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Michael G. Santangelo

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## SUCCESSOR EMPLOYER'S DUTY TO BARGAIN: WORKFORCE CONTINUITY IS MORE IMPORTANT THAN CONTINUITY OF ENTERPRISE—*SAKS & CO. v. NLRB*

A transfer of business ownership often creates a conflict between the prerogative of the purchaser-employer to organize his own operation and the right of the predecessor's employees to be protected from unexpected shifts in management.<sup>1</sup> Implementing the national policy favoring industrial stability,<sup>2</sup> the National Labor Relations Board (NLRB or the Board) and the federal judiciary have attempted to strike an equitable balance between these conflicting interests by applying a doctrine known as successorship.<sup>3</sup> Although questions of successorship frequently are

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<sup>1</sup> See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964); Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach*, 57 MINN. L. REV. 1051, 1052 (1973). The new employer seeks to ensure economic efficiency in the ongoing enterprise, while the affected employee groups desire continued employment under favorable conditions. One commentator has characterized these separate interests as "inherently contradictory [but] mutually dependent." *Id.* See generally Dopelt, *Successor Companies: The NLRB Limits the Options—And Raises Some Problems*, 20 DE PAUL L. REV. 176 (1971).

<sup>2</sup> See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964); *Tom-A-Hawk Transit, Inc. v. NLRB*, 419 F.2d 1025, 1027 (7th Cir. 1969); Slicker, *supra* note 1, at 1102.

<sup>3</sup> See generally Slicker, *supra* note 1; Note, *Successorship and the Duty to Bargain with the Incumbent Union: A Re-Examination of the Concept of Substantial Continuity*, 8 SW. U.L. REV. 138 (1976); Note, *Appropriate Standards of Successor Employer Obligations Under Wiley, Howard Johnson, and Burns*, 25 WAYNE L. REV. 1279 (1979); Comment, *Bargaining Obligations After Corporate Transformations*, 54 N.Y.U.L. REV. 624, 642-49 (1979). The successorship doctrine was introduced by the NLRB pursuant to its congressional mandate to fashion federal law "from the policy of our national labor laws," see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957), and thus exists as a matter of federal labor common law. See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548-49 (1964).

Successorship should be distinguished from the "single employer" and "alter ego" doctrines which also were developed by the NLRB and the courts to safeguard the collective bargaining rights of employees and to preserve industrial peace. Under the single employer test, four factors are considered to determine whether the operations of nominally distinct employers are sufficiently integrated to justify treating them as a single entity for bargaining purposes. *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv., Inc.*, 380 U.S. 255, 256 (1965) (per curiam); e.g., *NLRB v. Don Burgess Constr. Corp.*, 596 F.2d 378 (9th Cir.), cert. denied, 444 U.S. 940 (1979); *Great Chinese Am. Sewing Co. v. NLRB*, 578 F.2d 251 (9th Cir. 1978) (per curiam); *NLRB v. Winn-Dixie Stores, Inc.*, 341 F.2d 750 (6th Cir.), cert. denied, 382 U.S. 830 (1965). These four elements are "interrelation of operations,

presented in situations involving business reorganizations effected through agreements between predecessor and successor employers,<sup>4</sup> the issue may arise in many other contexts as well. For example, one company may replace another through competitive bidding,<sup>5</sup> or a shift in management may be occasioned by an employer's loss of a sales franchise.<sup>6</sup>

Traditional successorship principles, however, have been expanded, and the courts have demonstrated even greater tendencies to address labor problems from the perspective of the duty sought to be imposed.<sup>7</sup> For example, if there is a "substantial continuity of

common management, centralized control of labor relations and common ownership." *South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 802 n.3 (1976) (per curiam) (quoting *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv., Inc.*, 380 U.S. 255, 256 (1965) (per curiam)).

While the single employer test presumes the coexistence of two or more business entities, the alter ego doctrine presupposes a discontinued business. The doctrine binds a new employer to the labor obligations of the former business when the successor is deemed "merely a disguised continuance" of the predecessor. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). In order to establish alter ego status, the Board and the courts require that the corporate transformation producing the surviving entity be motivated by anti-union animus, *see, e.g., NLRB v. Herman Bros. Pet Supply*, 325 F.2d 68, 70-71 (6th Cir. 1963), and that the original employer retain control over the business, *see NLRB v. Bell Co.*, 561 F.2d 1264, 1268 (7th Cir. 1977). Where alter ego status is shown, the successor and predecessor are treated as the same employer. Thus, the former is subject to all the legal and contractual obligations of the latter. *See, e.g., NLRB v. Herman Bros. Pet Supply*, 325 F.2d 68 (6th Cir. 1963); *NLRB v. Ozark Hardwood Co.*, 282 F.2d 1 (8th Cir. 1960); *NLRB v. Lewis*, 246 F.2d 886 (9th Cir. 1957).

<sup>4</sup> Changes in the business entity may involve a purchase of assets, *e.g., NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135 (3d Cir. 1976); a corporate reorganization such as a merger, *e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); an incorporation of a former partnership, *e.g., Dickey v. NLRB*, 217 F.2d 652 (6th Cir. 1954); or a leasing of the business, *e.g., NLRB v. Band-Age, Inc.*, 534 F.2d 1 (1st Cir.), *cert. denied*, 429 U.S. 921 (1976); *NLRB v. Armato*, 199 F.2d 800 (7th Cir. 1952).

<sup>5</sup> *See, e.g., NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272 (1972); *Emerald Maintenance, Inc. v. NLRB*, 464 F.2d 698 (5th Cir. 1972).

<sup>6</sup> *See, e.g., Tom-A-Hawk Transit, Inc. v. NLRB*, 419 F.2d 1025 (7th Cir. 1969).

<sup>7</sup> *E.g., Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 262 n.9 (1974); *Boeing Co. v. International Ass'n of Machinists and Aerospace Workers*, 504 F.2d 307, 320-22 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975); *Slicker, supra* note 1, at 1103; *see John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 551 (1964). In *Howard Johnson*, the Supreme Court articulated factors which must be considered in determining whether an employer is obliged to fulfill any given duty of successorship:

[T]his inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, [or] the duty to arbitrate . . . .

417 U.S. at 262-63 n.9 (emphasis added); *see Dynamic Mach. Co. v. NLRB*, 552 F.2d 1195, 1204 (7th Cir.), *cert. denied*, 434 U.S. 827 (1977); *Boeing Co. v. International Ass'n of*

the business enterprise," a new employer may be required to remedy unfair labor practices committed by the prior employer,<sup>8</sup> or to arbitrate claims under the old collective bargaining agreement.<sup>9</sup> Whether a new employer will be required to assume the duties of his predecessor, however, depends upon the obligation to be imposed.<sup>10</sup> Thus, when the duty to bargain with the incumbent employees' union is at issue, the Supreme Court has indicated that the primary inquiry is whether there is "continuity of identity of the workforce."<sup>11</sup> Recently, in *Saks & Co. v. NLRB*,<sup>12</sup> the Court of Appeals for the Second Circuit, finding the requisite continuity, enforced a bargaining order against an employer who hired a majority of its employees from its former subcontractor.<sup>13</sup>

Saks & Co. (Saks), a retail store chain, operated its Pittsburgh shop in the same building as a Gimbels Brothers, Inc. (Gimbels) department store.<sup>14</sup> The Saks store provided an alterations service for women's garments and subcontracted this work to Gimbels.<sup>15</sup> Gimbels employed thirty-five alterations workers, eighteen of whom worked solely on the Saks alterations.<sup>16</sup> Gimbels had recognized the Amalgamated Clothing and Textile Workers Union (the Union) as the exclusive bargaining representative of these employees since 1937.<sup>17</sup>

In June 1976, Saks decided to terminate its operation within

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Machinists and Aerospace Workers, 504 F.2d 307, 321 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975).

<sup>8</sup> *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 185 (1973); *Perma Vinyl Corp.*, 164 N.L.R.B. 968, 969, 65 L.R.R.M. 1168, 1169 (1967), *enforced sub nom. United States Pipe and Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

<sup>9</sup> *E.g.*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550-51 (1964).

<sup>10</sup> *See note 7 supra*.

<sup>11</sup> *See note 42 and accompanying text infra*.

<sup>12</sup> 634 F.2d 681 (2d Cir. 1980).

<sup>13</sup> *Id.* at 687.

<sup>14</sup> *Id.* at 683. Gimbels has owned all of Saks' capital stock since 1924. Although the companies file consolidated income tax returns, they are operated independently, and have separate officers and labor relations policies. *Id.*

<sup>15</sup> *Id.* The cost of the alterations employees' social security taxes and premiums for unemployment and workmen's compensation was borne by Gimbels. Saks paid Gimbels for the cost of the alterations service, including a portion of the cost of fringe benefits for the Gimbels employees who worked on Saks garments. *Id.*

<sup>16</sup> *Id.* Gimbels employed a manager of operations to supervise all the alterations employees. Additionally, a supervisory employee of Saks assumed responsibility for work done on Saks garments. *Id.*

<sup>17</sup> *Id.* The most recent collective bargaining agreement extended from February 16, 1976, to February 15, 1979. *Id.*

the Gimbels store.<sup>18</sup> Moreover, because it planned to establish its own alterations department at its new location, Saks informed Gimbels that it no longer would subcontract its alterations work.<sup>19</sup> Saks agreed, however, to interview the displaced Gimbels alterations employees for possible employment at the new store.<sup>20</sup> Following interviews, Saks hired twenty employees for its alterations department, including sixteen of the former Gimbels workers.<sup>21</sup> At Saks' new store, this department was expanded to include men's and children's garments.<sup>22</sup>

Shortly before Saks relocated, its senior vice-president notified the Union that it would not be recognized as the collective bargaining representative of the alterations employees at the new store.<sup>23</sup> The NLRB, however, found that Saks was a successor employer to Gimbels with respect to the alterations employees,<sup>24</sup> concluding that Saks had violated the National Labor Relations Act (NLRA or the Act)<sup>25</sup> by its refusal to bargain with the Union.<sup>26</sup>

A divided Second Circuit panel<sup>27</sup> adopted the Board's finding of successorship and upheld the order, compelling Saks to bargain with the Union.<sup>28</sup> Writing for the majority, Judge Bonsal found

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 683-84.

<sup>20</sup> *Id.* at 684.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*; see note 32 *infra*. Although the former Gimbels employees' salaries initially remained unchanged, Saks later unilaterally altered their working conditions and fringe benefits. 634 F.2d at 684.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Act of July 5, 1935, Pub. L. No. 74-198, ch. 372, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-169 (1976 & Supp. III 1979)).

<sup>26</sup> *Saks & Co. v. NLRB*, 247 N.L.R.B. No. 128, 103 L.R.R.M. 1241 (1980). The Board found that Saks' refusal to bargain violated sections 8(a)(1) and 8(a)(5) of the Act. Section 8(a)(1), provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1) (1976). Section 7 of the Act gives employees the right to organize, join, or assist labor unions. See 29 U.S.C. § 157 (1976). Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . ." 29 U.S.C. § 158(a)(5) (1976). The NLRB also determined that Saks violated sections 8(a)(1) and 8(a)(5) by setting the terms and conditions of employment of the alterations employees after refusing to bargain with the union. 247 N.L.R.B. No. 128, 103 L.R.R.M. 1241 (1980).

<sup>27</sup> Judge Friendly joined Judge Bonsal's majority opinion. Judge Meskill filed a dissenting opinion.

<sup>28</sup> 634 F.2d at 687. The panel, however, unanimously denied enforcement of the Board's order with respect to Saks' establishment of different conditions of employment. *Id.* at 687-88. The dissenting judge agreed with the majority that a successor employer is free to set

that the prime consideration in determining the bargaining obligations of an employer toward an incumbent union was whether there had been "substantial continuity in the identity of the workforce."<sup>29</sup> The court determined that the proper measure of workforce continuity in duty to bargain cases is "whether a majority of the successor's bargaining unit is composed of the predecessor's employees."<sup>30</sup> Observing that most of the alterations employees hired had been a part of the Gimbels unit, the court concluded that Saks succeeded to the collective bargaining duty of Gimbels with respect to these workers.<sup>31</sup> Judge Bonsal rejected Saks' contention that a finding of successorship was inappropriate in light of the expansion of Saks' alteration department, because the work to be performed was virtually the same as that previously performed at Gimbels.<sup>32</sup>

In a vigorous dissent, Judge Meskill asserted that the majority's decision expanded the successorship doctrine beyond the limits set by Supreme Court precedent.<sup>33</sup> Despite his agreement with

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the initial terms and conditions of employment, subject to a later bargaining agreement. *See id.* at 690 (Meskill, J., dissenting).

<sup>29</sup> *Id.* at 684 (citing *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 879 (2d Cir. 1977)). *See also* *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 262-65 (1974); *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 280-81 (1972).

<sup>30</sup> 634 F.2d at 685. Although the court noted a lack of "clear guidance from the Supreme Court," *see id.* at 685 & n.3, it found support for its measure of workforce continuity in the decisions of other circuits. *Id.* at 685-86. Additionally, Judge Bonsal distinguished the Second Circuit's prior decision in *NLRB v. Bausch & Lomb, Inc.*, 526 F.2d 817 (2d Cir. 1975). There the court had stated that successorship obligations could be imposed where a majority of the predecessor's unit was hired. *Id.* at 824. The *Saks* majority dismissed that statement, reasoning that in *Bausch & Lomb*, "the issue of which test to apply was not before us since none of the predecessor's employees had in fact been hired." 634 F.2d at 685 n.2.

<sup>31</sup> *Id.* at 686.

<sup>32</sup> *Id.* Judge Bonsal noted that the addition of men's and children's clothing alterations represented a minimal change in employment conditions and, thus, was insufficient to prevent a finding of successorship. *Id.* (citing *NLRB v. Middleboro Fire Apparatus, Inc.*, 590 F.2d 4, 7 (1st Cir. 1978); *NLRB v. Interstate 65 Corp.*, 453 F.2d 269, 272-73 (6th Cir. 1971)).

<sup>33</sup> 634 F.2d at 688-89 (Meskill, J., dissenting) (citing *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 296 (1972) (Rehnquist, J., dissenting)). Judge Meskill asserted that the majority holding would encourage successor employers to hire just few enough of the predecessor's employees to avoid a bargaining duty. 634 F.2d at 690 (Meskill, J., dissenting). It is submitted, however, that such a result would be unlawful under section 8(a)(3) of the NLRA which makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . ." 29 U.S.C. § 158(a)(3) (1976). Indeed, the Board and the courts have utilized section 8(a)(3) to proscribe the refusal by a successor employer to hire employees of his predecessor, where the refusal was motivated by a desire to avoid successor obligations. *K.B. & J. Young's Super Markets v. NLRB*, 377 F.2d 463, 465 (9th Cir.), *cert. denied*,

the basic premise that continuity of the workforce is a primary consideration in duty to bargain cases,<sup>34</sup> Judge Meskill insisted that "the overall test to be met is whether there has been 'substantial continuity of identity of the business enterprise.'" <sup>35</sup> He asserted that the majority's approach effectively eliminated the several other factors traditionally deemed necessary to a finding of continuity of enterprise and, thus, of successorship.<sup>36</sup> To find successorship, he argued, there must be a showing of something beyond a "mere migration" of employees from one employer to another.<sup>37</sup> Based upon his analysis of precedent, Judge Meskill asserted that he would require, in addition to the majority's test, *either* that there be a transfer of assets accompanying the migration of employees,<sup>38</sup> *or* that the new employer retain most of his predecessor's employees, thus leaving the bargaining unit largely intact.<sup>39</sup>

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389 U.S. 841 (1967); *Mason City Dressed Beef, Inc.*, 231 N.L.R.B. 735, 747-48 (1977), *modified on other grounds sub nom. Packing House & Indus. Servs., Inc. v. NLRB*, 590 F.2d 688 (8th Cir. 1978) (per curiam); *Foodway of El Paso*, 201 N.L.R.B. 933, 938-39, 82 L.R.R.M. 1637 (1973), *enforced*, 496 F.2d 117 (5th Cir. 1974); *Tri State Maintenance Corp.*, 167 N.L.R.B. 933, 935 & n.6 (1967), *enforced*, 408 F.2d 171 (D.C. Cir. 1968); *Piasecki Aircraft Corp.*, 123 N.L.R.B. 348, 350, 43 L.R.R.M. 1443 (1959), *enforced*, 280 F.2d 575 (3d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961). In *Piasecki*, the successor employer hired few enough of the predecessor's employees to avoid a duty to bargain under NLRA section 8(a)(5). 123 N.L.R.B. at 349, 43 L.R.R.M. at 1444; *see* 29 U.S.C. § 158(a)(5) (1976). Although the Board did not find a violation of section 8(a)(5), it held that the successor's failure to hire additional employees of the predecessor was motivated by its desire to avoid a duty to bargain collectively with the incumbent union. 123 N.L.R.B. at 350, 43 L.R.R.M. at 1444. Thus, a violation of section 8(a)(3) was established and the successor was ordered to bargain with the representative of the predecessor's employees. *Id. Piasecki* subsequently was cited with approval by the Supreme Court. *See NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 280-81 n.5 (1972). It must be pointed out, however, that at least one commentator has suggested that the existing section 8(a)(3) remedy does not sufficiently safeguard the bargaining rights of the employees of a predecessor employer. Murphy, *Successorship and the Forgotten Employees: A Suggested Approach*, 31 N.Y.U. CONF. LAB. 75 (1978). Since it is difficult to establish a successor employer's motivation for a refusal to hire his predecessor's employees, this commentator urges that the courts and the Board establish "a doctrine that failure to rehire the predecessor's employees is a *presumptive* violation of Section 8(a)(3) of the Act." *Id.* at 78 (emphasis added).

<sup>34</sup> 634 F.2d at 688 (Meskill, J., dissenting) (citing *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 879 (2d Cir. 1977)).

<sup>35</sup> 634 F.2d at 689 (Meskill, J., dissenting).

<sup>36</sup> *Id.* at 688 n.1 (Meskill, J., dissenting); *see* note 67 and accompanying text *infra*.

<sup>37</sup> *Id.* at 690 (Meskill, J., dissenting).

<sup>38</sup> *Id.* (Meskill, J., dissenting).

<sup>39</sup> *Id.* (Meskill, J., dissenting). The dissent cautioned that where neither of the two circumstances were present, application of successorship principles would encourage discrimination against union members. *Id.* (Meskill, J., dissenting). *See* note 33 *supra*.

It is submitted that the *Saks* court's emphasis upon workforce continuity in duty to bargain cases comports with Supreme Court precedent and national labor policy. In *NLRB v. Burns International Security Services, Inc.*,<sup>40</sup> the sole Supreme Court decision involving a duty to bargain, the Court upheld an NLRB bargaining order where the predecessor employer had been ousted by competitive bidding and the new employer's workforce was composed primarily of employees from the predecessor.<sup>41</sup> In reaching its determination, the Court stated that where a majority of the employees hired by the new employer is represented by a recently certified bargaining agent, and the bargaining unit remains largely intact, there is no basis for refusing to order the new employer to bargain with the incumbent union.<sup>42</sup> The decision in *Saks*, therefore, would appear to be consistent with *Burns*, since sixteen of the twenty employees hired by *Saks* had been employed previously by *Gimbels* and worked under similar conditions.<sup>43</sup>

The *Saks* decision not only finds support in *Burns*, but also is consistent with the labor policy that an employer must bargain with a representative who has the support of a majority of the workforce. Under the National Labor Relations Act,<sup>44</sup> a union is

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<sup>40</sup> 406 U.S. 272 (1972).

<sup>41</sup> *Id.* at 275, 279. In *Burns*, the predecessor employer, Wackenhut Corporation, provided security services for the Lockheed Aircraft Service Company. *Id.* at 274. Shortly before Wackenhut's contract was to expire, Lockheed requested bids from companies supplying security services. *Id.* at 275. Three months prior to the bidding, however, a majority of the Wackenhut guards selected an exclusive bargaining representative in a NLRB election. *Id.* at 274. Prior to placing its bid, *Burns* was informed of the union certification. *Id.* at 275. Having provided the low bid, *Burns* replaced Wackenhut. It retained 27 of the Wackenhut guards and hired 15 of its own. *Id.* at 272.

<sup>42</sup> *Id.* at 280-81. This proposition has been followed consistently by the courts and by the NLRB. *NLRB v. Edjo, Inc.*, 631 F.2d 604, 606-07 (9th Cir. 1980); *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 879 (2d Cir. 1977); *NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135, 139 (3d Cir. 1976); *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 3 (1st Cir.), *cert. denied*, 429 U.S. 921 (1976); *Boeing Co. v. International Ass'n of Machinists & Aerospace Workers*, 504 F.2d 307, 321 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975); *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1140 (7th Cir.), *cert. denied*, 419 U.S. 838 (1974); *Slicker, supra* note 1, at 102-04, *see NLRB v. Polytech, Inc.*, 469 F.2d 1226, 1230 (8th Cir. 1972); *NLRB v. Wayne Convalescent Center, Inc.*, 465 F.2d 1039, 1041-42 (6th Cir. 1972); *W.T. Grant Co.*, 197 N.L.R.B. 955, 956-57, 80 L.R.R.M. 1591, 1591 (1972); *Denham Co.*, 187 N.L.R.B. 434, 443-44 (1970), *modified*, 469 F.2d 239 (1972), *aff'd*, 218 N.L.R.B. 30, 89 L.R.R.M. 1301 (1975); *Goldberg, The Labor Law Obligations of a Successor Employer*, 63 Nw. U.L. Rev. 735, 793-99 (1969).

<sup>43</sup> *Saks & Co. v. NLRB*, 634 F.2d 681, 686 (2d Cir. 1980).

<sup>44</sup> Section 9(a) of the National Labor Relations 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

conclusively presumed to have this support for 1 year following a certification election, or for "a reasonable time" after the employer voluntarily recognizes it as the bargaining representative of the unit.<sup>45</sup> After such period, the employer can rebut this presumption by casting a good faith doubt on the union's support.<sup>46</sup> In succes-

be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . .

29 U.S.C. § 159(a) (1976).

<sup>45</sup> When a union achieves exclusive bargaining representative status by a certification election it is conclusively presumed to enjoy majority support for 1 year. *NLRB v. Massachusetts Mach. & Stamping, Inc.*, 578 F.2d 15, 18 (1st Cir. 1978); *Teamsters Local 769 v. NLRB*, 532 F.2d 1385, 1390 (D.C. Cir. 1976); *Retired Person's Pharmacy v. NLRB*, 519 F.2d 486, 489 (2d Cir. 1975); *Orion Corp. v. NLRB*, 515 F.2d 81, 84 (7th Cir. 1975); see *Brooks v. NLRB*, 348 U.S. 96, 104 (1954). Similarly, a union that receives lawful voluntary recognition is entitled to an irrebuttable presumption of majority status for a reasonable period of time not exceeding 1 year. *Authorized Air Conditioning Co. v. NLRB*, 606 F.2d 899, 907 (9th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *Sahara-Tahoe Corp. v. NLRB*, 581 F.2d 767, 769 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); *e.g.*, *Pick-Mt. Laurel Corp. v. NLRB*, 625 F.2d 476, 479-80 (3d Cir. 1980); *NLRB v. Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d 135, 150 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); *NLRB v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (2d Cir. 1973); *NLRB v. Frick Co.*, 423 F.2d 1327, 1330 (3d Cir. 1970); *NLRB v. San Clemente Pub. Corp.*, 408 F.2d 367, 368 & n.1 (9th Cir. 1969) (*per curiam*); *NLRB v. Montgomery Ward & Co.*, 399 F.2d 409, 412 (7th Cir. 1968); *Rockwell Int'l Corp.*, 220 N.L.R.B. 1262, 1263, 90 L.R.R.M. 1481, 1482 (1975); *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583, 587, 61 L.R.R.M. 1396, 1397 (1966).

<sup>46</sup> *Authorized Air Conditioning Co. v. NLRB*, 606 F.2d 899, 907 (9th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *Sahara-Tahoe Corp. v. NLRB*, 581 F.2d 767, 769 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); see *NLRB v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383-84 (2d Cir. 1973). Unless the employer rebuts the presumption by demonstrating that the union in fact has lost majority backing or by establishing good faith doubt concerning continued majority status, he remains under a duty to bargain with the union.

To establish good faith doubt of the union's majority status, "the employer must present clear and convincing evidence of loss of union support capable of casting reasonable doubt of the union's continuing majority." *Retired Person's Pharmacy v. NLRB*, 519 F.2d 486, 489-90 (2d Cir. 1975). The Board generally has held that allegations of minor employee dissatisfaction with the union do not raise good faith doubts of the union's majority status. *E.g.*, *Pick-Mt. Laurel Corp.*, 239 N.L.R.B. 1257, 1261-62, 100 L.R.R.M. 1236, 1237, 1257, 1261-62 (1979), *enforcement denied on other grounds*, 625 F.2d 476 (3d Cir. 1980); *Pre-Engineered Bldg. Prods., Inc.*, 228 N.L.R.B. 841, 841 n.1, 96 L.R.R.M. 1170 (1977), *enforcement denied on other grounds*, 603 F.2d 134 (10th Cir. 1979); *C.M.E., Inc.*, 225 N.L.R.B. 514, 522-23, 92 L.R.R.M. 1634 (1976). Similarly, diminution in unit size is insufficient to rebut the presumption, *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 879-80 (2d Cir. 1977); *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 4-5 (1st Cir.), *cert. denied*, 429 U.S. 921 (1976); *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1141 (7th Cir.), *cert. denied*, 419 U.S. 838 (1974), nor is employee dissatisfaction with a particular strike or union policy, *Retired Person's Pharmacy v. NLRB*, 519 F.2d 486, 490 (2d Cir. 1975); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 393-94 (D.C. Cir. 1972).

In *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272 (1972), the Supreme Court, in imposing a duty to bargain on a successor employer, focused upon the recent certification of the employees' collective bargaining agent. *Id.* at 278-79. The Court's emphasis on this

sorship cases, where great emphasis is placed on the policy interest in stable bargaining relationships, this presumption is used to justify imposition of the duty to bargain upon the new employer.<sup>47</sup> Thus, where a majority of the successor's employees had been employed by the predecessor, the courts and the NLRB presume that these workers desire continued representation by the incumbent union.<sup>48</sup> Indeed, courts have stated in the past that a mere change in employers should not indicate that the employees' support for the union has diminished.<sup>49</sup> It is submitted therefore, that the *Saks* holding can be justified through this presumption. Moreover, if in fact this presumption is erroneous, the employees can always seek decertification in accordance with the procedures outlined in section 9(c) of the Act.<sup>50</sup>

It is conceded that the formula espoused in the *Saks*' dissenting opinion also can be justified through the presumption of continued majority support. It is submitted, however, that Judge Meskill's requirement that a majority of the predecessor's employees be retained by the successor is too strict in light of the policy con-

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fact has engendered speculation that the lack of recent certification may raise a good faith doubt as to a union's majority status. See Note, *Contract Rights and the Successor Employer: The Impact of Burns Security*, 71 MICH. L. REV. 571, 575-76 (1973); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 252 (1972). Courts that have considered the question have held, however, that a mere absence of certification will not sustain a finding of good faith doubt. See *Valmac Indus., Inc. v. NLRB*, 599 F.2d 246, 247-48 (8th Cir. 1979); *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 4-5 (1st Cir.), cert. denied, 429 U.S. 921 (1976); *NLRB v. Bachrodt Chevrolet Co.*, 468 F.2d 963, 968 (7th Cir. 1972), vacated and remanded, 411 U.S. 912 (1973).

<sup>47</sup> See, e.g., *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 279 & n.3 (1973); *NLRB v. Edjo, Inc.*, 631 F.2d 604 (9th Cir. 1980); *Dynamic Mach. Co. v. NLRB*, 552 F.2d 1195, 1204 n.10 (7th Cir.), cert. denied, 434 U.S. 827 (1977); *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 879 (2d Cir. 1977); *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 4-5 (1st Cir.), cert. denied, 429 U.S. 921 (1976); *M & H Mach. Co.*, 243 N.L.R.B. No. 147, 102 L.R.R.M. 1038 (1979); *Half-Century, Inc.*, 241 N.L.R.B. No. 95, 100 L.R.R.M. 1547 (1979).

<sup>48</sup> See *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 281 (1972); *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609, 611 (9th Cir. 1977); *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 3 (1st Cir.), cert. denied, 429 U.S. 921 (1976); *NLRB v. Daneker Clock Co.*, 516 F.2d 315, 316 (4th Cir. 1975) (per curiam); *Tom-A-Hawk Transit, Inc. v. NLRB*, 419 F.2d 1025, 1027 (7th Cir. 1969).

<sup>49</sup> *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 279 (1972); *NLRB v. Auto Ventshade, Inc.*, 276 F.2d 303, 307 (5th Cir. 1960); *NLRB v. Lunder Shoe Corp.*, 211 F.2d 284, 286 (1st Cir. 1954); *Johnson Ready Mix Co.*, 142 N.L.R.B. 437, 442, 53 L.R.R.M. 1068, 1069 (1963).

<sup>50</sup> National Labor Relations Act § 9(c)(1), 29 U.S.C. § 159(c)(1) (1976). The rebuttable presumption of continued majority support does not prevent employees from seeking decertification in appropriate situations. E.g., *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1139 (7th Cir.), cert. denied, 419 U.S. 838 (1974).

siderations involved in duty to bargain cases.<sup>51</sup> The purpose of imposing a duty to bargain on a "successor" employer is to protect workers from sudden shifts in employment policy occasioned by a change in management.<sup>52</sup> Indeed, employees can legitimately expect that their elected or recognized representatives will continue to be their agents in dealing with management.<sup>53</sup> Thus, it is submitted that the formula of the *Saks* majority furthers these policies in that it expands the successorship doctrine to encompass a greater number of "sudden shifts in management."<sup>54</sup>

The central conflict between the views of the judges of the *Saks* panel, however, involved more than determining which of two mathematical formulas was preferable. The basic disagreement in *Saks* concerned the emphasis to be placed on the element of workforce continuity in successorship cases.<sup>55</sup> Although Judge

<sup>51</sup> If Judge Meskill's formula were adopted, the new employer would be obliged to bargain with an incumbent union, absent a transfer of assets, only if he retained a majority of his predecessor's employees. See 634 F.2d at 690. One commentator has suggested that this approach can create absurd results. For example, he notes, if the new employer reduced the total workforce to less than 50% of the predecessor's unit, he would have no duty to bargain even if he had hired only from that unit. See Comment, *Bargaining Obligations After Corporate Transformations*, 54 N.Y.U.L. REV. 624, 646 n.151 (1979).

<sup>52</sup> The main purpose of the successorship doctrine is to allow business reorganizations while protecting employee rights and promoting industrial peace. *NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135, 138 (3d Cir. 1976). It has been noted, however, that "the basic aim and purpose of successorship in the bargaining context" is to promote the security of employees when management changes occur. Slicker, *supra* note 1, at 1090-91 (emphasis added). Thus, the underlying policy problem in these cases is whether the change in the nature of the employment relationship is sufficiently substantial so as to vitiate the employees' original choice of bargaining representative. 541 F.2d at 138-39; see *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609, 611 (9th Cir. 1977); Slicker, *supra* note 1, at 1103.

<sup>53</sup> Section 7 of the Act provides that "[e]mployees shall have the right . . . to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157 (1976).

<sup>54</sup> Although there appears to be some conflict in the circuits as to which formula correctly measures workforce continuity, the ratio applied by the *Saks* court seems to comport with the weight of authority. See, e.g., *NLRB v. Hudson River Aggregates, Inc.*, 639 F.2d 865, 870-71 (2d Cir. 1981); *NLRB v. Pre-Engineered Bldg. Prods., Inc.*, 603 F.2d 134, 136 n.2 (10th Cir. 1979); *Valmac Indus., Inc. v. NLRB*, 599 F.2d 246, 247-48 (8th Cir. 1979); *International Ass'n of Machinists & Aerospace Workers v. NLRB*, 595 F.2d 664, 669 n.29 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979); *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 879 (2d Cir. 1977); *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 4 n.6 (1st Cir.), *cert. denied*, 429 U.S. 921 (1976); *NLRB v. Daneker Clock Co.*, 516 F.2d 315, 316 (4th Cir. 1975); *Boeing Co. v. International Ass'n of Machinists & Aerospace Workers*, 504 F.2d 307, 319 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975); *Makela Welding, Inc. v. NLRB*, 387 F.2d 40, 45-46 (6th Cir. 1967); Goldberg, *supra* note 42, at 794; Slicker, *supra* note 1, at 1103. *But see* *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 263-64 (1974); *Dynamic Mach. Co. v. NLRB*, 552 F.2d 1195, 1203-04 (7th Cir.), *cert. denied*, 434 U.S. 827 (1977); *NLRB v. Bausch & Lomb, Inc.*, 526 F.2d 817, 824-25 (2d Cir. 1975).

<sup>55</sup> Compare 634 F.2d at 684 (Bonsal, J., writing for majority) with *id.* at 689 (Meskill,

Meskill agreed that continuity in workforce identity is a "primary factor," he asserted that this criterion should not dominate the "overall test"—whether the identity of the business enterprise was substantially continued.<sup>56</sup> Judge Meskill based his argument, in part, on *John Wiley & Sons, Inc. v. Livingston*,<sup>57</sup> where the Supreme Court held that in appropriate circumstances an employer may be required to arbitrate under a collective bargaining agreement signed by his predecessor.<sup>58</sup> Such circumstances, the Court indicated, could be found when there is a "substantial continuity of identity in the business enterprise before and after a change" in employers.<sup>59</sup> Judge Meskill's reliance on *Wiley*, it is submitted, suggests a failure to perceive the distinction between an employer's duty to arbitrate a claim arising under a preexisting collective bargaining agreement and the obligation to bargain with the representative of a legally cognizable bargaining unit.<sup>60</sup>

It is suggested that Judge Meskill's emphasis on identity of the business enterprise is not appropriate in duty to bargain cases. Such an approach results from attempting to apply the successorship label without fully considering the legal obligation sought to be imposed. Indeed, the Supreme Court has cautioned against straining to find a sweeping definition of successor which would apply in every legal context.<sup>61</sup> Thus, it is suggested, the relevant criteria for determining successorship must depend upon the duty sought to be imposed.<sup>62</sup> When the question is the existence of a

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J., dissenting).

<sup>56</sup> *Id.* (Meskill, J., dissenting).

<sup>57</sup> 376 U.S. 543 (1964).

<sup>58</sup> *Id.* at 551.

<sup>59</sup> *Id.*

<sup>60</sup> Judge Meskill conceded that in *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 879 (2d Cir. 1977), the Second Circuit focused upon workforce continuity. 634 F.2d at 688 (Meskill, J., dissenting). He asserted, however, that the case also involved a transfer of assets, thus evidencing continuity of enterprise. Thus, he contended, that *Nazareth* and *Wiley*, see notes 57-59 and accompanying text *supra*, properly emphasized the "business enterprise" approach. See 634 F.2d at 690 (Meskill, J., dissenting). It is submitted, however, that the *Nazareth* court did not demonstrate any great concern with a transfer of assets. Indeed, in imposing the duty to bargain, the court relied principally upon the presumption of continued majority status, see 549 F.2d at 879-80, thus focusing upon workforce continuity. See notes 47-50 and accompanying text *supra*. Similarly, it is suggested, Judge Meskill's reliance on *Wiley* is misplaced, for that case is distinguishable. *Wiley* involved a duty to arbitrate, not a duty to bargain. See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964); notes 57-59 and accompanying text *supra*.

<sup>61</sup> See *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 262-63 n.9 (1974); note 7 and accompanying text *supra*.

<sup>62</sup> The Second Circuit appeared to recognize that the *Saks* holding could be limited to

duty to arbitrate a preexisting grievance, other factors indicating continuity of the business enterprise may be more significant than workforce continuity.<sup>63</sup> This is because the obligation to arbitrate arises under the contract between the predecessor employer and his employees.<sup>64</sup> Thus, in the arbitration context, while retention of a majority of the predecessor's employees can be a factor, it is submitted that an element of greater importance is a transfer of assets, or some other indicator of the continuing nature of the business entity.<sup>65</sup> In contrast, it has been recognized that in duty to bargain cases, the new employer's obligation should be construed by looking to the workforce since the critical question is whether majority support for the union still exists.<sup>66</sup> Thus, although the Board and the courts may consider other factors in determining whether a duty to bargain exists,<sup>67</sup> the *essential* requirements are

the precise legal duty involved. Judge Bonsal stated that "where the question is *simply one of the successor's duty to bargain*, . . . the appropriate test of continuity is whether a majority of the successor's bargaining unit is composed of the predecessor's employees." 634 F.2d at 685 (emphasis added).

<sup>63</sup> Although continuity of the business enterprise can be evidenced by looking to the identity of the workforce, see *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 551 (1964), it has been recognized that a stronger showing can be made by focusing upon a transfer of assets. See *Boeing Co. v. International Ass'n of Machinists & Aerospace Workers*, 504 F.2d 307, 322 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975).

<sup>64</sup> *Boeing Co. v. International Ass'n of Machinists & Aerospace Workers*, 504 F.2d 307, 319 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975); see *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 551 & n.5 (1964); Slicker, *supra* note 1, at 1074-86.

<sup>65</sup> See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 551 (1964); *Boeing Co. v. International Ass'n of Machinists & Aerospace Workers*, 504 F.2d 307, 322 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975); see, e.g., *United Paperworkers Int'l Union v. Pennetech Papers, Inc.*, 439 F. Supp. 610, 614-17 (D. Maine 1977), *aff'd*, 583 F.2d 33 (1st Cir. 1978); *Local 1115 Joint Bd. Nursing Home v. B & K Investments, Inc.*, 436 F. Supp. 1203, 1208-09 (S.D. Fla. 1977); *Eastern Freight Ways, Inc. v. Local No. 707*, 300 F. Supp. 1289, 1292 (S.D.N.Y. 1969), *aff'd*, 422 F.2d 351 (2d Cir. 1970) (per curiam).

<sup>66</sup> See notes 45-49 and accompanying text *supra*.

<sup>67</sup> In determining the obligations of successor employers, the Board and the courts have considered whether

- (1) there has been a substantial continuity of the same business operations;
- (2) the new employer uses the same plant;
- (3) the same or substantially the same workforce is employed;
- (4) the same jobs exist under the same working conditions;
- (5) the same supervisors are employed;
- (6) the same machinery, equipment, and methods of production are used; and
- (7) the same product is manufactured or the same services offered.

*Border Steel Rolling Mills, Inc.*, 204 N.L.R.B. 814, 815, 83 L.R.R.M. 1606, 1608 (1973); *accord*, *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 3-4 (1st Cir.), *cert. denied*, 429 U.S. 921 (1976); *NLRB v. Dent*, 534 F.2d 844, 846 (9th Cir. 1976); *NLRB v. Daneker Clock Co.*, 516 F.2d 315, 316 (4th Cir. 1975) (per curiam); *Teamsters Local 249 v. Bill's Trucking, Inc.*, 493 F.2d 956, 963 n.40 (3d Cir. 1976); *J-P Mfg., Inc.*, 194 N.L.R.B. 965, 968-70, 79 L.R.R.M. 1216, 1218 (1972); see Slicker, *supra* note 1, at 1054-63. See generally Goldberg, *The Labor Law*

continuity of the workforce and appropriateness of the bargaining unit.<sup>68</sup> Indeed, where continuity of the workforce has not been found, courts have refused to enforce bargaining orders despite the presence of many other factors pointing to continuity of the business enterprise.<sup>69</sup>

### CONCLUSION

In *Saks*, the Second Circuit recognized that any successorship determination must be made by analyzing the legal duty sought to be imposed. The central focus in duty to bargain cases is whether the presumption of continued majority support is justified. Thus, the court correctly held that "substantial continuity in the identity of the workforce" is the primary factor to be considered in determining whether to impose bargaining obligations upon a successor employer. Finally, it is suggested that the measure of workforce continuity endorsed by the Second Circuit—whether most of the successor's employees were hired from the predecessor unit—best evidences continued majority support while ensuring that employees are protected when changes in management occur.

*Michael G. Santangelo*

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*Obligations of a Successor Employer*, 63 Nw. U. L. Rev. 735, 746-74, 793-806 (1969); Spelfogel, *Labor Liabilities in Purchases, Acquisitions and Mergers: The NLRB's Successor and Accretion Doctrines*, 21 LABOR L.J. 577, 578 (1970).

<sup>68</sup> NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272, 280-81 (1972); see note 42 and accompanying text *supra*.

<sup>69</sup> *E.g.*, Pacific Hide & Fur Depot, Inc. v. NLRB, 553 F.2d 609, 611-14 (9th Cir. 1977) (purchase of plant, same work, same equipment, same skills, but no continuity in workforce); NLRB v. United Indus. Workers of the Seafarers Int'l Union, 422 F.2d 59, 62-63 (5th Cir. 1970) (business was leased, but no continuity in workforce); NLRB v. John Stepp's Friendly Ford, Inc., 338 F.2d 833, 836 & n.8 (9th Cir. 1964) (transfer of assets and continuity of business operations, but no continuity in the workforce); Bengal Paving Co., 245 N.L.R.B. No. 163, 102 L.R.R.M. 1374, 1375 (1979) (transfer of assets but no continuity in the workforce).