The Successorship Doctrine Revisited: Fall River Dyeing & Finishing Corp. v. NLRB

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THE SUCCESSORSHIP DOCTRINE REVISITED: FALL RIVER DYEING & FINISHING CORP. V. NLRB

The purpose of the National Labor Relations Act (hereinafter the Act),1 from the time of its enactment in 1935, has been to promote industrial peace and stability in labor relations. To fur-


to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.


While the Act bestowed upon employees the right to join unions, enabling them to collectively bargain with their employer, its purpose was not to attenuate such relationships. See NLRB v. Knuth Bros., Inc., 537 F.2d 950, 957 (7th Cir. 1976). See also NLRB v. Milk Drivers & Dairy Employees, Local 338, 531 F.2d 1162, 1163 (2d Cir. 1976) (clear statutory intent that employees shall have choice to join unions, be inactive or participating member, or abstain completely, and regardless of choice their positions of employment remain intact); Mobil Oil Corp. v. NLRB, 482 F.2d 842, 846 (7th Cir. 1973) (aim of the Act was to safeguard right of employees to engage in concerted activities without hostile intermediating of employer).

The development of the Act dates back to the Railway Labor Act of 1926. See D. Twohey, LABOR LAW & LEGISLATION 42-43 (7th ed. 1985). The Railway Labor Act protected the right of employees to join labor unions in an effort to protect them from unfair treatment by their employers. Id. at 42. The National Industrial Recovery Act expanded upon the policy surrounding the Railway Labor Act and maintained the employees' right to engage in collective bargaining through unions and prohibited employers from requiring membership or non-membership in unions as conditions of hiring. Id. Finally, the National Labor Relations Act proposed to re-establish the balance of power between the employers and their employees. Id. at 43. See also NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1937) (right of employees to collectively bargain balances power between labor and management); L. Modjeska, NLRB Practice 6 (1983) (necessary for eradication of industrial instability is equality of bargaining power between employers and workers, promoted through use of unions).

2 See First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 674 (1981). "A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce... [through] the promotion of collective bargaining." Id. See also Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 271 (1964) (industrial peace and stability is Act's primary purpose, encouraging collective bargaining); NLRB v. Columbus Printing Pressmen & Assistants' Union No. 252, 543 F.2d 1161, 1170 (5th Cir. 1976) (Act's policy goal of industrial stability is furthered when "the balance of bargaining advantage is set by economic power realities").
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Senator Robert Wagner from New York, the NLRA bill's sponsor, strongly emphasized the law's attempt to meet the problem of industrial unrest and bring about peaceful labor relations, benefitting management, labor, and the country. See 1947 U.S. CODE CONG. & ADMIN. NEWS 1135, and in 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1408-32 (1949). See also Brooks v. NLRB, 546 U.S. 96, 103 (1954) ("the underlying purpose of [the Act] is industrial peace"); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1936) (necessary to industrial peace is acknowledgement of employees' rights to collectively establish and join unions and to select their collective bargaining representatives). In a dissenting opinion in NLRB v. Band-Age, Inc., 534 F.2d 1 (1st Cir.), cert. denied, 429 U.S. 921 (1976), Judge Campbell stated "the premise of [the Act] is industrial democracy, requiring an employer to bargain with the representative of a majority of its employees." Id. at 7. (Campbell, J., dissenting).


Congress recognized in 1935 that the development of large corporations and industries resulted in an imbalance of power between workers and their employers; the employers fared better than the employees. See Swerdlow, Freedom of Contract in Labor Law: Burns, H. K. Porter, and Section 8 (d), 51 TEX. L. REV. 1, 2 (1972). Their denial of employee bargaining rights resulted in poor working conditions for the employees, lowered wage rates and diminution of purchasing power, all tending to promote business depressions. Id. Congress established the Act in an effort to remedy the situation. Id. The Act emphasized the employees' right to organize unions to represent themselves in negotiations with their employer. See H. K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970). See also NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (formation of unions was necessary to promote equality between employer and workers); American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921) (union essential for equality in labor and management relations).

The rights of employees to join unions and collectively bargain with their employer are protected by the Act, which has specifically spelled out when an employer has violated such rights. See National Labor Relations Act, ch. 372, §§ 1-11, 49 Stat. 449 (1935); ch. 120 Title 1, § 101, 61 Stat. 136 (1947), reprinted in 1947 U.S. CODE CONG. & ADMIN. NEWS 1135 (codified as amended at 29 U.S.C. §§ 151-169 (1982)). An "unfair labor practice" is defined as:

it shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization... 29 U.S.C. § 158(a) (1982).
formed the National Labor Relations Board (hereinafter the Board) to oversee negotiations between the employer and the employees' collective bargaining representative. The Board is authorized to litigate and adjudicate claims of unfair labor practices arising under the Act.

Before the Act existed, an employer was free to discriminate and vengefully fire the powerless and unprotected workers who sought to engage in collective action and form labor organizations. See, e.g., Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 259, 258-62 (1917) (employer legally allowed to refuse employment to someone who was member of labor union, and allowed to require non-membership agreement from employees). See also NLRB v. Jones, 301 U.S. at 33 (in past, unprotected worker submitted to capricious and unjust treatment of employer for fear of losing job); Swerdlow, supra, at 2 (by combining employees' economic strength and acting through their chosen labor organization a balance of bargaining power between employee and employer reached).

29 U.S.C. §§ 153-156 (1982). See Textile Workers Union of America v. Arista Mills Co., 193 F.2d 529, 535 (4th Cir. 1951). The Board was established as a "quasi-judicial" body to enforce the policies underlying the Act. Id. See also R. GORMAN, LABOR LAW 7 (1976) (Congress created the Board to be the federal agency responsible for the implementation of the provisions in the Act); Newman & Shepherd, The Excessive Use of Presumptions and the Role of Subjective Employee Intent in Effectuating the Purposes of the National Labor Relations Act, 17 AKRON L. REV. 195, 195 (1983) (Board is "enforcer of the Act, utilizing a plethora of legal presumptions to maintain the stability of the collective bargaining relationship"); Note, The Successor Employer's Obligation to Bargain: Current Problems in the Presumption of a Union's Majority Status, 8 FORDHAM URB. L.J. 429, 429-30 (1979-80) (Board was created through decree of Congress to effectuate goals and policies behind the Act); Comment, Judicial Reviewability of NLRB Rulings, 63 NW. U.L. REV. 106, 106 (1968) (when promoting bill to become the Act, Congress viewed Board's role as being specifically dedicated to furthering maintenance of peaceful settlements of labor disputes). Cf. NLRB v. Fant Milling Co., 360 U.S. 301, 307-08 (1959) (Board advances public interest, does not decide private controversies); NLRB v. United Packinghouse Workers of America, 274 F.2d 816, 817 (5th Cir. 1960) (not the Board's function to settle private controversies; rather, it must act in its public capacity to represent public interest and policies); NLRB v. Condenser Corp. of America, 128 F.2d 67, 80 (3d Cir. 1942) (same); NLRB v. Bell Oil & Gas Co., 98 F.2d 870, 871 (5th Cir. 1938) ("[t]he Board is not a Court . . . [b]ut is a fact-finding tribunal with inquisitorial powers in labor controversies").

See H. K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970). It is the Board's function "to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." Id.

To function properly as a neutral mediator and administrator, the Board must zealously protect the rights of the employer as well as the employee. See Leonard v. NLRB, 205 F.2d 355, 357 (9th Cir. 1953). See also Slicker, A Reconsideration of the Doctrine of Employer Successorship-A Step Toward a Rational Approach, 57 MN. L. REV. 1051, 1052 (1973) (the Board, as arbiter between employer and employee, has allowed parties power and flexibility to obtain stable relations without undue interference by government).

Since it is the Board's duty to further the general policies of the Act, it must have broad "discretionary power in its administrative application." See NLRB v. A. J. Tower Co., 329 U.S. 324, 330 (1946). See also NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 462 (9th Cir. 1985) (although Board orders are reviewable, if its findings are based on substantial evidence in record and derived from correct application of law to facts, courts will enforce order); Premium Foods Inc. v. NLRB, 709 F.2d 623, 626-27 (9th Cir. 1983) (same).

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The Board has also developed the “successorship doctrine” in order to determine whether the new company is a successor employer, and thus bound by its predecessor’s collective bargaining obligations. While the courts generally have approved of this doc-

t to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce”).

The President, with the consent of Congress, instituted a General Counsel to the Board. See 29 U.S.C. § 155(d) (1982). The General Counsel's responsibilities include investigating unfair labor practice charges and determining whether to file complaints based upon such investigations. Id. See also Baker v. International Alliance of Theatrical Stage Employees & Moving Picture Operators of U.S. & Canada, 691 F.2d 1291, 1294 (9th Cir. 1982) (power granted to General Counsel of Board to make these public policy decisions intended to leave these determinations out of courts’ hands); Chicago Truck Drivers v. NLRB, 599 F.2d 816, 819 (7th Cir. 1979) (only when Board acts beyond statutory authority does its decisions become subject to judicial review); Bova v. Pipefitters & Plumbers Local 60, 554 F.2d 226, 228-29 (5th Cir. 1977) (generally, as long as Board or General Counsel did not go beyond authority or act unreasonably, determinations of unfair labor issues were not subject to review); Royal Typewriter Co. v. NLRB, 533 F.2d 1050, 1040 (8th Cir. 1976) (General Counsel's authority to select and institute questions involved in an “unfair labor practice case” resembles job of prosecutor). See generally R. GORMAN, supra note 4, at 10 (many claims of unfair labor practice have involved failure of duty to collectively bargain); L. MODJESKA, NLRB PRACTICE 7 (1983) (one of the Board’s primary duties is “the prevention and remedying of unfair labor practices”).

29 U.S.C. § 158(d) (1982) states that “to bargain collectively” the employer and the employees' chosen representative are required to fulfill their shared commitment by meeting and reasonably discussing wages, hours and other conditions of employment. Id. See also NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 281-82 (1972) (in stressing freedom to bargain, Court stated both parties need not make concessions or have contract provisions imposed upon them against their will); NLRB v. Insurance Agents’ Int'l Union, 361 U.S. 477, 487-90 (1960) (Congress' definition of right to collectively bargain adopted in order to prevent the Board from controlling settlement of terms of agreement); Kaden, Judges and Arbitrators: Observations on the Scope of Judicial Review, 80 COLUM. L. REV. 267, 296 (1980) (Act provides “procedural protections” for employees, does not dictate terms of agreement).

See John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964). The Supreme Court in rendering its first major decision involving the successorship doctrine noted that the objectives of national labor policy . . . require that the rightful prerogative of owners independently to rearrange their businesses . . . be balanced by some protection to the employees from a sudden change in the employment relationship.” Id. at 549. See also Randolph Rubber Co., 152 N.L.R.B. 496, 499 (1965) (a new employer is considered to be the “successor” and bound to bargain with predecessor’s union when there is “substantial continuity in the identity of the employing enterprise”). See generally Note, The Bargaining Obligations of Successor Employers, 88 HARV. L. REV. 759, 760-61 (1975) [hereinafter Note, Bargaining Obligations] (illustrating need to impose obligations of predecessor’s collective bargaining agreement on new company is expectation of employees that they would continue to enjoy certain rewards gained through agreement); Slicker, supra note 5, at 1074-86 (successor’s duty to arbitrate grievances pursuant to predecessor’s collective bargaining agreement).

The key inquiry that must be made in determining a new company’s status as a successor is “whether the essential nature” of the business has been affected by the turnover of ownership. See NLRB v. Middleboro Fire Apparatus, 590 F.2d 4, 6 (1st Cir. 1978) (quoting
trine,\textsuperscript{8} it remains unclear what factors will be consistently applied to determine whether the new company is a "successor".\textsuperscript{9} Recently, in \textit{Fall River Dyeing and Finishing Corp. v. NLRB},\textsuperscript{10} the United States Supreme Court reaffirmed the successorship doctrine.\textsuperscript{11} The Court held that the new employer was obligated to bargain with the labor union representing the predecessor's employees, where that union was certified more than one year before the changeover.\textsuperscript{12}

\textit{NLRB v. Band-Age, Inc.}, 534 F.2d 1, 3 (1st Cir.), \textit{cert. denied}, 429 U.S. 921 (1976) (if upon totality of circumstances the Board finds no change in essential nature of the enterprise, then new enterprise is required to bargain with union that represented employees of former business). \textit{See also Swerdlow, supra note 3, at 7} (factors of why and how change of ownership occurred not controlling in determining successorship status of new employer); Note, supra note 4, at 429 (employees' security of their right to bargain collectively can only be achieved by imposing duty to deal with union which represented predecessor's employees on new employer (deemed a successor)); Comment, \textit{Criteria for Determining Employer Successorship-Factor Analysis: Burns and the Need for a New Standard}, 11 \textit{Wake Forest L. Rev. 437}, 438 (1975) (the standard of "employing industry" had been used since 1939 in \textit{NLRB v. Colten} and thereafter).

\textsuperscript{8} \textit{See NLRB v. Burns Int'l Sec. Servs., Inc.}, 406 U.S. 272, 281 (1972); \textit{NLRB v. Middleboro Fire Apparatus}, 590 F.2d 4, 6 (1st Cir. 1978); \textit{NLRB v. Band-Age, Inc.}, 534 F.2d 1, 3 (1st Cir.), \textit{cert. denied}, 429 U.S. 921 (1976); \textit{Tom-A-Hawk Transit, Inc. v. NLRB}, 419 F.2d 1025, 1026-27 (7th Cir. 1969).

\textsuperscript{9} \textit{See}, e.g., \textit{NLRB v. Burns}, 406 U.S. at 280-81 & n.4. The Supreme Court determined that the employer was the "successor." \textit{Id.} This determination was premised upon several factors. \textit{Id.} First, a majority of the employees hired were former employees of the predecessor company. \textit{Id.} at 278, 281. Next, the former employees recently elected the union as their bargaining representative. \textit{Id.} Finally, they were hired by the new employer to perform the same jobs at the location that was utilized prior to the change-over in ownership. \textit{Id.} at 278. \textit{See also NLRB v. Boston Needham Indus. Cleaning Co.}, 526 F.2d 74, 77 (1st Cir. 1975) ("the Board looks to the totality of circumstances" in reviewing whether or not company is successor; Court affirmed Board's finding that basic nature of company was maintained); \textit{Tom-A-Hawk Transit, Inc. v. NLRB}, 419 F.2d 1025, 1026-27 (7th Cir. 1969) (Court held that the main question in determining successorship is whether there has been a "change of ownership not affecting the essential nature of the enterprise"). \textit{See generally} Slicker, supra note 5, at 1054-63 (due to unsettled and changeable test utilized in determining successorship, courts have experienced much discord). \textit{But see} Comment, supra note 7, at 438-40 (workforce size and composition, changes in internal operations of business, turnover of facilities or equipment, change in product, personnel changes and personnel policy, and lapse in production are relevant criteria in determining successorship).

\textsuperscript{10} 107 S. Ct. 2225 (1987).

\textsuperscript{11} \textit{Id.} at 2235.

\textsuperscript{12} \textit{Id.} The Court held that although the new employer is not bound by the substantive provisions of the predecessor's bargaining agreement, if it is determined to be the "successor" and a majority of its employees are former employees of its predecessor, then it has an affirmative duty to bargain with the Union. \textit{Id.} at 2234. In determining that Fall River was a successor, the Court applied a factor analysis based on the totality of the circumstances. \textit{Id.} at 2236-37. It considered the following factors: 1) acquisition of property and equipment of the prior company; 2) lack of introduction of new products; 3) employees' unal-
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In *Fall River*, the predecessor company, Steringwale Corporation, had been engaged in textile manufacture, which encompassed the dyeing and finishing of textiles, for approximately thirty years. After experiencing financial losses for several years, Steringwale was compelled to cease operations. Immediately following the shutdown of the plant, a former Steringwale employee and officer, in conjunction with the president of one of Steringwale's major customers, formed a new company, Fall River Dyeing and Finishing Corporation ("Fall River"), with the intention of engaging in commission dyeing. "Fall River" purchased Steringwale's plant, real property, equipment and some of its inventory at the liquidator's auction. In September 1982 it began its operations out of Steringwale's former facility.

The union which had represented the old Steringwale employees, the United Textile Workers of America, AFL-CIO, Local 292 (the Union), promptly requested that Fall River recognize it as a proper representative bargaining unit and begin collective bargaining as soon as a "representative complement of workers"
was hired. "Fall River" denied that it had any obligation to bargain with the Union even though eighteen out of twenty-one of their first shift of employees were former Steringwale employees. The Union subsequently brought charges against "Fall River" for its refusal to bargain. The Union argued that "Fall River" was a "successor" to Steringwale. Furthermore, the Union urged that "Fall River" would be obligated to bargain with it once "Fall River" selected a "representative complement" of its work force. At the "representative complement" stage, the majority of "Fall River's" employees would have to be former employees of Steringwale to trigger "Fall River's" obligation to bargain with the Union.

The Board affirmed the Administrative Law Judge's decision utilized, "[t]he determination of whether a new employer is a successor is postponed until his workforce reaches a substantial complement, representative of the number and type of employees that will ultimately constitute the appropriate bargaining unit." Id. See also Premium Foods, Inc. v. NLRB, 709 F.2d 623, 628 (9th Cir. 1983) (whether substantial and representative complement of employees exists depends on "job classifications designated for the operation [being] filled or substantially filled and whether the operation was in normal or substantially normal production"); Aircraft Magnesium, 265 N.L.R.B. 1344, 1345 (1982), enforced, 730 F.2d 767 (9th Cir. 1984) (same); infra notes 34 and 65-66 and accompanying text (discussion of substantial and representative complement rule).

Fall River Dyeing & Finishing Corp. v. NLRB, 107 S. Ct. 2225, 2227 (1987). The Union had represented Steringwale's production and maintenance employees for the first 30 years of Steringwale's existence. Id. at 2259. The Union continued as representative of Steringwale's employees and entered into successive collective bargaining agreements, the most recent dated 1978 with a 1981 expiration date. Id. at 2250. An October 1980 agreement amended the 1978 agreement to extend its expiration date by one year without wage increases but with improved productivity. Id. However, shortly following the making of such agreement Steringwale went out of business. Id. Thereafter, the Union's bargaining demand upon the new company was premature because the newly hired employees had not yet acquired majority status among the successor employees. Id. at 2238. The successor employer, therefore, was not yet obligated to recognize the Union. Id. Nevertheless, the Court acknowledged that the Union's demand would continue to be in effect until the time when the new company acquired the "substantial and representative complement." Id. In doing so, the Court recognized the "continuing demand" rule. Id. At this point in time, the successor employer became obligated to bargain. Id.

Fall River refused the Union's request to bargain stating that the request had no "legal basis." Id.

The charges filed by the Union were for unfair labor practice, alleging that Fall River, in its refusal to bargain, violated §§ 8(a)(1) and (5) of the National Labor Relations Act. See also 29 U.S.C. §§ 151-165 (1982).

Fall River, 107 S. Ct. at 2231.

Id.

Id.

See Fall River Dyeing & Finishing Corp., 272 N.L.R.B. 839 (Member Hunter, dissenting) (dissent based on fact that "Fall River", at time of bargaining demand, did not have a
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that "Fall River" was a successor company\textsuperscript{27} and was obligated to bargain with the Union.\textsuperscript{28} By refusing to bargain, "Fall River" committed an unfair labor practice.\textsuperscript{29} The United States Court of Appeals for the First Circuit affirmed the Board's decision that "Fall River" was a successor company to Steringwale and was, therefore, compelled to negotiate with the Union.\textsuperscript{30}

The Supreme Court affirmed the Court of Appeals' determination.\textsuperscript{31} In reaching its decision, the Court addressed principles developed by the Board as applied to the facts of this case.\textsuperscript{32} First, the successor company's duty to bargain was held to be independent of the age of the Union.\textsuperscript{33} Next, the Court approved the "substantial and representative complement" rule, which fixes the moment of determining whether a majority of the successor's employees are former employees of the predecessor employer.\textsuperscript{34}

"representative complement" of employees which resulted in appropriate denial of recognition of the Union as proper representative bargaining unit).

\textsuperscript{27} Id. Members Zimmerman and Dennis determined that "Fall River" was an employer within the meaning of § 2(2) of the National Labor Relations Act who was engaging in commerce within the meaning of §§ 2(b) and (7) of the Act. \textit{Id.} They also determined that the Union was a labor organization within the meaning of § 2(5) of the Act. \textit{Id.}

\textsuperscript{28} Id. The Board determined that the refusal of "Fall River" to recognize and bargain collectively with the Union as the exclusive representative of all its employees resulted in unfair labor practices within the meaning of §§ 8(a)(5) and (1) of the Act. \textit{Id.} at 840-41.

\textsuperscript{29} Id. \textit{See supra} note 28 and accompanying text.

\textsuperscript{30} \textit{NLRB v. Fall River Dyeing & Finishing Corp.}, 775 F.2d 425 (1st Cir. 1985). The court initially found that "Fall River" was "substantially continuous" to Steringwale in that there were no material changes in the nature of the company. \textit{Id.} at 430. Numerous factors were relied upon by the Board, and accepted by this court, in determining that "Fall River" was a "successor." \textit{Id.} at 429-30. These factors included the number of former Steringwale employees who were hired by the new company, the fact that the employees' responsibilities and the products remained the same and the fact that the new company continued serving the same customers and operated out of the same facility. \textit{Id.} at 429-30. Furthermore, the court agreed with the Board in its application of the "representative complement rule" to the facts of this case. \textit{Id.} at 430. In so doing, the court found a substantial number of the jobs were filled, the new company's operations were in "normal or substantially normal production", and the new company had hired a majority of the employees that would eventually make up their complete workforce. \textit{Id.} at 431. Finally, the court accepted the Board's use of the "continuing demand rule" which allowed the union's initial demand to be renewed at the time when the new company hired the majority of its employees. \textit{Id.} at 432-33.

\textsuperscript{31} \textit{See Fall River, 107 S. Ct. at 2237.}

\textsuperscript{32} \textit{Id. at 2229.} The Court addressed issues concerning the application of the certification bar rule, the proper test to establish successorship status and the applicability of the continuing demand rule to a successor company. \textit{Id.}

\textsuperscript{33} \textit{See infra} notes 42-43 and accompanying text (discussion of the certification rule as applying to unions not recently certified before changeover in employers).

\textsuperscript{34} \textit{See Fall River, 107 S. Ct. at 2228.} Application of the "substantial and representative
A vigorous dissent stated that "the Court misconstrued the successorship doctrine and misapplied the substantial complement test." Furthermore, the dissent asserted that there was a lack of substantial continuity between the two businesses and, consequently, "Fall River" was not a successor and was not obligated to bargain with the Union. It criticized the Board and the Court for giving too little weight to the indicia of "discontinuity" between the new company and the old company. Additionally, the "substantial and representative complement" rule to Fall River reveals that "Fall River" became obligated to bargain with the Union when the first shift of workers was hired. Id. at 2239. The Court rejected the argument made by "Fall River" that the majority status should be determined at the "full complement" stage, i.e., when the successor has hired all the employees desired for the business. Id. The "substantial and representative complement" rule attempts to balance "the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible." See Fall River, 775 F.2d at 430-31 (quoting NLRB v. Pre-Engineered Bldg. Prods., Inc., 603 F.2d 154, 156 (10th Cir. 1979)). See also NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 294-95 (1972) (discussing rights of new employer, old employees whom new employer had hired, and new employees not previously represented by the Union, with the ultimate goal of assuring majority rule among employees in successor company); NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 467 (9th Cir. 1985) (Board may determine if successor has duty to bargain when he has hired "substantial and representative complement"); Premium Foods, Inc. v. NLRB, 709 F.2d 623, 628 (9th Cir. 1983) (appropriate to apply "substantial and representative" standard in successor employer cases); Clement-Blythe Cos., 182 N.L.R.B. 502, 502 (1970) (discussion of origination of balancing approach to determine appropriate time for election of representation). But see Pre-Engineered Bldg. Prods., Inc., 603 F.2d at 136 (stating that when it is necessary for new company to "rebuild both production demand and workforce", it becomes imperative to determine successorship status at full complement stage).

81 Fall River, 107 S. Ct. at 2242-44 (Powell, J., dissenting). The extension of the successorship doctrine has no application where the Board's finding of "substantial continuity" was incorrect. Id. Furthermore, the Board's decision to measure the composition of the new company's workforce at the substantial and representative complement stage was an imperfect measure of majority union support. Id. at 2244-46.

82 Id. at 2243. The dissent noted that the majority erred in its lack of attention to the evidence of "discontinuity" between the two businesses and concluded that the Board's finding of substantial continuity was incorrect. Id. The new company, therefore, was not a successor within the meaning of the Act. Id. at 2244. See also supra notes 22-28 and accompanying text and infra note 37 and accompanying text (discussion of Union's refusal to bargain and indicia of discontinuity).

83 Fall River, 107 S. Ct. at 2243-45 (Powell, J., dissenting). The dissent found that the weight of the evidence demonstrated that "Fall River" was a distinct and detached entity from Steringwale. Id. at 2243. Indicia of the discontinuity relied on by the dissent included "Fall River's" operation of commission work versus converting work, failure to sell or transfer employee or customer lists, failure to maintain any direct contractual or business relationships and the seven month hiatus. Id. Although each factor was not determinative individually, a combination of these factors led to the finding of no successorship. Id. Furthermore, the dissent noted that in relation to the number of workers released by Steringwale, only a small percentage of them were hired by "Fall River." Id. at 2242.
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dissent argued that at the time "Fall River" attained its full complement stage of employment, the new company was not composed of a majority of its predecessor's employees.\textsuperscript{38} It, therefore, did not have a duty to bargain with the predecessor employees' union.\textsuperscript{39} Finally, the dissenting opinion indicated that there was no recent re-certification of the union by the predecessor employees.\textsuperscript{40}

In an earlier decision, the United States Supreme Court\textsuperscript{41} ruled that a successor employer had an obligation to bargain with the union which had been recently certified by the predecessor's employees.\textsuperscript{42} Expanding upon that decision, the Supreme Court in Fall River held that a successor employer's obligation to bargain

\textsuperscript{38} Id. at 2244-45.
\textsuperscript{39} Id. at 2244.
\textsuperscript{40} Id. at 2246. See NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972). In Burns, the new company, Burns Security Agency, won the bidding for providing security services to an aircraft facility. Id. at 274. The previous company, Wackenhut Corp., and its employees were represented by a union that they had elected four months prior to the changeover in the companies. Id. at 278-79. In Fall River, the union had been certified or elected by employees at least 30 years prior to the transition in ownership. Fall River, 107 S. Ct. at 2229.
\textsuperscript{41} See Burns, 406 U.S. at 274. The majority opinion, however, noted that the resolution of the case turned upon the precise facts presented. Id. The union in question had been certified within four months of the change in employers and the successor company had significant knowledge in relation to the substantive nature of the previous employer's contract with the union. Id. at 278. See generally Slicker, supra note 5, at 1087-97 (examines Supreme Court's decision in Burns); Swerdlow, supra note 3, at 8-11 (same); Comment, Contractual Successorship: The Impact of Burns, 40 U. Chi. L. Rev. 617 (1973) (examines impact of Supreme Court's decision in Burns).
\textsuperscript{42} See Burns, 406 U.S. at 277-81. See also supra note 41 and accompanying text (discussion of the Burns decision in which successor employer bound to bargain with recently certified union). The explicit language and legislative history of the labor laws are consistently cited with approval in decisions which have held successor employers bound to recognize and bargain with the union, while at the same time affirming the principle that they are not bound by the substantive provisions of the predecessor's collective bargaining agreements which were neither agreed to nor assumed by successor employers. See, e.g., General Extrusion Co., 121 N.L.R.B. 1165, 1168 (1958). Such a position reflects the intent of Congress. Congress has "consistently declined to interfere with free collective bargaining and has preferred that device [of voluntary arbitration] to the imposition of compulsory terms as a means of avoiding or terminating labor disputes" in the advancement of the fundamental goal of the legislation, i.e., "to promote industrial peace." Id. See also Burns, 406 U.S. at 281-91 (while successor employer bound to recognize and bargain with incumbent union, not bound by substantive terms of predecessor's agreement); H. K. Porter Co. v. NLRB, 397 U.S. 99, 103-04 (1970) (minimal governmental intervention stressed, parties negotiate their own agreement); NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 469 (9th Cir. 1985) (successorship doctrine imposes duty to bargain in good faith, not duty to accept terms of old union contract).
with the predecessor company's employees' union was not limited to situations where the union was recently certified before the change in ownership.\footnote{See Fall River, 107 S. Ct. at 2222-35. The primary inquiry in Fall River focused on the lack of recent certification of the union in question, thereby distinguishing it from the Burns decision. Id. The Court in Fall River, however, examined the dicta in Burns and held that the identical analysis "would be equally applicable even if a union . . . had not been certified just before the transition in employers." Id. at 2233. Based upon the policy orientation of "industrial peace", the Court determined that the union in Fall River was entitled to a rebuttable presumption of majority status for one year following certification, despite the change in employers. Id. See also Brooks v. NLRB, 348 U.S. 99, 103 (1970) (presumption based on overall policy of industrial peace); NLRB v. Jarm Enters., 785 F.2d 195, 205 (7th Cir. 1986) (majority status of certified union is irrefutably presumed for one year after certification; precludes challenge, even if successor employer involved); NLRB v. Stevens Ford, Inc., 773 F.2d 468, 474 (2d Cir. 1985) (bargaining representative presumed to have continuing majority); Celanese Corp. of America, 95 N.L.R.B. 664, 672 (1951) (based on policy of industrial peace, union entitled to conclusive presumption of majority status for one year, then rebuttable). See generally Note, supra note 4, at 419 (discusses majority status of bargaining representative); Note, Bargaining Obligations supra note 7, at 760-64 (discusses presumption of union's majority status).}

It is submitted that the extension of the successorship doctrine to include a new employer dealing with a union which has been established as the bargaining representative of the employees of the predecessor company for thirty years, may not be wholly responsive to the employees' needs and wishes. Further, it is submitted that the traditional factor analysis approach, employed by the Supreme Court in Fall River,\footnote{See Fall River Dyeing & Finishing Corp., 272 N.L.R.B. 839 (1984).} the Board\footnote{See NLRB v. Allen, 758 F.2d 1145, 1147 (6th Cir.), cert. denied, ____ U.S. ____ , 106 S. Ct. 882 (1985). A subsequent employer was found to be a successor through factor analysis. Id. See also NLRB v. Hudson River Aggregates, Inc., 639 F.2d 865, 869 (2d Cir. 1981) (determination of successorship based on number of relevant factors); NLRB v. Middleboro Fire Apparatus, Inc., 590 F.2d 4, 6-8 (1st Cir. 1978) ("totality of circumstances" used to find successorship); NLRB v. Bausch & Lomb, Inc., 526 F.2d 817 (2d Cir. 1975) (factor analysis).} and the federal courts in general,\footnote{See Fall River, 107 S. Ct. at 2225, 2237 (1987).} to determine the issue of successorship, fails to consider the critical issue of whether the employees actually desired the representation by the incumbent union. It is, therefore, suggested that a more comprehensive approach to the successorship issue be adopted, requiring the consideration of employees' needs and wishes as well as an additional inquiry as to whether a re-certification, election or poll of union support is warranted.

This Comment will discuss the inherent problems of the doctrine and will suggest a more equitable approach to such a situa-
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tion. Additionally, the obligations of successor employers will be considered.

I. SUCCESSORSHIP DOCTRINE

The decisions of the Board and the courts have led to considerable uncertainty with reference to a specific analysis to be used in order to determine that a company is a successor employer and is, therefore, required to bargain with its predecessor's union. These factors include the following: the number of former predecessor's employees in the successor's employ; changes

4 See NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272, 299 (1972) (Rehnquist, J., dissenting). The dissent referred to the successorship doctrine as an "imprecise concept." Id. See also Howard Johnson Co. v. Detroit Local Joint Exec. Bd. of Hotel & Restaurant Employees, 417 U.S. 249, 263 n.9 (1974) (no one particular meaning of successor is suitable in all legal contexts); International Ass'n & Machinists v. NLRB, 414 F.2d 1135, 1139 (D.C. Cir.) (Leventhal, J., concurring) ("subject of successorship is shrouded in somewhat impressionist approaches"), cert. denied, 396 U.S. 889 (1969). See generally Slicker, supra note 5, at 1063 (in absence of more specific standards, confusion and unpredictability will continue); Comment, Saks & Co. v. NLRB: Toward the Emasculation of the Successorship Doctrine?, 48 BROOKLYN L. REV. 1103, 1107 (1982) [hereinafter Comment, Toward the Emasculation] (many different combinations of factors used to determine successor and its duty to bargain); Comment, supra note 7, at 765-78 (discusses confusion involved in determining when successor must assume predecessor's bargaining obligation).

4 See infra notes 49-55 and accompanying text. See, e.g., Universal Sec. Instruments, Inc. v. NLRB, 649 F.2d 247, 263-54 (4th Cir.), cert. denied, 454 U.S. 965 (1981) (numerous factors considered including retention of predecessor's employees and continuity of business operation); NLRB v. Hudson River Aggregates, Inc., 639 F.2d 865, 869 (2d Cir. 1981) (factors include same business operations and essentially same workforce); Boeing Co. v. International Ass'n of Mach. & Aerospace Workers, 504 F.2d 307, 317 (5th Cir. 1974) (no one could exhaust all relevant factors as to determine whether successor has duty to bargain). See also Slicker, supra note 5 (discusses various criteria in determining successorship issue); Swerdlow, supra note 3, at 10-11 (Board should focus on a number of factors in resolving successorship question).

4 See NLRB v. Band-Age, Inc., 534 F.2d 1, 5 (1st Cir.), cert. denied, 429 U.S. 921 (1976). Ninety four percent of the successor's employees came from the predecessor's "all-union" workforce and the Board concluded that the successor was bound to bargain with the union. Id. See also Burns, 406 U.S. at 281 (Court focused on fact that majority of new company's workforce came from employees of predecessor company); NLRB v. Security-Columbian Banknote Co., 541 F.2d 135, 139 (3d Cir. 1976) (necessary predicate for imposing duty to bargain with incumbent union is retention of predecessor's employees); NLRB v. Bausch & Lomb, Inc., 526 F.2d 817, 824-25 (2d Cir. 1975) (successorship ordinarily requires substantial continuity in identity of workforce); Zim's Foodliner, Inc., 495 F.2d 1131, 1140 (7th Cir.) (court noted significance of number of predecessor's employees in
or modifications in the nature and operation of the business; the purchase and utilization of assets, equipment, or facilities of the predecessor; changes in the services rendered or products manufactured; the length of the hiatus, if any, between the end of the new company as determinant of proposed successorship), cert. denied, 419 U.S. 838 (1974); Cf. Howard Johnson Co. v. Detroit Local Joint Exec. Bd. of Hotel & Restaurant Employees, 417 U.S. 249, 267 (1974) (while hiring majority of predecessor's employees has been held to be important in determining employer to be successor, it is not necessarily determinative factor).

See NLRB v. Jeffries Lithograph Co., 752 F.2d 454, 464 (9th Cir. 1985). The court found that the new employer was a successor employer when the business operations which existed under the predecessor company also existed under the successor company. Id. See also United Food & Commercial Workers Int'l Union v. NLRB, 768 F.2d 1469, 1470 (D.C. Cir. 1985) (focus on continuity of particular operation of business with respect to its effect on union members); NLRB v. Cablevision Sys. Dev. Co., 671 F.2d 737, 739 (2d Cir.), cert. denied, 459 U.S. 906 (1982) (essential inquiry in determining successorship and duty to bargain is whether operations, as they impinge on union members, are essentially same); Pacific Hide & Fur Depot, Inc. v. NLRB, 555 F.2d 609, 611 (9th Cir. 1977) (one test of successorship is whether new company continued to conduct substantially same business as predecessor); NLRB v Geronimo Serv. Co., 467 F.2d 903, 904 (10th Cir. 1972) (two prong test of successorship is same employing industry and substantially the same employees); NLRB v. John Stepp's Friendly Ford, Inc., 338 F.2d 833, 836 (9th Cir. 1964) (no successorship and no need to bargain with old union where business is entirely different and minority of former union member employees); Alamo White Trucking Serv., Inc. v. NLRB, 273 F.2d 238, 242 (5th Cir. 1959) (subsequent employer not obligated to bargain with union if new operation is entirely different from old operation and only minority of former employees voted for union).

See, e.g., Alpert's, Inc., 267 N.L.R.B. No. 159 (1983). The Board found that a successorship existed in a situation where the new company purchased the former company's assets and continued working at the same location. Id. See also Saks & Co. v. NLRB, 634 F.2d 681, 687 (2d Cir. 1980) (transfer of assets may be evidence of continuity of business operations); Cf. Pacific Hide & Fur Depot, Inc. v. NLRB, 553 F.2d 609, 611 (9th Cir. 1977) (purchase of assets and use of predecessor's equipment alone were insufficient in finding successorship when majority of employees were not predecessor's employees); NLRB v. Band-Age, Inc., 534 F.2d 1, 5 (1st Cir.) (successorship not unwarranted because employer did not purchase substantial assets or good will from former employer, where new employer leased floor space, machinery, fixtures, furniture and equipment from former employer), cert. denied, 429 U.S. 921 (1976). Contra Tom-A-Hawk Transit, Inc. v. NLRB, 419 F.2d 1025, 1027 (7th Cir. 1969) (fact that new company used different facilities than predecessor of little significance when basic operations and services performed were identical).

See generally Slicker, supra note 5, at 1058-59 (although no consistency has evolved, generally new employer held as successor where goods or services remained unchanged; held not to be successor where product or service discontinued); Comment, Toward the Emasculation, supra note 47 at 1108 n.18 (new company’s lack of similarity in products or services relevant criteria in determining no continu-
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predecessor's ownership and the successor's take-over; a retention or carry-over of supervisory personnel from the predecessor company to the successor company; and changes in plant location or internal operations.

Due to the number of factors that must be considered for a successorship determination, the Board and the courts have taken an ad-hoc approach to resolving the issue. This has inevitably led to

\[\text{See, e.g., United Food & Commercial Workers Int'l Union v. NLRB, 768 F.2d 1463, 1471-72 (D.C. Cir. 1985). Although the new company took one and a half years to resume operations, the court determined that it was a successor. Id. See also Daneker Clock Co., 211 N.L.R.B. No. 108 (1974) (administrative law judge found successorship despite hiatus of seven months); C. G. Conn., Ltd., 197 N.L.R.B. No. 84 (1972), enforced, 474 F.2d 1544 (5th Cir. 1973) (successorship found despite four and a half month hiatus); Marsack & Eaton, supra note 2, at 228 (Board and courts have regarded termination of production for a considerable length of time a factor in determining successorship and duty to recognize union); Comment, Toward the Emasculation, supra note 47, at 1108 n.19 (the longer the lapse in time between change in employers, the less likely new enterprise a successor to former company). Compare Fall River, 107 S. Ct. at 2225 (where all other factors demonstrated continuity of employing enterprise, a hiatus of seven months did not affect finding of successorship) with Radiant Fashions, Inc., 202 N.L.R.B. 988, 940 (1973) (no successorship; court found hiatus of two and a half to three months determinative).} 

\[\text{See NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 465 (9th Cir. 1985). A successor's employment of its predecessor's supervisory staff was deemed additional evidence of the continuity of the enterprises. Id. See also Fall River, 107 S. Ct. at 2230 (new company hired twelve supervisors, eight had been supervisors with predecessor company, finding of successorship made); Premium Foods, Inc. v. NLRB, 709 F.2d 623, 627 (9th Cir. 1983) (hiring of former company's supervisors was a factor in reviewing successorship); Stove, 277 N.L.R.B. No. 187 (1986) (factor analysis indicated general supervisors carried over to new employer).} 

\[\text{See NLRB v. Hudson River Aggregates, Inc., 659 F.2d 865, 869 (2d Cir. 1981). A change in plant location has been considered when assessing the continuity of the employment relationship. Id. Such a change usually indicates a lack of successorship. Id. See, e.g., Bakery, Confectionary & Tobacco Workers Union Local No. 19 v. Ryan's I.G.A., 642 F. Supp. 1131, 1133-34 (N.D. Ohio 1986). A new employer was not a successor because, inter alia, the business was moved to an entirely new location. Id. See also Alpert's, Inc., 267 N.L.R.B. No. 159 (1983) (successor found where new employer continued business in same place and under same working conditions); cf. International Union of Elec., Radio & Mach. Workers v. NLRB, 604 F.2d 689, 694 (D.C. Cir. 1979) (successor employer's substantial organizational changes did not preclude finding that successor employer succeeded to predecessor's bargaining obligation); NLRB v. DIT-MCO, Inc., 428 F.2d 775, 781 (8th Cir. 1970) (manufacturer moved business to new location in same city yet court still found new company as successor).} 

\[\text{See Howard Johnson Co. v. Detroit Local Joint Exec. Bd., 417 U.S. 249, 262 n.9 (1974). Successorship is a fact-based inquiry and, therefore, determined on a case by case basis. Id. at 256. See also NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 464 (9th Cir. 1985) (must consider successorship question in light of totality of circumstances); Computer Sciences Corp. v. NLRB, 677 F.2d 804, 806-07 (11th Cir. 1982) (whether bargaining unit remains appropriate under new employer is purely factual inquiry). See generally Comment, Successorship Doctrine: A Hybrid Approach Threatens to Extend the Doctrine When the Union}
arbitrary and uncertain results as evidenced by the *Fall River* case. The dissent in *Fall River* applied the same factor analysis test that the majority applied, yet it determined that *Fall River* was not a successor company.

The major consideration in finding that a new employer represents a successor employer is the existence of "substantial continuity" between the predecessor employer and the new employer. The "substantial continuity" doctrine requires that the new company’s workforce be composed of a majority of the predecessor’s employees. It is this majority composition which trig-

*Stikes Out*, 28 St. Louis U.L.J. 263, 274 (1984) (traditional "case-by-case" method has been employed by the Board and courts to determine successorship, finding turning on specific and unique facts of each case); *supra* note 47 and accompanying text (discussion of imprecision and unpredictability of the factor analysis approach).

7 See, e.g., Saks & Co. v. NLRB, 634 F.2d 681, 685 (2d Cir. 1980). The United States Court of Appeals noted that there is "no clear guidance from the Supreme Court" for determining successor’s duty to bargain. *Id.* See also Howard Johnson Co., 417 U.S. at 256-57 (since no decisive factor underlying successorship issue exists, it is necessary to extract broad concepts from cases decided on their changeable facts); Boeing Co. v. International Ass’n of Mach. & Aerospace Workers, 504 F.2d 307, 318 (5th Cir. 1974) (Supreme Court has established no precise benchmark in developing standard for determining successorship issue, rather case by case approach used). See generally Slicker, *supra* note 5, at 1063 (noting that contradictory and unpredictable decisions are results of judging each case on its particular circumstances); Comment, *Toward the Emasculation*, *supra* note 47, at 1107 (author noted the confusing and uncertain doctrine of successorship as evinced through Supreme Court decisions); Note, *Bargaining Obligations*, *supra* note 7, at 765 (Supreme Court has not clearly delineated circumstances in which imposition of duty to bargain is appropriate).

8 See *Fall River*, 107 S. Ct. at 2242. (Powell, J., dissenting). The result of the imprecise approach is unstable and unpredictable decisions involving successorship. *Id.*

7 Id. (Powell, J., dissenting).

8 See Smegal v. Gateway Foods of Minneapolis, Inc., 819 F.2d 191, 193 (8th Cir. 1987). A requirement of "substantial continuity" is that a majority of the new employer’s workforce be composed of the predecessor’s employees. *Id.* at 194. See also John Wiley & Sons v. Livingston, 376 U.S. 543, 551 (1964) (crucial inquiry in determining whether duty to arbitrate survives is "any substantial continuity of identity in the business enterprise before and after a change . . . "); Saks & Co. v. NLRB, 634 F.2d 681, 684 (2d Cir. 1980) (key factor in determining whether employer succeeds to obligation to bargain with incumbent union is "substantial continuity in identity of workforce"); Valmac Indus., Inc. v. NLRB, 599 F.2d 246, 248 (8th Cir. 1979) (test for successorship is continuity in "employing industry"); Aircraft Magnesium, 265 N.L.R.B. No. 1344 (1982), enforcing, 730 F.2d 767 (9th Cir. 1984) (traditional criteria for "substantial continuity" include continuity in "business operations, plant, workforce, jobs and working conditions . . . ").

8 See NLRB v. Burns Int’l Sec. Servs., Inc., 406 U.S. 272, 278-79 (1972). The Court noted that in a case involving unfair labor practices, continuity may be found provided a majority of the new employer’s workforce consisted of the predecessor’s employees. *Id.*; Smegal v. Gateway Foods of Minneapolis, Inc., 819 F.2d 191, 193-94 (8th Cir. 1987). In *Smegal*, the appellants argued that the new company was a successor because a majority of the predecessor’s workforce was retained by the new company. *Id.* at 193. The court noted, however, that in cases involving a claim of "failure to bargain", the test is whether a
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...gers the successor’s obligation to bargain with the incumbent union. The time at which the majority makeup of the successor’s workforce is determined, thus obligating the company to bargain with the union, has not received uniform treatment by the courts. In some cases, the courts have implemented the “full complement” rule which allows the new employer to hire all of his expected workforce prior to the making of a determination concerning the question of whether union majority support status exists. In other cases, the use of the “substantial and representative complement” standard has been deemed appropriate. This standard measures the union majority support at a date on which the new company has hired a certain number of employees or filled a majority of the new employer’s workforce came from the preceding employer. See also Comment, Toward the Emasculation, supra note 47, at 1107 (“[a]lthough no clear definition of enterprise continuity has evolved, [it requires] a comprehensive analysis of qualitative factors that reflect the relationship between the substantive composition of [new company and predecessor company]”).

See Fall River Dyeing & Finishing Corp. v. NLRB, 107 S. Ct. 2225, 2231 (1987). The Supreme Court noted that the administrative law judge’s ruling that “Fall River” had an “obligation to bargain with the Union if the majority of petitioner’s employees were former employees of Sterlingwale” was correct. Id.

See infra notes 64-65 and accompanying text.

See Burns, 406 U.S. at 294-95. In some instances it is not possible for the new employer to know whether he is obligated to bargain with the union until he has hired his entire workforce. Id. at 295. This is so because it is at this time that he will become aware that such union represents a majority of his employees. Id. See also Premium Foods, Inc. v. NLRB, 709 F.2d 623, 628 (9th Cir. 1983) (if substantial increase in workforce size is reasonably expected to occur in relatively short time, delaying until full complement to count majority is appropriate); Pacific Hide & Fur Depot, Inc. v. NLRB, 553 F.2d 609, 611-14 (9th Cir. 1977) (following Burns, full complement date is determinative because employer reached full complement in less than 60 days, steadily as planned); St. John of God Hospital, Inc., 260 N.L.R.B. 905 (1982) (Board allowed employer four to five months to reach full complement where there was planned, expected increase); supra note 34 and accompanying text.

The determination of whether to implement the full complement rule requires balancing expedient representation of the employees against the goal of allowing the maximum number of employees to voice their opinion as to who shall act as their bargaining representative. See NLRB v. Pre-Engineered Bldg. Prods., Inc., 603 F.2d 134, 136 (10th Cir. 1979).

See NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 467-68 (9th Cir. 1985). The court found that an eight month period between the opening of a plant and its reaching its full complement stage was too long to delay bargaining and the time at which the employer achieved a representative complement of workers was determinative. Id. See also Premium Foods, Inc. v. NLRB, 709 F.2d 623, 628 (9th Cir. 1983) (board permitted to make successorship determination when new employer achieved substantial representative complement of employees); NLRB v. Hudson River Aggregates, Inc., 639 F.2d 865, 870 (2d Cir. 1981) (not necessary in all cases to delay bargaining obligations until an employer has reached “full complement”); supra note 34 and accompanying text.
certain number of positions that essentially would be representative of his expected full workforce.66

II. A Suggested Approach

The policies underlying the Act have fostered the need for the immediate representation of new employees,67 while section 9(a) of the Act provides for selection of the employees' representatives by the majority of the employees.68 It is submitted that by imposing an incumbent union on a new employer and its employees, the policy favoring free choice of union representation by the major-

66 See supra notes 64-65 and accompanying text.
67 See NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 468-69 (9th Cir. 1985). Since a transition in company ownership may lead to instability and changes in the working conditions, the employees of the new company need some protection of their representational power. Id. It is at this time that the employees' collective bargaining power is most needed. Id. at 469. See also Tom-A-Hawk Transit, Inc. v. NLRB, 419 F.2d 1025, 1028 (7th Cir. 1969) (quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964)) ("[t]he objectives of national labor policy . . . require that the rightful prerogative of owners independently to rearrange their businesses . . . be balanced by some protection to the employees from a sudden change in the employment relationship"); Slicker, supra note 5, at 1052 (individual employees often view the changeover of business as a threat to job security and achieved rights through past collective bargaining agreements); Note, Bargaining Obligations, supra note 7, at 762 (employees' representation by union may increase during time immediately following change in ownership); Comment, supra note 47, at 1137 (unforeseen conditions involved in successorship area may affect employees need to safeguard previously bargained for rights).

Employees already involved on a specific job and then hired by a new company which had won a bid for the job may have expected the wages, conditions and other terms of a previous collective bargaining agreement with the former employer. See Boeing Co., 214 N.L.R.B. 541 (1974). The uncertainty and instability involved in the transfer of employment has necessitated that the new employer abide by such prior agreement to protect the rights of the employees. See Hearings on Bills to Amend See. 5 of the Service Contract Act of 1965 Before the Subcomm. on Labor of the House Comm. on Educ. & Labor, 92nd Cong., pt. 1, at 197-217 (1971). The policy behind the National Labor Relations Act was to insure some protection for the employees involved in the successorship situation. Id. 68 29 U.S.C. § 159(a) (1982). The Act provides in pertinent part:

Representatives 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 of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

Id.

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It is necessary to consider the applicability of the certification rule to successor employers in light of the need to consider employees' wishes. The certification rule has eliminated the employees' right to challenge a union's majority support in situations where an election of such union had been held within the past year. The certification of a union by the Board within the past year will create a conclusive presumption of majority support for the union, requiring a new employer to bargain with the union. However, after the first year of certification has elapsed, the

See Schmerler Ford, Inc. v. NLRB, 424 F.2d 1335, 1339 (7th Cir.) (stating "[t]he Act establishes a strong public policy favoring free choice of a bargaining agent by employees which should not be lightly frustrated"), cert. denied, 400 U.S. 823 (1976); NLRB v. Band-Age, Inc., 534 F.2d 1, 7 (1st Cir.) (Campbell, J., dissenting) (consideration of employees' wishes is diminished by "enlargement of the successor doctrine"), cert. denied, 429 U.S. 921 (1976). Contra Jeffries Lithograph Co., 752 F.2d at 468-69. The Jeffries court endorsed the successorship presumption on the grounds that the period immediately following a change of ownership is a period of vulnerability for employees and a time when union representation is most urgently needed. Id. See also NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 296 (1972) (dissent criticized majority for "stretch[ing] [the successorship] concept beyond the limits of its proper application" and failing to recognize employees' right of free choice). See Note, supra note 4, at 434. Once a successor takes over a company, it is likely that employees' feelings towards both the employer and the union have changed. Id. See also Burns, 406 U.S. at 296 (dissent concluded that application of successorship doctrine was not authorized by Act; stating industrial stability was being created at expense of majority of employees' desires); NLRB v. Fall River Dyeing & Finishing Corp., 775 F.2d 425, 438 (1st Cir. 1985) (Torresella, J., dissenting) (Board stripped employees' right to voice their preferences, counteracting basic intention of the Act); Band-Age, Inc., 534 F.2d at 7 (Campbell, J., dissenting) ("[u]nion [must] have roots in the actual wishes of the employees"). See generally Comment, Toward the Emasculation, supra note 47, at 1138 ("industrial peace will be preserved" through safeguarding of employees' recognized rights, consequently meeting their expectations). But see Brooks v. NLRB, 348 U.S. 96, 97-99 (1954). A change in owners does not necessarily affect the certification presumption of one year, if a majority of the new company's employees were previously employed by the former employer. Id.

The provision states in pertinent part that "[n]o election shall be directed in any bargaining unit or any subdivision within which in the preceeding twelve-month period, a valid election shall have been held." Id. See also Brooks v. NLRB, 348 U.S. 96, 101-02 (1954) (Board has correctly continued its application of one-year certification rule); Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131, 1139 (7th Cir.) (well established that Board certification constitutes "an almost conclusive presumption of continued majority status for a reasonable period of time, usually one year"), cert. denied, 419 U.S. 858 (1974). See generally Note, Bargaining Obligations, supra note 7, at 761 (certification rule enjoins employer from questioning majority status of a union which had been certified by Board within that year).

See NLRB v. Burns Int'l Sec. Servs., Inc. v. NLRB, 406 U.S. 272 (1972) (Court noted union recently certified and conclusive presumption of majority support existed); supra note 71 (discussion of conclusive presumption of majority status for union certified within the year).
union is only entitled to a rebuttable presumption of majority support. An employer may introduce competent evidence in an effort to rebut the presumption of majority support.

Since the Union's certification in Fall River was well over one year old at the time the successor employer refused to bargain with it, it is suggested that "Fall River" could have rebutted the presumption of majority status based on a good faith doubt as to the existence of majority union support. Although "Fall River"

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7 See Celanese Corp. of America, 95 N.L.R.B. 664, 672 (1951). The Board, in dicta, noted that after the first year of certification had elapsed the union still had a rebuttable presumption of majority support. Id. See also Nazareth Regional High School v. NLRB, 549 F.2d 873, 879 (2d Cir. 1977) (presumption of union's majority status continued beyond one year, obligating successor to bargain with union unless successor provides evidence of union's lack of majority support); Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 489 (2d Cir. 1975) (following first twelve months of irrebuttable majority status of union, rebuttable presumption continues in favor of such support).

74 See Mingtree Restaurant, Inc. v. NLRB, 736 F.2d 1295, 1297 (9th Cir. 1984). An employer may poll its employees to determine their sentiment towards an incumbent union provided the employer had substantial objective evidence to doubt the majority support of the union and notifies the Board of such polling. Id. See also Nazareth, 549 F.2d at 880 (discussing various criteria employer can use to determine whether union had majority support); Retired Persons Pharmacy, 519 F.2d at 489 (union's majority status may be rebutted by employer, if, in fact, the union no longer had support or if employer provided evidence of a "good faith doubt" at time of refusal to bargain); Harley-Davidson Transp. Co., 273 N.L.R.B. 1531 (1985) (successor may appropriately withdraw from bargaining with certified union if it can show union had lost its majority status at time of refusal to bargain); Sofco, Inc., 268 N.L.R.B. 159 (1983) (expression of opposition by almost all employees toward union produces good faith doubt of its majority support). See generally Note, supra note 4, at 454 (in successorship situation, "[f]lexibility in the law's prerequisites for finding a reasonable good faith doubt [is needed]").

76 See, e.g., W & W Steel Corp. v. NLRB, 608 F.2d 397 (10th Cir. 1979). Good faith doubt was established where the new employer was not contacted by the union until one week after it reopened the plant and where former employees were nevertheless not represented by a recently certified bargaining agent. Id. See also Retired Persons Pharmacy, 519 F.2d at 489-90 (good faith doubt must be proven by "clear and convincing evidence of loss of union support capable of raising reasonable doubt of union's continuing majority"); Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131, 1139 (7th Cir.) (doubt of majority support must be based on objective facts and rational basis), cert. denied, 419 U.S. 838 (1974); NLRB v. Auto Ventshade, Inc., 276 F.2d 303, 307 (5th Cir. 1960) (employee petition for de-certification prior to change in employers did not establish reasonable doubt by successor). Cf. Harley-Davidson Transp. Co., 273 N.L.R.B. 1532 (employee petition for de-certification grounds for reasonable doubt and refusal to bargain).

Certain criteria have been recognized as relevant to the successor's reasonable doubt of a union's majority status. See Note, supra note 4, at 431-32. The Board examines the employer's doubt to assure that it was based on objective, not subjective considerations. See also Newman & Shepherd, supra note 4, at 196. The conducting of an employee poll will not withstand the Board's scrutiny unless it can be shown that the company had an objective reason to perform the poll in the first instance. Id. at 198. Affidavits indicating employee dissatisfaction also must be based on objective factors of loss of majority support. Id.
produced petitions for de-certification at the administrative hearings, the administrative judge excluded them on the basis that they were dated three days before the hearing. Such petitions, therefore, did not justify “Fall River’s” refusal to bargain with the union more than three months earlier. However, where a subsequent employer is requested by the incumbent union to bargain with it, as in Fall River, it would be appropriate to wait until the employer had hired its entire workforce to determine the union’s support.

It is submitted that the Court never actually addressed the issue of whether “Fall River” doubted the majority status of the incumbent Union. It merely determined that “Fall River” was a successor employer and was obligated to bargain with the Union. When “Fall River” completed the employment of its anticipated workforce, less than fifty percent of persons hired by “Fall River” were formerly employed by Sterlingwale, the predecessor company. Therefore, it is submitted that the evidence of its petitions at this time, combined with the lack of substantial continuity in the workforce, demonstrates that the employees did not wish to be represented by the Union. Furthermore, it is suggested that the Board’s and the courts’ consistent failure to consider the subjective intent of the employees’ wishes as to union representation renders it impossible for the successor employer to rebut the presumption of majority support, and consequently, defeats the basic goal of the employees’ free choice.

While the certification bar has been applied to successors to bind them to their predecessors’ duty to bargain, in reality, it appears to limit an employee’s freedom of choice. It is strongly

at 199.

77 Id.
78 See supra notes 64-65 and accompanying text.
80 Id. at 2244.
81 See Newman & Shepherd, supra note 4, at 196.
82 See NLRB v. Band-Age, Inc., 534 F.2d 1, 6 (1st Cir.) (Campbell, J., dissenting), cert. denied, 429 U.S. 921 (1976). The dissent in this case found it “too speculative to adopt as a ’presumption’ that . . . . a majority of [the new company’s employees] desired or even anticipated representation by the Union.” Id. at 7. Although nearly all of the employees had previously worked for the predecessor company and had been represented by the union,
recommended that an employer wait until a full complement of workers have been hired and consider the employment desires of the entire workforce before determining whether there is majority support in favor of a union. It is submitted that this approach neither harms the successor nor its employees. In actuality, it gives employees a voice in the selection of their bargaining representative, and consequently, serves to enhance industrial peace and stable relations between employer and employees. Furthermore, the rule's main objective, which is to preserve stable bargaining relationships between an employer and the union is not realized in a successorship situation because no established relationship yet exists between the two entities.86

This suggested approach would require that, in the case of a successor employer, an election be held after representation petitions by the new employer and its employees have been submitted to the Board. This election would, naturally, involve the participation of the entire workforce.84 It is submitted that the new employer's successorship is no longer significant and, in effect, what is now decisive is the emergence of a union that truly reflects the desires of the workforce.88

it does not necessarily follow that the same desire existed. Id. The dissent further asserted that the existence of new ownership and a changed enterprise made it quite "possible that the employees had no desire to re-establish the Union in its former role." Id. See generally Note, Bargaining Obligations, supra note 7, at 761 (certification bar can lead to restraining employees' right to select their own representatives).

86 See Band-Age, 534 F.2d at 7 (Campbell, J., dissenting). The dissent stated that the presumption of continuity of majority support should not be applied to all cases. Id. He noted that the rule developed upon the concept of one business; when there is a transition in the enterprise such that its nature and the original bargaining unit should have substantially changed, the rule should not be applied. Id.

84 See Comment, supra note 7, at 457. The representation election is "the most equitable substitute" for the successorship doctrine. See also Note, Bargaining Obligations, supra note 7, at 764 (to hold certification rule as applicable to successorship cases would lead to the institution of union which could not be attacked, at a time in which there is reason to doubt continued existence of majority support).

88 See generally Comment, supra note 56, at 277. The Board and the courts have frequently avoided analyzing the facts in applying the union majority presumption to successorship situations by labeling the employer as a successor. Id. What is meant by this is that instead of considering the appropriateness of the bargaining unit of the new employer, the Board finds it easier to label the new employer as a successor and then require it to bargain based solely on the categorization. Id.
Successorship Doctrine

CONCLUSION

The Court in *Fall River v. NLRB* expanded the successorship doctrine and the duty to bargain with an incumbent union to include a union that was not recently certified. When it applied the factor analysis technique used in the past by the Board and many courts, it applied a confused and inconsistent approach to determine successorship. Consequently, employee wishes as to particular union representation were disregarded.

The *Fall River* case should be the beginning of a closer examination of the inequities and uncertainty of the successorship doctrine as applied to the recognition of incumbent unions. Although the dissent provides a starting point for such an analysis, it fails to develop an alternative approach.

This Article has suggested that industrial peace requires that the factor analysis approach used to determine the existence of "successorship" be modified to include the consideration of employees' wishes as to union representation as well as the age of the union. The policies of the Act and the stability of labor relations will be more fully realized with the use of such an approach.

*Dana M. Schear*

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

*See supra notes 47-57 and accompanying text.*