownership, sale or lease of company assets, transfer from a foreclosing creditor or bankruptcy trustee, or loss of a sales franchise or service contract by competitive bidding. *Slicker*, *supra* note 5, at 1062-63.

34. *E.g.*, *NLRB v. Wayne Convalescent Center, Inc.*, 465 F.2d 1039, 1041-42 (6th Cir. 1972). The broad test for successorship doctrine purposes is whether, from the employees' viewpoint, "the employing industry remains essentially the same." *Valleydale Packers, Inc.*, 162 N.L.R.B. 1486, 1490 (1967). For example, hiring a majority of its work force from among existing employees will obligate a successor to recognize and bargain with the predecessor's union, *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272 (1972) (discussed at notes 60-65 and accompanying text *infra*), and to honor unfair labor practice awards against the predecessor when the successor has notice. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973) (discussed at notes 15-16 and accompanying text *supra*). The successor must also submit to arbitration the issue of what substantive provisions of the existing collective bargaining agreement will be binding on it when the successor hires almost the identical work force. *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) (discussed at notes 74-86 and accompanying text *infra*). A new employer cannot, however, avoid successorship doctrine duties by discriminating against the predecessor's employees in hiring without violating § 8(a)(3) of the National Labor Relations Act. Compare *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 262 & n.8 (1974) (no violation) with *NLRB v. Houston Distribution Serv., Inc.*, 573 F.2d 260 (5th Cir.), *cert. denied*, 99 S. Ct. 722 (1978); *NLRB v. Foodway of El Paso*, 496 F.2d 117 (5th Cir. 1974); *K.B. & J. Young's Super Mkts., Inc. v. NLRB*, 377 F.2d 463 (9th Cir.), *cert. denied*, 389 U.S. 841 (1967); *NLRB v. New England Tank Indus., Inc.*, 302 F.2d 273 (1st Cir.), *cert. denied*, 371 U.S. 875 (1962); and *Macomb Block & Supply, Inc.*, 223 N.L.R.B. 1285 (1976). See also *Severson & Willcoxon*, *supra* note 5, at 839-43.

cessor within the scope of a successorship clause.³⁵ Similarly, a lessee of the predecessor's plant is not a successor subject to a successorship clause, especially if there is a hiatus between operations.³⁶

In 1972 the Second Circuit held that a successorship clause purporting to bind a purchaser of less than all the predecessor's assets is a "hot cargo" agreement in violation of section 8(e) of the National Labor Relations Act and therefore invalid.³⁷ The NLRB quickly followed suit in a related case.³⁸ In a flurry of more recent cases, the NLRB has made it clear that successorship clauses do not violate section 8(e) if narrowed in scope to apply only in situations where the entire business is sold to the successor.³⁹ These cases illustrate the distinction that while selling off some assets can fall within the scope of "doing business" referred to in section 8(e), a sale of the entire going concern is ceasing business, not doing business.

B. Enforceability Against Successors

1. Not binding absent consent

Successorship clauses have generally been held *not* to bind a successor without its consent to the substantive terms and conditions of a predecessor's collective bargaining agreement. Courts (and to a lesser extent the NLRB) have been fairly consistent in applying basic contract law—a party cannot be bound by a con-

35. *Machinists Local 954 v. Shawnee Indus., Inc.*, 224 F. Supp. 347, 352 (W.D. Okla. 1963); *Phoenix Brewery Corp. v. Brewery Workers Local 194*, 30 Lab. Arb. & Disp. Settl. 21 (1958) (Kates, Arb.). See also *MGM-Telestudios, Inc. v. IEW Local 1212*, 48 Lab. Arb. & Disp. Settl. 1267 (1967) (Wolff, Arb.).

36. *Drivers Local 75 v. Wisconsin Employee Relations Bd.*, 61 L.R.R.M. 2113 (Wis. 1965).

37. *National Maritime Union v. Commerce Tankers Corp.*, 457 F.2d 1127 (2d Cir. 1972). Section 8(e) defines and invalidates hot cargo agreements as follows:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and avoid

29 U.S.C. § 158(e) (1976).

38. *National Maritime Union (Vantage Steamship Corp.)*, 196 N.L.R.B. 1100 (1972).

39. *Local 814, Int'l Bhd. of Teamsters (Bader Bros. Warehouses)*, 225 N.L.R.B. 609 (1976); *District 71, Int'l Ass'n of Machinists (Harris Truck & Trailer Sales, Inc.)*, 224 N.L.R.B. 100 (1976); *Operating Engineers Local 701 (Cascade Employers Ass'n)*, 221 N.L.R.B. 751 (1975). See also *UMW (Lone Star Steel Co.)*, 231 N.L.R.B. 573 (1977).

tract to which it did not consent. Despite indications that federal labor policy could outweigh this contract principle in some successorship situations,⁴⁰ the Supreme Court clearly established in *NLRB v. Burns International Security Services, Inc.*⁴¹ that, absent consent, a successor is not bound by the predecessor's agreement, at least when no successorship clause is involved. Of course, if a successor either expressly consents to be bound by the predecessor's contract with a union or is nothing more than the alter ego of the predecessor, the successor is bound by the substantive terms of the unexpired collective bargaining agreement.⁴²

In 1974 the Supreme Court refused to enforce a successorship clause against a successor in *Howard Johnson Co. v. Detroit Local Joint Executive Board*.⁴³ Applying the successorship doctrine, the Court reasoned that the successor was neither bound to arbitrate the effect of the predecessor's contract nor to bargain with the union because it had renounced the unexpired labor contract and had hired over three-fourths of its employees from other sources.⁴⁴ A few earlier cases had also held that even the purchase of substantially all of a predecessor's assets did not give a successorship clause effect or impose any affirmative duties under the successorship doctrine if the successor had hired predominantly different work forces.⁴⁵

In *Emerald Maintenance, Inc. v. NLRB*⁴⁶ the Fifth Circuit refused to enforce a successorship clause against a successor who had obtained a service contract by competitive bidding even though it had hired over three-fourths of its employees from the predecessor's work force. The successor was only required to rec-

40. See *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550 (1964); *Detroit Local Joint Exec. Bd. v. Howard Johnson Co.*, 482 F.2d 489, 494 (6th Cir. 1973), *rev'd*, 417 U.S. 249 (1974); Comment, *Successor Corporation Subject to Labor Arbitration Agreement of Merged Corporation*, 17 SYRACUSE L. REV. 513, 513-14 (1966).

41. 406 U.S. 272 (1972).

42. Examples of alter ego cases include: *Crawford Door Sales Co.*, 226 N.L.R.B. 1144 (1976); *Bell Co.*, 225 N.L.R.B. 474 (1976); *Associated Transp. Co.*, 194 N.L.R.B. 62 (1971); *California Footwear Co.*, 114 N.L.R.B. 765 (1955). See also *NLRB v. Southport Petroleum Co.*, 315 U.S. 100 (1942); *NLRB v. Herman Bros. Pet Supply, Inc.*, 325 F.2d 68 (6th Cir. 1963); *NLRB v. Ozark Hardwood Co.*, 282 F.2d 1 (8th Cir. 1960); *Dickey v. NLRB*, 217 F.2d 652 (6th Cir. 1954); *NLRB v. Weirton Steel Co.*, 135 F.2d 494 (3d Cir. 1943).

43. 417 U.S. 249 (1974).

44. Only nine of Howard Johnson's 45 employees had been employed by the predecessor franchisee. *Id.* at 252.

45. *E.g.*, *Retail Store Employees Local 954 v. Lane's of Findlay, Inc.*, 260 F. Supp. 655 (N.D. Ohio 1966). See also *Tarr v. Street Elec. Ry. & Motor Coach Employees Div.* 1055, 73 Idaho 223, 250 P.2d 904 (1952) (same result even though some of predecessor's employees were retained).

46. 464 F.2d 698 (5th Cir. 1972).

ognize the predecessor's union and to bargain with it pursuant to the then very recent Supreme Court decision in *NLRB v. Burns International Security Services, Inc.*,⁴⁷ which had involved an almost identical fact situation except that the labor agreement considered in *Burns* contained no successorship clause. This factual difference, however, was insufficient to distinguish the two cases:

Burns compels this Court to hold that the union's petition for review [of the NLRB's refusal to enforce the successorship clause] cannot be sustained. First, a successor employer in the position of Emerald is not bound by the substantive provisions of a collective bargaining agreement, negotiated by a predecessor, to which the successor has not agreed or the obligations of which are not assumed.⁴⁸

The duty to bargain with a predecessor's union, without any obligation to honor a successorship clause, has also been applied by the NLRB to a successor to a franchise that retained the predecessor's entire work force.⁴⁹

Perhaps the deadliest blow to the enforceability of successorship clauses against successors was the Ninth Circuit's holding in *Bartenders & Culinary Workers Local 340 v. Howard Johnson Co.*⁵⁰ As in *Howard Johnson Co. v. Detroit Local Joint Executive Board*,⁵¹ the successor purchased the assets of the predecessor franchisee, except this time the successor retained practically the entire work force of the predecessor. The Ninth Circuit refused to enforce the successorship clause in light of the Supreme Court's holding in *Burns*,⁵² but recognized that the successor may be required under the successorship doctrine to submit to arbitration⁵³ in light of the High Court's earlier holding in *John Wiley & Sons v. Livingston*.⁵⁴ Any language in prior cases indicating that a successorship clause may be enforceable against a nonconsenting successor was declared by the Ninth Circuit to be for the most part inadvertent dicta and not controlling.⁵⁵

47. 406 U.S. 272 (1972).

48. *Emerald Maintenance, Inc. v. NLRB*, 464 F.2d at 701.

49. *See Goodyear Tire & Rubber Co.*, 217 N.L.R.B. 73, 78 (1975).

50. 535 F.2d 1160 (9th Cir. 1976).

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

52. 535 F.2d at 1162 (citing *NLRB v. Burns Int'l Security Servs.*, 406 U.S. 272 (1972)).

53. *Id.* at 1163.

54. 376 U.S. 543, 555 (1964) (arbitrator, not court, to determine whether any of the substantive terms of the agreement are binding on successor); note 80 *infra*.

55. 535 F.2d at 1163 n.4, 1164 n.6. These footnotes distinguish or explain, *seriatim*, language in *Wackenhut Corp. v. Plant Guard Workers Local 151*, 332 F.2d 954, 958 (9th

These cases clearly show that the existence of a successorship clause alone is insufficient to bind a successor to the substantive terms of a predecessor's collective bargaining agreement. Cases like *Emerald Maintenance* can be reconciled as instances where the new employer does not fall within the narrow definition of successor necessary for a successorship clause to apply.⁵⁶ However, the successors in *Howard Johnson* and *Bartenders & Culinary Workers* do fit the narrow definition, especially in the latter case where the predecessor's work force was almost entirely retained. Both courts nevertheless refused to enforce successorship clauses against the successors, apparently believing that the proper balance is struck by the successorship doctrine regardless of the existence of successorship clauses.⁵⁷

2. *Interplay with successorship doctrine*

While the two major strands of successorship doctrine developed in *NLRB v. Burns International Security Services, Inc.*⁵⁸ and *John Wiley & Sons v. Livingston*⁵⁹ appear to prevail over express successorship clauses, neither case actually involved such a clause. It is theoretically possible, however, for the existence of a successorship clause to affect the application of these two major strands of successorship doctrine.

a. *Burns—duty to bargain.* Citing a series of NLRB decisions, the Supreme Court in *Burns* held that "although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them."⁶⁰ The duty to bargain can take

Cir. 1964); *Teamsters Local 524 v. Billington*, 402 F.2d 510 (9th Cir. 1968); *Teamsters Local 249 v. Bill's Trucking, Inc.*, 493 F.2d 956 (3d Cir. 1974); *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 305 (1972); *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 258 n.3 (1974).

56. It can be argued that since the transfer of the business to *Emerald Maintenance* was by competitive bidding instead of by a voluntary sale from the predecessor, the successorship clause in the predecessor's contract is irrelevant. For further discussion of the applicability of successorship clauses to an involuntary transfer of a business, see text accompanying notes 112-16 *infra*.

57. For a discussion of the balance struck by this doctrine, see *Bartenders & Culinary Workers Local 340 v. Howard Johnson Co.*, 535 F.2d 1160 (9th Cir. 1976).

58. 406 U.S. 272 (1972).

59. 376 U.S. 543 (1964).

60. 406 U.S. at 284 (citing *Rohlik, Inc.*, 145 N.L.R.B. 1236, 1242 n.15 (1964); *Slater Sys. Md., Inc.*, 134 N.L.R.B. 865, 866 (1961); *General Extrusion Co.*, 121 N.L.R.B. 1165, 1168 (1958); *Jolly Giant Lumber Co.*, 114 N.L.R.B. 413, 414 (1955); *International Long-*

two forms: (1) the duty to recognize the predecessor's union as bargaining agent after initial hiring or (2) the duty to bargain with that union over the initial terms of hiring before the hiring takes place. Although it was not clear when *Burns* first came down,⁶¹ subsequent cases have held that the successor must recognize the union and henceforth bargain with it regarding any changes in terms and conditions of employment only if a majority of the successor's work force had been employees of the predecessor and represented by the union.⁶² *Burns* also hypothesized that if "it is perfectly clear that the new employer plans to retain all of the employees in the unit . . . it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes [initial] terms [of employment]."⁶³ This strand of the successorship doctrine—requiring a nonconsenting successor to bargain without binding it to the contract—applies in cases factually analogous to *Burns*;⁶⁴ even an express successorship clause will be subordinate.⁶⁵

The *Burns*-like cases in which a successorship clause may make a difference are those involving an implied consent of the successor employer to be bound by the substantive terms of a predecessor's labor contract. This is an express exception to the general rule in *Burns* and can be determined as an issue of fact.⁶⁶ A successor's knowledge of the existence of a successorship clause could tip the scales toward finding an implied adoption and, by analogy to express adoption, the successor could be held to all the

shoremen's Local 16 (Juneau Spruce Corp.), 82 N.L.R.B. 650, 658-59 (1949), *enforced*, 189 F.2d 177 (9th Cir. 1951), *aff'd*, 342 U.S. 237 (1952)).

61. See 406 U.S. at 277-81 (frequent references to "majority"); Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759, 771-76 (1975).

62. *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609 (9th Cir. 1977); *NLRB v. Band-Age, Inc.*, 534 F.2d 1 (1st Cir. 1976). Cf. *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249 (1974) (only nine of successor's 45 employees had worked for predecessor).

63. 406 U.S. at 294-95. Subsequent cases have illustrated in what instances it will and will not be "perfectly clear." Compare *Spitzer Akron, Inc. v. NLRB*, 540 F.2d 841 (6th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977); *NLRB v. Bachrodt Chevrolet Co.*, 468 F.2d 963 (7th Cir. 1972); *C.M.E., Inc.*, 225 N.L.R.B. 514 (1976); and *Ivo H. Denham*, 206 N.L.R.B. 659 (1973) with *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977) and *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974).

64. E.g., *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896 (5th Cir. 1974) (discussed at notes 28-30 and accompanying text *supra*); *Emerald Maintenance, Inc. v. NLRB*, 464 F.2d 698 (5th Cir. 1972) (discussed at notes 46-48 and accompanying text *supra*).

65. See, e.g., *Emerald Maintenance, Inc. v. NLRB*, 464 F.2d 698 (5th Cir. 1972); text accompanying notes 46-49 *supra*.

66. 406 U.S. at 291; Slicker, *supra* note 5, at 1099-100.

substantive terms of that labor contract,⁶⁷ even those of which the successor is unaware.⁶⁸

In 1965 a state court held that a successor's knowledge of the successorship clause coupled with its contribution to the union's health, welfare, and pension fund was sufficient to support the jury's finding that the successor had adopted the predecessor's collective bargaining agreement with the union.⁶⁹ Similarly, in 1978 a federal district court held that a successor employer had implicitly assumed the predecessor's labor agreement by failing to disclaim the labor contract and successorship clause, and by following most of the other terms of the existing collective bargaining agreement.⁷⁰ In determining whether the successor fell into the implied adoption exception mentioned in *Burns*, these courts considered the usual factors of (1) the form of the transfer of the business,⁷¹ (2) whether the successor had continued to honor some or all of the labor contract's terms,⁷² and (3) whether the successor had disclaimed assumption of the collective bargaining agreement.⁷³ In addition, the existence of a successorship clause should be recognized as a significant factor in applying the exception and binding a successor to the substantive terms of a predecessor's labor agreement.

67. *E.g.*, *Stockton Door Co.*, 218 N.L.R.B. 1053 (1975); *Patton Throwing Mills, Inc. v. Textile Workers Union*, 13 Lab. Arb. & Disp. Settl. 614 (1949) (Karpinsky, Arb.).

68. *E.g.*, *Spatex Corp. v. Textile Workers Local 770*, 11 Lab. Arb. & Disp. Settl. 1076 (1949) (Maggs, Arb.).

69. *Horn Transfer Lines, Inc. v. Morgan*, 61 L.R.R.M. 2161, 2162 (Ky. 1965).

70. *General Truck Drivers Local 92 v. Strabley Bldg. Supply, Inc.*, [1978] LAB. L. REP. (CCH) (84 Lab. Cas. 18,681) ¶ 10,694, at 18,685-86 (N.D. Ohio).

71. "[I]n a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract. *Cf. Oilfield Maintenance Co.*, 142 NLRB 1384 (1963)." *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 291 (1972).

72. Courts have held a successor bound to the predecessor's collective bargaining agreement if nearly all the terms and conditions of the agreement had been continued by the successor. *See NLRB v. Pine Valley Div. of Ethan Allen, Inc.*, 544 F.2d 742 (4th Cir. 1976); *General Truck Drivers Local 92 v. Strabley Bldg. Supply, Inc.*, [1978] LAB. L. REP. (CCH) (84 Lab. Cas. 18,681) ¶ 10,694 (N.D. Ohio). *But see Virginia Sportswear, Inc.*, 226 N.L.R.B. 1296 (1976). Some cases have held that honoring even a few of the terms is sufficient to bind the successor to the entire agreement. *See Eklund's Sweden House Inn, Inc.*, 203 N.L.R.B. 413 (1973); *Horn Transfer Lines, Inc. v. Morgan*, 61 L.R.R.M. 2161 (Ky. 1965).

73. In *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 251-52 (1974), the Supreme Court emphasized that the successor was not bound because, at least in part, it had expressly refused to assume the existing labor contract. But, in *Eklund's Sweden House Inn, Inc.*, 203 N.L.R.B. 413 (1973), the NLRB held that the disclaimer was not enough to halt a finding of implied adoption when some of the terms of the labor contract were continued by the successor.

b. *Wiley—duty to arbitrate.* Recent cases demonstrate that the Supreme Court's 1964 holding in *John Wiley & Sons v. Livingston*⁷⁴ is still good law,⁷⁵ despite speculation that it may have been overruled in effect by *Burns* in 1972.⁷⁶ The Court in *Wiley* decided that even without a successorship clause "a corporate employer must arbitrate with a union under a bargaining agreement between the union and another corporation which has merged with the employer."⁷⁷

In successorship cases involving "the continuity required by *Wiley*,"⁷⁸ an arbitrator is placed in a new and unfamiliar role.⁷⁹ He must "decide which provisions of the agreement will bind the nonconsenting party; he does not construe existing terms, but decides whether there *are* terms, and if so, what they are."⁸⁰ The courts have set no standards or guidelines for an arbitrator to follow⁸¹ except that any term imposed on the successor should not

74. 376 U.S. 543 (1964).

75. See, e.g., *Local 1115, Joint Bd. Nursing Home & Hosp. Employees v. B & K Invs., Inc.*, 436 F. Supp. 1203, 1208 (S.D. Fla. 1977).

76. The opinion in *Burns* itself sought to distinguish *Wiley*, 406 U.S. at 285-87, but the Supreme Court confessed in *Howard Johnson* "that the reasoning of *Wiley* was to some extent inconsistent with our more recent decision in *NLRB v. Burns International Security Services*," 417 U.S. at 254 (citation omitted). See also *Severson & Willcoxon*, *supra* note 5, at 813-15; *Slicker*, *supra* note 5, at 1097-102.

77. 376 U.S. at 544 (for the arbitrator's award see *Interscience Encyclopedia, Inc. v. District 65, Retail, Wholesale & Dep't Store Union*, 55 Lab. Arb. & Disp. Settl. 210 (1970) (Roberts, Arb.)).

78. *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 258 n.3 (1974).

79. See Note, *The Successor Employer's Duty to Arbitrate: A Reconsideration of John Wiley & Sons, Inc. v. Livingston*, 82 HARV. L. REV. 418, 426 (1968).

80. Comment, *Contractual Successorship: The Impact of Burns*, 40 U. CHI. L. REV. 617, 631 (1973) (footnote omitted). The court or the NLRB must decide whether a new employer is a successor employer and, if so, to what degree in order to determine what duties are imposed. If a court decides there is sufficient continuity in the successor under *Wiley*, it can require the successor to submit to an arbitrator the question of which provisions of the predecessor's collective bargaining agreement survive the transfer. However, a federal court may not go the next step and decide which terms are binding on the successor. See *Brotherhood of Ry. & S.S. Clerks v. United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963). Once a court determines that a successor is subject to arbitration, the arbitrator can decide whether procedural prerequisites to arbitration under the union contract have been satisfied, *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964), and then decide which labor contract terms to impose on the successor, *United Steelworkers v. Reliance Universal Inc.*, 335 F.2d 891 (3d Cir. 1964); *Food Employees Local 590 v. National Tea Co.*, 346 F. Supp. 875, 881 (W.D. Pa. 1972); *In re Swift & Co.*, 8 Lab. Arb. & Disp. Settl. 1065 (N.Y. Sup. Ct. 1947). Arbitration cannot be imposed on a successor until a court has acted, *In re Hart Sales Corp.*, 56 L.R.R.M. 2901 (N.Y. Sup. Ct. 1964), and afterward, federal courts are powerless to enjoin the arbitration, *Rosenberg v. Ladies' Garment Workers Local 109*, 53 Lab. Cas. 65,300 (M.D. Pa. 1966).

81. Comment, *Successor Corporation Subject to Labor Arbitration Agreement of Merged Corporation*, 17 SYRACUSE L. REV. 513, 519-20 (1966).

be "unreasonable or inequitable."⁸² *Wiley* suggests that the enforceability of seniority, contribution to pension funds, job security, severance pay, and vacation pay provisions is proper for arbitration.⁸³ Dues checkoff provisions have also been imposed on successor employers by arbitrators.⁸⁴ In fact, all provisions of a predecessor's labor contract could be imposed by an arbitrator⁸⁵ and presumably enforced by a court according the usual deference to an arbitrator's decision.⁸⁶

Successorship clauses superimposed on this *Wiley* strand of the successorship doctrine make a bootstrap possible. For example, in *Local 1115, Joint Board Nursing Home & Hospital Employees v. B & K Investments, Inc.*⁸⁷ the union attempted to enforce successorship clauses against the successor, B & K Investments. The court was to determine whether the successor "was either bound by the collective bargaining agreements or had a duty to arbitrate under them."⁸⁸ Relying on *Burns*, the court refused to impose the labor agreement,⁸⁹ but did compel the successor to arbitrate "[w]hether or not any of the substantive terms of the agreement are binding" because, following *Wiley*, "there is such substantial continuity . . . of identity in the work force."⁹⁰ A simple bootstrap past the court's holding regarding *Burns* could be accomplished by an arbitrator's finding that the successorship clause is one of the provisions of the collective bargaining agreement that has survived the transfer of the business to the successor.⁹¹

82. *United Steelworkers v. Reliance Universal Inc.*, 335 F.2d 891, 895 (3d Cir. 1964).

83. 376 U.S. at 552-55; see *Interscience Encyclopedia, Inc. v. District 65, Retail, Wholesale & Dep't Store Union*, 55 Lab. Arb. & Disp. Settl. 210 (1970) (Roberts, Arb.).

84. *E.g.*, *United Steelworkers v. United States Gypsum Co.*, 492 F.2d 713, 719 (5th Cir. 1974).

85. Comment, *Contractual Successorship: The Impact of Burns*, 40 U. CHI. L. REV. 617, 617-18 (1973). Experience shows, however, that arbitrators have often refused to bind a successor to even the vacation pay benefits of a predecessor. See *Merchants Transfer Co. v. Teamsters Local 639*, 77-2 Lab. Arb. Awards 5644 (1977) (Daly, Arb.); *National Beverage Co. v. Brewery Workers Local 111*, 63 Lab. Arb. & Disp. Settl. 186 (1974) (Sisk, Arb.). See also *New England Lead Burning Corp. v. Lodge 27, Int'l Bhd. of Boilermakers*, 58 Lab. Arb. & Disp. Settl. 1254 (1972) (Keefe, Arb.); *M & T Co. v. International Ass'n of Machinists*, 69-1 Lab. Arb. Awards 3278 (1968) (Caraway, Arb.).

86. See generally *The Steelworkers Trilogy*: *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

87. 436 F. Supp. 1203 (S.D. Fla. 1977).

88. *Id.* at 1206.

89. *Id.* at 1207-08.

90. *Id.* at 1209.

91. It is not known what the arbitrator has actually done (or will do) in this case, but the potential for bootstrapping is clearly demonstrated here by the union's timely

On several occasions, arbitrators have found successorship clauses binding on successors.⁹² However, since the *Burns* decision in 1972, no arbitrator has followed these earlier awards.⁹³ In fact, two cases just prior to *Burns* demonstrate that there is little possibility of a bootstrap past *Burns*' holding that a successor is not normally bound by the substantive terms of a predecessor's collective bargaining agreement.

In *Theel v. Four Lakes Concrete Corp.*⁹⁴ the court refused to overturn an arbitrator's decision to compel the successor employer to dovetail seniority for the predecessor's employees it had hired. The arbitrator relied on a successorship clause for his decision regarding seniority, but did not give full effect to the wording of the clause itself. Almost simultaneously with *Theel*, the court in *Andrus v. Convoy Co.*⁹⁵ refused to overturn an arbitrator's decision denying dovetailing of seniority for former employees of the predecessor then employed by the successor. The successorship clause was found by the arbitrator to have no effect on the successor employer. The existence of a successorship clause, therefore, does not lead arbitrators to a carte blanche imposition of the predecessor's labor agreement, but can influence the arbitrator's analysis of each provision of the agreement in his piecemeal decision of which provisions should survive the transfer of the business to the successor.

3. California Labor Code § 1127

When it became fairly clear to the California Legislature that "[e]xisting law [did] not impose the terms and conditions of collective bargaining agreements between employers and labor

attempt to enforce successorship duties. A union is deemed to have waived its right to arbitrate the effect of a successorship clause, however, if it fails to proceed in good faith to make a timely demand to arbitrate. *Russom v. Sears, Roebuck & Co.*, 415 F. Supp. 792, 798 (E.D. Mo. 1976), *aff'd*, 558 F.2d 439 (8th Cir. 1977).

92. *Lake States Leasing Corp. v. General Teamsters Local 126*, 46 Lab. Arb. & Disp. Settl. 935 (1966) (Gundermann, Arb.); *Walker Bros. v. IEW Local 1088*, 41 Lab. Arb. & Disp. Settl. 844, 850-56 (1963) (Crawford, Arb.) (discussing numerous arbitration awards binding successors to predecessors' labor contracts); *Sigman Meat Co. v. Butcher Workmen Local 641*, 40 Lab. Arb. & Disp. Settl. 540 (1963) (Seligson, Linquist, & McCabe, Arb.).

93. As soon as certiorari was granted in *Burns*, the reliability of these earlier arbitration awards was thought to be clouded. See *Machinists Dist. 147 v. Northeast Airlines, Inc.*, 473 F.2d 549, 553 (1st Cir. 1972).

94. 64 Lab. Cas. 20,428 (W.D. Wis. 1971).

95. 65 Lab. Cas. 21,023 (N.D. Cal. 1971), *aff'd*, 480 F.2d 604 (9th Cir.), *cert. denied*, 414 U.S. 989 (1973). See also *Sanborn's Motor Express, Inc. v. Truck Drivers Local 340*, 44 Lab. Arb. & Disp. Settl. 346 (1965) (Wallen, Arb.).

organizations upon employers succeeding to contracting employers' businesses,"⁹⁶ section 1127 was added to the California Labor Code.⁹⁷ The section provides that "[w]here a collective bargaining agreement . . . contains a successor clause, such clause shall be binding upon and enforceable against any successor employer."⁹⁸ The impact of section 1127, however, will be very slight because the pervasive nature of federal labor law coverage leaves relatively few situations to which the section can apply.⁹⁹

California has been the only jurisdiction to legislate the enforceability of successorship clauses, but no court has construed section 1127 or tested its validity.¹⁰⁰ Federal statutes requiring a successor to certain federally funded projects to maintain the wages and benefits established by the predecessor's labor con-

96. 1976 Cal. Stats. Summary Digest 277.

97. Act of Sept. 19, 1976, ch. 1057, 1976 Cal. Stats. 4686 (codified at CAL. LABOR CODE § 1127 (West Supp. 1978)). The California Legislature took up the issue right after the Ninth Circuit Court of Appeals, while sitting in California, refused to enforce a successorship clause against the successor in *Bartenders & Culinary Workers Local 340 v. Howard Johnson Co.*, 535 F.2d 1160 (9th Cir. 1976). See text accompanying notes 50-55 *supra*.

98. CAL. LAB. CODE § 1127(a)-(b) (West Supp. 1978):

Where a collective bargaining agreement between an employer and a labor organization contains a successor clause, such clause shall be binding upon and enforceable against any successor employer who succeeds to the contracting employer's business until the expiration date of the agreement stated in the agreement. No such successor clause shall be binding upon or enforceable against any successor employer for more than three years from the effective date of the collective bargaining agreement between the contracting employer and the labor organization.

As used in this section, "successor employer" means any purchaser, assignee, or transferee of a business the employees of which are subject to a collective bargaining agreement, if such purchaser, assignee, or transferee conducts or will conduct substantially the same business operation, or offer the same service, and use the same physical facilities, as the contracting employer.

99. Section 1127 on its face does not apply "to any employer who is subject to the National Labor Relations Act." CAL. LAB. CODE § 1127(c) (West Supp. 1978):

This section shall not apply to a receiver or trustee in bankruptcy of any contracting employer who has gone into receivership or bankruptcy, or to any employer who acquires a business from a receiver or trustee in bankruptcy, or to any employer which is a public entity, or to any employer who is subject to the National Labor Relations Act, Agricultural Labor Relations Act of 1975, or the Railway Labor Act.

This severe restriction is necessary to avoid running afoul of federal preemption. See *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 245-47 (1962); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *California State Council of Carpenters v. Associated Gen. Contractors*, 404 F. Supp. 1067, 1072 (N.D. Cal. 1975); *Butchers Local 532 v. Farmers Mkts.*, 67 Cal. App. 3d 905, 910, 136 Cal. Rptr. 894, 897 (1977); *Holayter v. Smith*, 29 Cal. App. 3d 326, 332-34, 104 Cal. Rptr. 745, 749-51 (1972).

100. The fact that there are no reported cases involving § 1127 in the years since its enactment is further evidence of how rarely it is applicable.

tract¹⁰¹ illustrate a public policy to support provisions like section 1127.¹⁰² Moreover, collective bargaining agreements are entitled to special consideration in light of labor law policy that can override the basic contract principle of mutual consent in some instances.¹⁰³ These factors must be weighed against the belief of courts generally that the judicially created successorship doctrine strikes the proper balance in determining the extent of a successor's labor obligations regardless of the existence of a successorship clause.¹⁰⁴

IV. EFFECT ON PREDECESSOR EMPLOYERS

Some of the decisions refusing to enforce successorship clauses against nonconsenting successors have suggested that enforcement should be sought against predecessor employers instead.¹⁰⁵ The successors' defense of no consent is not available to predecessors since they are parties to the collective bargaining contract. A successorship clause may explicitly obligate the predecessor to make assumption of the labor contract a mandatory condition of the sale of the business¹⁰⁶ or a similar duty can be inferred from a successorship clause with more general language.¹⁰⁷

101. *E.g.*, 41 U.S.C. § 353(c) (1976) (Government Service Contract Labor Standards); 49 U.S.C. § 1609(c) (1970) (Urban Mass Transportation Labor Standards). Neither of these provisions depends on the existence of a successorship clause in the predecessor's collective bargaining agreement.

102. Broad police powers are available to state legislatures. "Under the expanded conception, the police power means the general power to preserve and promote the public welfare, even at the expense of private rights." B. SCHWARTZ, *CONSTITUTIONAL LAW* 44 (1972) (citation omitted). The focus of police power has evolved from "*sic utere tuo ut alienum non laedas*" to "public health, safety and morals" and finally to "public welfare". See *id.* at 42-45.

103. Note 40 *supra*.

104. Regarding state regulation of labor, the Supreme Court has held that state labor laws must "not run afoul of some specific federal constitutional prohibition, or of some valid federal law." *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 535, 536 (1949). The issue, therefore, is whether the judiciary's successorship doctrine is "valid federal law" and, if so, whether § 1127 of the California Labor Code "run[s] afoul" of it.

105. *E.g.*, *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 257-58 & n.3 (1974).

106. See, *e.g.*, note 10 and accompanying text *supra*.

107. See, *e.g.*, *Bressette v. International Talc Co.*, 527 F.2d 211, 214-15 (2d Cir. 1975). See also CAL. LAB. CODE § 1127(d) (West Supp. 1978):

An employer who is a party to a collective bargaining agreement containing a successor clause has the affirmative duty to disclose the existence of such agreement and such clause to any successor employer. Such disclosure requirement shall be satisfied by including in any contract of sale, agreement to pur-

As with successors, a successorship clause will apply to a particular predecessor employer only if the entire business is transferred. In addition, the applicability of a successorship clause is limited to a voluntary transfer of the business.

If a predecessor employer breaches a successorship clause by not binding its successor to the existing labor contract, there are two possible remedies. In some cases it may be appropriate for the union or employees to recover damages from the predecessor, but this remedy is often inadequate. An injunction to halt the transfer of the business to the successor is also possible, but rarely granted. Practically, an injunction is a hollow remedy after a sale of the business has been consummated and courts have often considered even a timely injunction prior to the sale to be an unreasonable restraint on alienation.¹⁰⁸

A. *Applicability to Predecessors*

As previously discussed,¹⁰⁹ successorship clauses can apply only to situations where a transfer of the entire business is contemplated. The first case to invalidate a successorship clause covering the transfer of less than all the predecessor's assets actually involved a defendant predecessor rather than a successor. The union in *National Maritime Union v. Commerce Tankers Corp.*¹¹⁰ attempted to apply and enforce a successorship clause against a predecessor employer who was selling one of its ships without imposing the labor contract on the buyer. The court held, in effect, that the hot cargo prohibition in section 8(e) of the National Labor Relations Act¹¹¹ sets one specific limit on the applicability of successorship clauses to predecessor employers transferring less than their entire businesses.

Even when the entire business is being transferred to the successor, a successorship clause may not apply to a predecessor if the transfer is involuntary. Under the successorship doctrine, which has essentially preempted the applicability and enforceability of successorship clauses against successors, the form of the transfer is largely irrelevant.¹¹² With regard to predecessors, how-

chase, or any similar instrument of conveyance, a statement that the successor employer is bound by such successor clause as provided for in the collective bargaining agreement.

108. See text accompanying notes 145-51 *infra*.

109. See text accompanying notes 37-39 *supra*.

110. 457 F.2d 1127 (2d Cir. 1972).

111. 29 U.S.C. § 158(e) (1976) (for pertinent excerpt, see note 37 *supra*).

112. See note 33 *supra*.

ever, the form of the transfer can be critical.

Since there is no sales agreement in an involuntary transfer of the business, it would be ludicrous to sue the predecessor under a successorship clause for failing to make assumption of the existing labor contract a condition of the transfer. For example, the *Burns*-like predecessor in *Emerald Maintenance, Inc. v. NLRB*¹¹³ had no power to impose the union contract on its successor because the successor had won the service contract by competitive bidding without ever meeting or negotiating face to face with the predecessor.¹¹⁴ A foreclosing creditor¹¹⁵ or a successor who picks up the business after a hiatus¹¹⁶ also appears to be sufficiently removed from the predecessor to thwart any action against the predecessor for damages or an injunction.

B. Enforceability Against Predecessors

1. Damages from predecessor employers

While some successorship clauses specifically state that a predecessor must pay damages to the union if it fails to bind its successor,¹¹⁷ most do not and any remedy must be sought through an arbitrator or a court. The tendency has been for courts to defer to arbitrators, merely holding that a predecessor employer is still obligated to arbitrate the question even if it has gone out of business.¹¹⁸ The Supreme Court in *Howard Johnson* mentioned that the union had a "realistic remedy" because the predecessors had agreed "to arbitrate the extent of their liability to the Union and their former employees."¹¹⁹ The remedy was considered

113. 464 F.2d 698 (5th Cir. 1972) (discussed in text accompanying notes 46-48 *supra*).

114. If anyone would be the logical target for a suit, it would be the third party awarding the contract, but that third party has not agreed to be bound by a successorship clause.

115. See *Bohack Corp. v. Truck Drivers Local 807*, 431 F. Supp. 646 (E.D.N.Y.), *aff'd*, 567 F.2d 237 (2d Cir. 1977). See also *In re Penn Fruit Co.*, 92 L.R.R.M. 3548 (E.D. Pa. 1976); *REA Express, Inc. v. Brotherhood of Ry., Airline & S.S. Clerks*, 92 L.R.R.M. 3244 (S.D.N.Y. 1976); CAL. LAB. CODE § 1127(c) (West Supp. 1978) (for full text, see note 99 *supra*).

116. See cases cited in Coughlin & Van de Kerckhove, *supra* note 1, at 32, 41-42 n.19. See also *Office Employees Local 153 v. Ward-Garcia Corp.*, 190 F. Supp. 448 (S.D.N.Y. 1961); *Industrial Catering Co.*, 224 N.L.R.B. 972 (1976).

117. See, e.g., *Local 814, Int'l Bhd. of Teamsters (Bader Bros. Warehouses, Inc.)*, 225 N.L.R.B. 609, 610-11 (1976).

118. E.g., *Bressette v. International Talc Co.*, 527 F.2d 211 (2d Cir. 1975) (distinguishing *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), and *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 312 F.2d 181 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963)).

119. 417 U.S. at 257-58.

"realistic" because the predecessors had continued "as viable entities with substantial retained assets."¹²⁰

*Leona Lee Corp. v. Heat & Frost Insulators Local 66*¹²¹ presented an arbitrator with the issue of damages when the predecessor sold its insulation business without binding the successor to the existing collective bargaining agreement in violation of a successorship clause. The arbitrator awarded the union damages against the predecessor¹²² to compensate for the union's loss of bargaining power, its impaired standing with union members, and its loss of income from dues, assessments, and the like.¹²³ The arbitrator could find no undue hardship in imposing this award because the predecessor was still a going concern doing business in the industry under a different name.

The arbitration award in *Dawn Farms Corp. v. Teamsters Local 584*¹²⁴ illustrates at least one problem associated with holding a predecessor liable for failing to obligate a successor employer to comply with a successorship clause. Dawn Farms' dairy and retail milk route business was bound by a collective bargaining agreement containing a successorship clause when it sold its entire business to Merlin Dairies. In an attempt to comply with the successorship clause, Dawn Farms included in the sales agreement a provision that the successor was to sign the existing collective bargaining agreement when requested to by the union.¹²⁵ When the successor subsequently refused to sign the union contract, the union demanded damages from the predecessor. The arbitrator concluded that the predecessor had violated the successorship clause and should be liable to the union for damages, but because of the predecessor's "good faith and the fact that it is no longer in the Milk Industry," the arbitrator exercised his "discretion so as to disallow a monetary Award."¹²⁶ This distin-

120. *Id.* at 257.

121. 60 Lab. Arb. & Disp. Settl. 1310 (1972) (Gorsuch, Arb.) (the successorship clause was actually contained in a settlement agreement between the employer and union rather than in the collective bargaining agreement itself).

122. *Id.* The arbitrator held the predecessor and successor employers jointly and severally liable for the award, finding the successor to be the alter ego of the predecessor. The successor's liability in this case is vicarious only; successors are not normally held liable for damages in such situations. See text accompanying notes 40-42 *supra*.

123. *Id.* The arbitrator denied the union recovery for payments to picketers, expenses incurred in patrolling the breach of the agreement, and attorneys' fees.

124. 45 Lab. Arb. & Disp. Settl. 1075 (1965) (Wolff, Arb.).

125. *Id.* at 1075.

126. *Id.* at 1076. The arbitrator in essence suggested the union pursue remedies against the successor instead, referring to *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

guishes the situation from that in *Leona Lee Corp.* where the predecessor was still doing business in the insulation industry under a different name.

Another problem with a suit for damages is that a "monetary award is generally acknowledged to be an inadequate remedy for loss of employment."¹²⁷ The damages awarded in *Leona Lee Corp.* were to compensate the union, not the employees. Of course, ousted employees of the predecessor employer have the right to sue for damages, "but the money damages remedy fails to recognize that the employee interest involved in the successorship context is the preservation of jobs. Thus, even if a money award could compensate the employees for their economic loss, it cannot adequately protect their other interests."¹²⁸

2. Enjoining the sale of the business

After mentioning the possibility of a monetary award against the predecessor in *Howard Johnson*, the Supreme Court noted that "[t]he Union apparently did not explore another remedy which might have been available to it prior to the sale, i.e., moving to enjoin the sale to Howard Johnson on the ground that this was a breach by the [predecessor] of the successorship clauses in the collective-bargaining agreements."¹²⁹ In other words, if the predecessor fails to give effect to a successorship clause, the union or the predecessor's employees can seek an injunction to halt the imminent sale of the business until the predecessor binds the successor to the existing labor contract.

a. *Examples of injunctions issued.* The Supreme Court has implied that *National Maritime Union v. Commerce Tankers Corp.*¹³⁰ establishes a precedent for enjoining the sale of a business if the sale would violate a successorship clause.¹³¹ In *Commerce Tankers*, the district court did enjoin the employer's sale of one of its ships because an arbitrator had decided that to make the transfer without binding the buyer to the union contract would violate the successorship clause. The court agreed with the arbitrator "that injunctive relief . . . is the only kind truly effective

127. Severson & Willcoxon, *supra* note 5, at 839 (footnote omitted); see *National Maritime Union v. Commerce Tankers Corp.*, 325 F. Supp. 360, 366 (S.D.N.Y. 1971), *vacated on other grounds*, 457 F.2d 1127 (2d Cir. 1972).

128. Severson & Willcoxon, *supra* note 5, at 839.

129. 417 U.S. at 258 n.3.

130. 325 F. Supp. 360 (S.D.N.Y. 1971), *vacated on other grounds*, 457 F.2d 1127 (2d Cir. 1972).

131. *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. at 258 n.3.

. . . . If the [predecessor] may simply shuck off the vessel and the collective agreement, the position of the Union (and its members) can never be restored or be accurately compensated for in money terms."¹³² Ultimately, the injunction was vacated and the predecessor was not required to bind the successor to the union contract because the particular successorship clause was found on appeal to be an invalid hot cargo agreement.¹³³

Injunctions less drastic than the initial order in *Commerce Tankers* are also available based on the existence of a successorship clause in a collective bargaining agreement. In *NLRB v. United Industrial Workers of the Seafarers International Union*¹³⁴ the union sought to enforce a successorship clause that merely bound the successor to recognize the predecessor's union.¹³⁵ A preliminary injunction restraining transfer of the assets to the successor was granted on appeal,¹³⁶ but when the case was tried on the merits the lack of continuity in the work force excused the successor from any successorship doctrine obligations.¹³⁷ Another less drastic injunction based on a successorship clause was issued in *Food Employees Local 590 v. National Tea Co.*¹³⁸ There the condition necessary to end the preliminary injunction was completion of arbitration as to the effect of the successorship clause on the proposed closing of the predecessor's business.

Cases issuing the broader type of injunction originally granted in *Commerce Tankers* are not to be found. The closest a court has come to enjoining a transfer of a business to give effect to a successorship clause is *Local 1115, Nursing Home & Hospital Employees v. B & K Investments, Inc.*¹³⁹ Although the injunction was denied ostensibly because a sale of the business was not "imminent," the court discussed the practical problems associated with ever granting such a broad injunction based on a successorship clause.¹⁴⁰

b. Timing problems. Although unions or employees may be able to enjoin the predecessor's sale of the business, this offers

132. 325 F. Supp. at 366.

133. *National Maritime Union v. Commerce Tankers Corp.*, 457 F.2d 1127 (2d Cir. 1972); see notes 37-39 and accompanying text *supra*.

134. 422 F.2d 59 (5th Cir. 1970).

135. See text accompanying notes 13-14 *supra*.

136. *United Indus. Workers of the Seafarers Int'l Union v. Board of Trustees of the Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965).

137. 422 F.2d 59 (5th Cir. 1970).

138. 346 F. Supp. 875 (W.D. Pa. 1972).

139. 436 F. Supp. 1203 (S.D. Fla. 1977).

140. *Id.* at 1209.

them little solace if they do not learn of the sale until it is a fait accompli.¹⁴¹ An employer may have many legitimate reasons for working out a sales agreement behind closed doors. Once the sale is completed, it is too late for the union to enjoin the sale or for the employees to complain that the union failed to fairly represent them.¹⁴²

One way of preserving the opportunity to enjoin a sale of a business would be to include language in the successorship clause requiring the predecessor employer to give the union advance notice of any pending sale. Upon receiving notice the union would have the right to demand more details¹⁴³ and would presumably be able to learn whether the predecessor intends to honor the successorship clause in sufficient time to seek an injunction. Such language could be patterned after the court's order in *B & K Investments*. While denying an injunction on the ground that the sale in violation of the successorship clause was not imminent, that court did order the employer "to give ten (10) days prior written notice by registered mail to the Union of any pending closing of a transaction directly or indirectly involving the sale, (assets or stock), lease, merger or any other disposition of the [business]."¹⁴⁴

c. *Unreasonable restraint on alienation*. Without pausing to label it as such, the Supreme Court made a brand of restraint-on-alienation analysis applicable to successorship cases when it stated in *Burns* that "[s]addling [a successor] employer with the terms and conditions of employment contained in the old collective-bargaining contract may make [desired] changes impossible and may discourage and inhibit the transfer of capital."¹⁴⁵ The restrictive effect of collective bargaining agreements has been expressly recognized by several federal district courts that have recently held that receivers may terminate union contracts covering businesses in bankruptcy.¹⁴⁶ In each case the deci-

141. See Severson & Willcoxon, *supra* note 5, at 838.

142. See *Russom v. Sears, Roebuck & Co.*, 558 F.2d 439 (8th Cir. 1977).

143. *Cf. NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967) (employer has a general obligation to provide information the union needs to carry out union functions).

144. 436 F. Supp. at 1210.

145. 406 U.S. at 288.

146. *Bohack Corp. v. Truck Drivers Local 807*, 431 F. Supp. 646 (E.D.N.Y.), *aff'd*, 567 F.2d 237 (2d Cir. 1977); *In re Penn Fruit Co.*, 92 L.R.R.M. 3548 (E.D. Pa. 1976); *REA Express, Inc. v. Brotherhood of Ry., Airline & S.S. Clerks*, 92 L.R.R.M. 3244 (S.D.N.Y. 1976). See also *All State Factors*, 205 N.L.R.B. 1122 (1973) (requiring a finance company in possession to bargain with the union but not holding it to the terms of the debtor's union contract); CAL. LAB. CODE § 1127(c) (West Supp. 1978) (for full text, see note 99 *supra*).

sion was based on a bankruptcy judge's findings that (1) the contract was onerous and burdensome and (2) equity favored termination of the agreement.¹⁴⁷

In *B & K Investments* the court refused to enjoin possible sales of the business in violation of the successorship clause because no sale was imminent and because the present employer "should be free to offer the [business] on the market unfettered by the restraints of a Court Order which would certainly inhibit the ability of [the employer] to find a purchaser."¹⁴⁸ Similarly, in *Machinists District 147 v. Northeast Airlines, Inc.*¹⁴⁹ the court refused to enjoin a merger pending arbitration as to the effect of a successorship clause in large part because an injunction would have devastated the merger.

Although clouded by some additional issues, a similar conclusion was reached in *Teamsters Local 5 v. Pharmacies, Inc.*,¹⁵⁰ where the court refused to enjoin the sale of a chain of pharmacies despite disregard of the successorship clause in the unexpired labor agreement. The facts of the case highlight the precise problem: a liquidator had been appointed but his "efforts to sell the various store units of the business, either to a single purchaser or to separate buyers, were unsuccessful because prospective buyers were unwilling to undertake the obligations of the union contract."¹⁵¹ The impediment created by the successorship clause was simply found to be intolerable.

All these cases indicate that even when a successorship clause would logically apply to a situation, courts are still hesitant to enjoin a predecessor's sale of a business solely because the predecessor has not required the successor to adopt the terms of an existing collective bargaining agreement. The hesitancy is apparently based on the principle of law disfavoring unreasonable restraints on alienation just as the reluctance of courts to enforce successorship clauses against successors seems rooted in the basic contract law principle that a party should not be bound without its consent to the substantive terms of a contract.

147. See Bankruptcy Act, § 313(1), 11 U.S.C. § 713(1) (1976) (repealed and replaced by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549).

148. 436 F. Supp. at 1209.

149. 473 F.2d 549 (1st Cir.), cert. denied, 409 U.S. 845 (1972).

150. 84 L.R.R.M. 2453 (M.D. La. 1973).

151. *Id.* at 2454.

V. CONCLUSION

The specific language of a successorship clause in a collective bargaining agreement may purport to bind "successors and assigns" directly to the agreement, it may obligate the predecessor employer to require assumption of the labor contract by any successor before the business can be transferred, or it may combine both approaches. The difference in wording, however, does not alter a successorship clause's substantive impact. A successorship clause cannot bind a nonconsenting successor to the collective bargaining agreement unless, perhaps, the situation is covered by section 1127 of the California Labor Code. Instead, courts have applied the successorship doctrine, which has developed to cover all successorship situations regardless of the existence of a successorship clause. Depending on the degree of continuity in the work force and in other aspects of a predecessor's business, the successor may have (1) a duty to arbitrate with the union under *Wiley*, (2) a duty to recognize and bargain with the union under *Burns*, or (3) no duty at all under *Howard Johnson*.¹⁵²

Generally, predecessor employers who agree to include successorship clauses in their collective bargaining agreements must impose the labor contract on successors to their business or they will be liable for breaching the successorship clause. In practice, however, predecessors have been able to find ways around the general rule. Pursuant to hot cargo provisions of the National Labor Relations Act, successorship clauses will not apply to predecessors who transfer less than their entire business. Similarly, predecessor employers do not breach their duty if the transfer of the business is involuntary and they have had no opportunity to make assumption of the labor contract a condition of the transfer.

Even in cases where successorship clauses are applicable to predecessors, certain exceptions undercut enforceability. A breaching predecessor employer will be liable for damages, unless the court or arbitrator finds a monetary award would be impractical because the predecessor has left the industry or inadequate because the damage is loss of employment. A predecessor's sale of its business in violation of a successorship clause can be enjoined, unless the sale has already taken place or the court considers such an injunction to be an unreasonable restraint on aliena-

152. A successor employer can, of course, avoid second-guessing which strand of the successorship doctrine should apply by voluntarily assuming the unexpired collective bargaining agreement of the predecessor, thereby giving effect to a successorship clause.

tion. Nevertheless, the fact that the enforceability of successorship clauses against predecessors is not rejected outright as it is when sought against successors indicates that predecessor employers will have a greater incentive to give effect to a successorship clause and may, therefore, insist that the successor assume the existing labor contract as a condition of the sale of the business.

Jay D. Pimentel