Fall River: The NLRB's Expansive Successorship Doctrine

The National Labor Relations Board (NLRB or Board) of the 1980s has been widely accused of being biased in favor of management.[1] Thus, when the Board does issue an order favoring a union, the reviewing court might feel obliged to enforce it. Regrettably, the Supreme Court appears to have yielded to this temptation when it took one of its infrequent looks at the successor employer doctrine in *Fall River Dyeing & Finishing Corp. v. NLRB*.[2] This Comment argues that the Court incorrectly approved of the Board's broad application of the successorship doctrine in this case, producing a result which was unfair to both the employer and the employees.

I. Facts

In 1982 Sterlingwale Corp. (Sterlingwale) closed the textile dyeing and finishing plant that it had operated in Fall River, Massachusetts for over thirty years.[3] The company laid off most of its employees in February 1982[4] and went out of business several months later.[5] A new company, Fall River Dyeing and Finishing Corp. (Fall River), bought most of Sterlingwale's real property and equipment from Sterlingwale's secured creditors.[6] Fall River also purchased Sterlingwale's inventory and some other assets at a public auction.[7] Fall River commenced operations in September 1982.[8] Initially, most of its employees were former employees of Sterlingwale.[9] By the time the new company was operating at full capacity, however, less than half of its employees were former Sterlingwale employees.[10]

United Textile Workers Local 292 (Local 292 or Union) had represented Sterlingwale's employees for many years,[11] and Fall River refused the Union's request to bargain with it.[12] The issue in this case was whether this refusal constituted

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1. *See, e.g.*, Gould, *Some Reflections on Fifty Years of the National Labor Relations Act: The Need for Labor Board and Labor Law Reform*, 38 Stan. L. Rev. 937 (1986); Modjeska, *The Reagan NLRB, Phase I*, 46 Ohio St. L.J. 95 (1985); Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769 (1983); Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harv. L. Rev. 351 (1984); Comment, *The Guards Trilogy: The NLRB Lowers the Guard on Employee Rights*, 35 Am. U.L. Rev. 175 (1985); Note, *The National Labor Relations Board at 50: Politicization Creates Crisis*, 52 Brooklyn L. Rev. 229 (1986); *but see* Coleman, *The New, "New" Reagan National Labor Relations Board and the Outlook for the Future*, 34 Fed. B. News & J. 255, 255 (1987) (maintaining that the Reagan Board "has merely brought the decisions of the NLRB back to [the Board's] statutorily mandated 'neutral' position").

2. 107 S. Ct. 2225 (1987).
3. *Id.* at 2229–30.
4. *Id.* at 2229.
5. *Id.* at 2230.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 2230–31.
10. *Id.* at 2231.
11. *Id.* at 2229.
12. *Id.* at 2230.

a violation of subsections 8(a)(1)[13] and 8(a)(5)[14] of the National Labor Relations Act (NLRA or Act). Subsection 8(a)(1) of the Act prohibits an employer from interfering with its employees' choice of a bargaining representative. Subsection 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain with the representative of its employees. The resolution of this issue turned on whether the successor employer doctrine applied to Fall River and on whether Local 292 could be considered the exclusive representative of Fall River's employees.

A panel of the National Labor Relations Board found, by a vote of two to one, that Fall River had violated subsections 8(a)(1) and 8(a)(5) of the Act and ordered it to bargain with the Union.[15] A panel of the Court of Appeals for the First Circuit enforced the order by the same margin,[16] and the Supreme Court affirmed by a vote of six to three.

II. BACKGROUND

The National Labor Relations Act,[17] which was passed in 1935, sought to promote industrial peace by establishing a federal policy of encouraging and facilitating collective bargaining.[18] The duty to bargain imposed on employers by subsection 8(a)(5) of the Act is based on the premise that collective bargaining is the best way to further the mutual interests of the parties.[19] The Act is silent on whether the duties it imposes on employers extend to situations where one employer succeeds to the business of another. Successorship can occur in a variety of contexts, such as "merger, sale of stock, sale of assets, loss of a renewable contract, incorporation of a formerly unincorporated entity, dissolution of a corporation, bankruptcy, and other

13. 29 U.S.C. § 158(a)(1) (1982). Subsection 8(a)(1) of the Act provides: "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]." Section 7, in turn, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activites for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

29 U.S.C. § 157 (1982).

14. 29 U.S.C. § 158(a)(5) (1982). Subsection 8(a)(5) of the Act provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of [subsection 9(a)]." Subsection 9(a), in turn, 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 . . . .

29 U.S.C. § 159(a) (1982).

15. Fall River Dyeing & Finishing Corp., 272 N.L.R.B. 839 (1984), *enforced*, 775 F.2d 425 (1st Cir. 1985), *aff'd*, 107 S. Ct. 2225 (1987).

16. NLRB v. Fall River Dyeing & Finishing Corp., 775 F.2d 425 (1st Cir. 1985), *aff'd*, 107 S. Ct. 2225 (1987).

17. National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935).

18. 29 U.S.C. § 151 (1982).

19. *See* H. K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970) ("The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.").

means."[20] The duties of successor employers have been developed by the NLRB and the federal courts.

The Supreme Court first addressed this issue in *John Wiley & Sons, Inc. v. Livingston*.[21] The case involved an employer, Wiley, which had merged with a smaller company, Interscience Publishers, Inc.[22] Prior to the merger, Interscience had signed a collective bargaining agreement that included an arbitration clause.[23] At the time of the merger, Wiley and the union representing Interscience's employees were unable to agree whether or not Wiley would be bound by the arbitration clause.[24] The Supreme Court held that

> the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.[25]

Immediately following *Wiley*, it was unclear how extensive the duties of successor employers were.[26] The Court addressed this issue in *NLRB v. Burns International Security Services, Inc.*[27] In *Burns*, an employer acquired a plant protection service contract that had previously been held by a competitor, Wackenhut Corp.[28] A majority of the security guards hired by the new employer, Burns, were former employees of Wackenhut.[29] Wackenhut had recently negotiated a collective bargaining agreement with the United Plant Guard Workers of America, which the Board had certified several months earlier to represent Wackenhut's employees.[30] The Court held that Burns was not bound by the substantive terms of the contract to which it had not agreed,[31] but that it was obligated to bargain with the union.[32]

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20. Silver, *Reflections on the Obligations of a Successor Employer*, 2 CARDOZO L. REV. 545, 545 n.1 (1981). For discussions of the successorship doctrine in the context of mergers and acquisitions, see Fasman & Fischler, *Labor Relations Consequences of Mergers and Acquisitions*, 13 EMP. REL. L.J. 14 (1987) and Mace, *The Supreme Court's Labor Law Successorship Doctrine After* Fall River Dyeing, 39 LAB. L.J. 102 (1988). For a discussion of the effect of the federal Bankruptcy Code on the duty to bargain, see West, *Life After* Bilidisco*: Section 1113 and the Duty to Bargain in Good Faith*, 47 OHIO ST. L.J. 65 (1986). The successor employer doctrine should be distinguished from the doctrine that an employer remains bound by a collective bargaining agreement if it is the alter ego of the employer that entered into the agreement, *see* Note, *Labor Law's Alter Ego Doctrine: The Role of Employer Motive in Corporate Transformations*, 86 MICH. L. REV. 1024, 1033–38 (1988), or if it is a "continuing employer" which "remain[s] intact and unaltered" after a transfer of ownership. EPE, Inc. v. NLRB, 845 F.2d 483, 487 (4th Cir. 1988). *See also* District 1199P, Nat'l Union of Hosp. and Health Care Employees v. NLRB, 864 F.2d 1096 (3d Cir. 1989) (discussion of whether either the successorship doctrine or the alter ego doctrine applies when an employer closes a facility with the intention of selling it, but later reopens the facility).

21. 376 U.S. 543 (1964).

22. *Id.* at 544–45.

23. *Id.* at 544, 547.

24. *Id.* at 546.

25. *Id.* at 548.

26. *See* Note, *The Duties of Successor Employers Under* John Wiley & Sons v. Livingston *and Its Progeny*, 43 N.Y.U. L. REV. 498 (1968).

27. 406 U.S. 272 (1972).

28. *Id.* at 274.

29. *Id.*

30. *Id.*

31. *Id.* at 281–82.

32. *Id.* at 278.

In the Supreme Court's next major successorship case, *Howard Johnson Co. v. Detroit Local Joint Executive Board*,[33] one company purchased a hotel and restaurant from another.[34] The new employer, Howard Johnson, hired an almost entirely new work force, retaining a few of the former owner's employees.[35] The Court held that Howard Johnson was not bound by the arbitration provision in its predecessor's collective bargaining agreement, in part because of a lack of "substantial continuity in the identity of the work force."[36]

The Supreme Court cautioned in *Howard Johnson* that the label "successor employer" may be misleading because "a new employer . . . may be a successor for some purposes and not for others."[37] Therefore, "the real question . . . is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative?"[38] Thus, in *Fall River*, the issue was not simply whether Fall River could be considered Sterlingwale's "successor," but whether Fall River had an obligation to bargain with the union that the Board had certified as the representative of Sterlingwale's employees.

Under the rationale of *Wiley*, *Burns*, and *Howard Johnson*, this obligation turned on two questions. The first was whether, at the appropriate time,[39] a majority

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33. 417 U.S. 249 (1974).

34. *Id.* at 250.

35. *Id.*

36. *Id.* at 263.

37. *Id.* at 263 n.9.

38. *Id.* at 262 n.9.

39. The time when a successor employer's duty to bargain arises was a major issue in *Fall River*. For the first time, the Supreme Court addressed the Board's "substantial and representative complement" rule. *Fall River*, 107 S. Ct. at 2237–40. The First Circuit explained that

> [i]n a successorship situation, the bargaining obligation can normally be determined at the time of transfer or when operations begin. In other instances, however, such as when an employer is rebuilding a collapsed business or is operating at a substantially reduced capacity, a delay in making the determination may be appropriate. As the Supreme Court has noted, a determination regarding the successor's obligation to bargain may have to wait "until the successor employer has hired his full complement of employees . . . , since it will not be evident until then that the bargaining representative represents a majority of employees in the unit as required by Section 9(a) of the Act."

Fall River, 775 F.2d at 430 (quoting *Burns*, 406 U.S. at 295).

In *Fall River*, the new employer started its operations gradually, beginning in September 1982. *See Fall River*, 107 S. Ct. at 2230. The Board found that "the first shift was at almost full operating level when a second shift was commenced in January 1983." *Fall River*, 272 N.L.R.B. at 840. Two full shifts were in place by April 1983. *See id.* Fall River argued that the correct point in time for assessing whether it had a duty to bargain with Local 292 was April 1983, *id.*, relying on the "full complement" language in *Burns*. The NLRB, on the other hand, made this determination as of January 1983. *Id.* The distinction is outcome-determinative because, as of the earlier date, a majority of Fall River's employees were former employees of Sterlingwale, while, as of the later date, this was no longer true. *Id.* In the absence of such a majority, no duty to bargain with the union would attach. *See Burns*, 406 U.S. at 295. *But see infra* note 41 and accompanying text.

In arriving at the January 1983 date, the Board applied the administratively created rule that the bargaining obligation arises when the new employer has hired a substantial and representative complement of employees. *Fall River*, 272 N.L.R.B. at 840. The rationale for this rule is that the start-up of operations may last for a long period of time and that, without such a rule, a new employer may continuously expand his business and claim that he has never reached a "full complement" of employees. *See* NLRB v. Hudson River Aggregates, Inc., 639 F.2d 865, 870–71 (2d Cir. 1981). The "substantial and representative complement rule" strikes a balance between the right of the first employees hired to prompt representation and the right of employees hired later to a voice in choosing their representative. *Fall River*, 107 S. Ct. at 2238 (citing NLRB v. Pre-Engineered Bldg. Prods., Inc., 603 F.2d 134, 136 (10th Cir. 1979)).

In applying this rule, the Board considers

> (1) whether the job classifications designated for the operation are substantially filled, (2) whether the new business is at a substantially normal level of operations, (3) the difference between the current size of the

of Fall River's employees[40] were former employees of Sterlingwale.[41] The second was whether there was "substantial continuity of identity in the business enterprise."[42] The Board explained in *Aircraft Magnesium*[43] that "[t]he traditional criteria for this [second] test include whether there has been substantial continuity in the following: (1) business operations; (2) plant; (3) work force; (4) jobs and working conditions; (5) supervisors; (6) machinery, equipment, and methods of production; and (7) product or service."[44]

Both the majority[45] and the dissent[46] in *Fall River* cited with approval these seven indicia of successorship. However, they differed in the application of these factors to the facts in the case. The Supreme Court upheld the Board's determination that the requisite continuity was present.[47]

This Comment focuses on this determination and argues that *Fall River* was incorrectly decided because there was insufficient continuity between the old and the new employers.[48] This Comment[49] also argues that, even if there were enough

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complement and its size at the time the business reaches a normal level of operations, (4) the time expected to elapse before a substantially larger complement will be at work, and (5) the relative certainty of the employer's anticipated expansion of the complement.

NLRB v. Cutter Dodge, Inc., 825 F.2d 1375, 1378 (9th Cir. 1987) (citing *Fall River*, 107 S. Ct. at 2239 (citing Premium Foods, Inc. v. NLRB, 709 F.2d 623, 628 (9th Cir. 1983))). Fall River argued that this rule is invalid because it is inconsistent with *Burns*, at least where the "full complement" rule would not be difficult to apply. Brief for Petitioner at 27-31, Fall River Dyeing & Finishing Corp. v. NLRB, 107 S. Ct. 2225 (1987) (No. 85-1208) [hereinafter Brief for Petitioner]. Even if one accepts the rule as valid, however, "the date chosen by the NLRB for measuring the substantial complement standard is unsupportable, and the Court's affirmance of this choice, curious." *Fall River*, 107 S. Ct. at 2245 (Powell, J., dissenting). Admittedly, the rule is designed to be "applied impressionistically rather than mechanically." Fasman & Fischler, *supra* note 20, at 32. However, of the five factors which the Board considers, the first is the only one supporting the January 1983 date. A "complete range of jobs" had been filled by as early as November 1982. *Fall River*, 107 S. Ct. at 2231. On the other hand, the business was not near its normal operating level in January 1983. Only one shift was in operation at that time, and the employer had definite plans to implement a second shift within only three months. *Fall River*, 272 N.L.R.B. at 840. There was never any serious doubt that this expansion would take place, and, in fact, the second shift was in place by April 1983. *Id.* Thus, four of the Board's five criteria indicate that January 1983 was an inappropriate time for measuring the carryover of employees from Sterlingwale to Fall River.

The Board should re-examine the means by which it determines the appropriate date for assessing employee carryover. Although the substantial and representative complement rule is not inappropriate, the Board should adhere more strictly to the five criteria which it has established.

40. An additional requirement was that a majority of Fall River's employees supported the Union. For a discussion of this issue and the presumptions which the Board applies in determining the Union's majority status, see *infra* text accompanying notes 116–45.

41. *But see Fall River*, 107 S. Ct. at 2237 n.12 (suggesting that, although the great weight of authority supports this proposition, a slightly different interpretation of *Burns* and *Howard Johnson* is possible).

42. *Wiley*, 376 U.S. at 551.

43. 265 N.L.R.B. 1344 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984).

44. *Id.* at 1345.

45. *Fall River*, 107 S. Ct. at 2236.

46. *Id.* at 2243 (Powell, J., dissenting).

47. *Id.* at 2236.

48. *See infra* text accompanying notes 51–115.

49. An additional issue raised by the case is beyond the scope of this Comment. The employer maintained that the Board's "continuing demand" rule, whereby a union's premature demand for recognition continues in force until the time when it can properly be made, should not apply in successorship situations. Brief for Petitioner, *supra* note 39, at 31–35. The Court rejected this argument, noting that "[i]t makes no sense to require the union repeatedly to renew its bargaining demand in the hope of having it correspond with the 'substantial and representative complement' date, when, with little trouble, the employer can regard a previous demand as a continuing one." *Fall River*, 107 S. Ct. at 2241. *See also 1985–1986 Annual Survey of Labor Relations and Employment Discrimination Law*, 28 B.C.L. REV. 25, 53–57 (1986) (applauding the First Circuit's approval of the continuing demand rule in *Fall River*).

continuity to establish a bargaining duty, the Board improperly disregarded evidence that the Union lacked the support of a majority of Fall River's employees.[50]

III. ANALYSIS

A. *Continuity of the Enterprise*

The Court's conclusion that Fall River was a successor to Sterlingwale for purposes of the duty to bargain can best be evaluated by considering separately, to the extent possible, each of the seven criteria listed in *Aircraft Magnesium*.[51] The criteria that the Board purports to consider in successorship cases have been relatively consistent over the years[52] and were not questioned by Fall River. Thus, they provide a useful framework for discussion.

The first of these seven factors, the continuity of business operations, was one of the main areas of disagreement. The Board gave very little weight to the seven-month hiatus between the cessation of Sterlingwale's operations and the start of Fall River's operations, referring to it only in a footnote.[53] Both the court of appeals[54] and the Supreme Court[55] recognized that the hiatus is a factor that should be considered, but indicated that, by itself, it does not preclude successorship. The Supreme Court discounted the hiatus because of its "less than certain" nature,[56] pointing out that Sterlingwale retained a skeleton crew during most of the period and that its owner was attempting to revive the enterprise.[57] Justice Powell, in his dissenting opinion, recognized the importance of the hiatus, describing it as a "clear break."[58] The employees had reason to question the viability of the predecessor enterprise when they were laid off indefinitely.[59] As time went by, the likelihood that they would be rehired at the same location quickly decreased.[60] Thus, one of the key sets of factual circumstances justifying the successor employer doctrine—that the retained employees "view their job situations as essentially unaltered"[61]—does not exist in this case.

Of course, *Fall River* does not indicate that a hiatus of seven months or less is

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50. *See infra* text accompanying notes 116–45.

51. *See supra* text accompanying note 44.

52. *See* Comment, *Successorship Doctrine: A Hybrid Approach Threatens to Extend the Doctrine When the Union Strikes Out*, 28 ST. LOUIS U.L.J. 263, 274–76 (1984). While one commentator has asserted that "the factors considered in the analysis of successorship have continuously changed," Note, *Expansion of the Successorship Doctrine*—Fall River Dyeing & Finishing Corp. v. NLRB, 23 WAKE FOREST L. REV. 549, 569 (1988), a more accurate statement would be that the Board's application of the criteria has sometimes produced conflicting results. *See* Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach*, 57 MINN. L. REV. 1051, 1054–63 (1973).

53. *Fall River*, 272 N.L.R.B. at 840 n.4.

54. *Fall River*, 775 F.2d at 429.

55. *Fall River*, 107 S. Ct. at 2237.

56. *Id.*

57. *Id.*

58. *Id.* at 2243 (Powell, J., dissenting).

59. *Id.* at 2244 (Powell, J., dissenting). *See also* Brief for Petitioner, *supra* note 39, at 21.

60. *Fall River*, 107 S. Ct. at 2244 (Powell, J., dissenting).

61. Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973). *See also* NLRB v. Aquabrom, 855 F.2d 1174, 1179 (6th Cir.), *amended*, 862 F.2d 100 (1988) ("By focusing on the employees' perspective in conducting the substantial continuity inquiry, the Board furthers the Act's policy of industrial peace.").

always insignificant. The Board, however, may be leaning toward such a conclusion. In *Briggs Plumbingware, Inc.*,[62] the Board discounted the importance of a three-month hiatus because it was shorter than that in *Fall River*.[63] The courts in *Fall River* simply upheld the Board's decision not to give much weight to the seven-month hiatus under the circumstances of that case, and the Board should not interpret *Fall River* more broadly.

The employer also argued that there was no continuity of business operations because there was no transfer of customer lists between Sterlingwale and Fall River.[64] Nevertheless, over half of Fall River's dollar volume was attributable to former customers of Sterlingwale.[65] Fall River argued that sales to one of its customers, Marcamy Sales Corp., should be excluded from this calculation, in which case only one-third of its sales would be attributable to former Sterlingwale customers.[66] This argument was based on the fact that one of Fall River's largest shareholders was the president of Marcamy.[67] The majority and dissenting opinions took note of these arguments and apparently gave them at least some weight in the context of the totality of circumstances test for successorship.[68]

The Board's current view on this subject is unclear. In *Good N' Fresh Foods, Inc.*,[69] the new employer did business with only a few of the old employer's customers.[70] The Board, though, held that

> the successorship doctrine does not require that the predecessor and the successor have the same customers. Rather[,] as indicated by the Supreme Court, the pertinent question is whether they "basically [have] the same body of customers," *i.e.*[,] whether they do business in the same market. Here, [the old employer] did and the [new employer] does business with the same class of customers, *i.e.*, both sell to wholesale and retail distributors of bakery products.[71]

However, in *Faria, Ltd.*,[72] decided only two days after *Good N' Fresh*, the Board felt obliged to compare the particular customers of the old and new employers before finding that successorship existed.[73] Given the contradictory reasoning in these two cases, the meaning of the phrase "same body of customers" is likely to be the subject of future litigation.

The second factor the Board considers in determining whether a successorship situation exists is whether the new employer uses the same physical plant.[74] This issue is closely related to the question of whether the same machinery, equipment,

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62. 286 N.L.R.B. No. 121 (Nov. 27, 1987) (LEXIS, Labor library, NLRB file).
63. *Id.* (citing the First Circuit's decision in *Fall River*).
64. *Fall River*, 107 S. Ct. at 2243 (Powell, J., dissenting); Brief for Petitioner, *supra* note 39, at 18.
65. *Fall River*, 107 S. Ct. at 2231.
66. Brief for Petitioner, *supra* note 39, at 18.
67. *See Fall River*, 107 S. Ct. at 2230.
68. *Id.* at 2236–37; *id.* at 2243 (Powell, J., dissenting).
69. 287 N.L.R.B. No. 134, 1988 NLRB LEXIS 59.
70. *Id.* at 11.
71. *Id.* at 25 (quoting *Fall River*, 107 S. Ct. at 2236) (second set of brackets in original).
72. 287 N.L.R.B. No. 136, 1988 NLRB LEXIS 35.
73. *Id.* at 14–15.
74. Aircraft Magnesium, 265 N.L.R.B. 1344, 1345 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984).

and methods of production are used,[75] so it is useful to discuss them together. At first glance, the facts in this case would seem to favor the Board's position on this point because a substantial amount of Fall River's plant and equipment was acquired from Sterlingwale.[76] However, Fall River argued that, because some of these assets were acquired at public auction, the sales were not evidence of continuity of the enterprise.[77] The Court rejected this argument, in part because Fall River was formed for the purpose of acquiring Sterlingwale's assets.[78] Viewed in the context of all of the facts of the case, the Court's explanation is unsatisfactory. This was not a situation in which the new employer purchased most of the old employer's business assets.[79] As Fall River's brief pointed out, the new employer did not acquire Sterlingwale's trade name, good will, personnel records, or other intangible assets, nor did it assume any of Sterlingwale's liabilities.[80] "[T]he fact that the physical plant and equipment once were a part of Sterlingwale's operation should be totally irrelevant to the successorship determination."[81]

Fall River did not seriously argue that there was a change in the methods of production.[82] As the Court noted, "from the perspective of the employees, their jobs did not change. Although petitioner abandoned converting dyeing in exclusive favor of commission dyeing, this change did not alter the essential nature of the employees' jobs, because both types of dyeing involved the same production process."[83] This focus on the employees' perspective is appropriate because the purpose of the successor employer doctrine is to preclude a new employer from avoiding the duty to bargain in a situation where, from the employees' point of view, nothing has changed. Thus, standing alone, the fact that there was no change in production methods tends to support the Board's finding of successorship.

The third factor, continuity of the work force,[84] is always one of the most important issues[85] because the successorship doctrine necessarily focuses on the relationship between a defined group of employees and their new employer.[86] The dispute in this case focused on the means by which the employees of Sterlingwale

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75. *See id.*

76. *Fall River*, 107 S. Ct. at 2230.

77. *Id.* at 2236 n.10.

78. *Id.*

79. *Cf.* NLRB v. McFarland, 306 F.2d 219 (10th Cir. 1962).

80. Brief for Petitioner, *supra* note 39, at 16.

81. *Id.* at 17.

82. *But see infra* text accompanying notes 104–07.

83. *Fall River*, 107 S. Ct. at 2236.

84. *See* Aircraft Magnesium, 265 N.L.R.B. 1344, 1345 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984).

85. It has been suggested not only that continuity of the work force is more important than the other factors, but also that this issue should be considered as a threshold matter before determining whether any of the other indicia of successorship are present. Comment, *The Successorship Doctrine: In Search of a New Focus*, 17 WILLAMETTE L. REV. 405, 441 (1981). This approach would be appropriate if continuity of the work force were a purely numerical matter. However, as this Comment's discussion of the *Fall River* case demonstrates, this is not always so. *See infra* text accompanying notes 87–96.

86. *See* Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 263–64 (1974). Actually, there were two distinct issues regarding continuity of the work force in *Fall River*. One issue involved the point in time at which this continuity should be assessed. *See supra* note 39. The other issue was the continuity itself. *See infra* notes 87–96 and accompanying text.

became employees of Fall River. These employees had been laid off by Sterlingwale when it went out of business.[87] Fall River argued that

> [t]here was no transfer of employee personnel records between Sterlingwale and Fall River, no direct transfer of any employees or personnel, and there was no expectation by Sterlingwale's employees of employment by Fall River. It is submitted that the employment of individuals who formerly worked for Sterlingwale resulted from factors unique to a small town with a shrinking industrial base. Many of the employees who had been permanently laid off by Sterlingwale in February, 1982, eagerly applied for positions at a new mill opening in their city. Production and maintenance employees were all hired on the open market from newspaper advertisements.[88]

Although the Court mentioned this argument,[89] it apparently found that because a majority of Fall River's employees had previously been employees of Sterlingwale, and because Fall River's hiring decisions took into account the applicants' previous employment with Sterlingwale and the recommendations of former Sterlingwale supervisors,[90] continuity of the work force existed.[91]

The Board should have considered Fall River's hiring practices to be strong evidence that it was not a successor to Sterlingwale for purposes of the duty to bargain.[92] An employer is free, within limits,[93] to restructure its labor force or other aspects of its business.[94] This is an essential ingredient of an employer's right to operate its business efficiently. It is not disputed that Fall River, by advertising its job openings in the newspaper and not seeking to acquire a list of Sterlingwale's former employees, sought to avoid a duty to bargain with the Union. However, there is no logical reason why an employer should be prohibited from taking action to *avoid* a legal duty,[95] as long as that action is not designed to *disguise* that duty.[96] Thus, the Court's deference to the Board on this issue was inappropriate.

Fall River's principal argument regarding the fourth factor, similarity of jobs and working conditions,[97] was that it had substantially fewer employees than Sterlingwale and that it employed two ten-hour shifts, compared with Sterlingwale's three eight-hour shifts. Fall River maintained that these differences constituted substantial

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87. *Fall River*, 107 S. Ct. at 2229.

88. Brief for Petitioner, *supra* note 39, at 16–17.

89. *Fall River*, 107 S. Ct. at 2237.

90. *See id.* at 2230.

91. *See id.* at 2236.

92. The Board's Decision and Order did not address this matter. *See* Fall River Dyeing & Finishing Corp., 272 N.L.R.B. 839 (1984), *enforced*, 775 F.2d 425 (1st Cir. 1985), *aff'd*, 107 S. Ct. 2225 (1987).

93. For example, an employer commits an unfair labor practice under § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (1982), if its hiring methods discriminate on the basis of union membership. NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 280 n.5 (1972).

94. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964).

95. *See* Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 269 (1974) (Douglas, J., dissenting) ("The effect [of the Court's decision] is to allow any new employer to determine for himself whether he will be bound [by the old employer's duties], by the simple expedient of arranging for the termination of all of the prior employer's personnel.").

96. *Cf.* Kallman v. NLRB, 640 F.2d 1094 (9th Cir. 1981) (new employer violated § 8(a)(3) of the Act when it disguised its identity in newspaper advertisements in order to make it less likely that union members would apply for jobs).

97. *See* Aircraft Magnesium, 265 N.L.R.B. 1344, 1345 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984).

changes in the working conditions.[98] Neither the majority nor the minority in the Supreme Court directly responded to this argument, although Judge Torruella mentioned it in his dissent from the First Circuit's decision.[99]

The fifth factor the Board ordinarily considers is whether the old and new enterprises employ the same supervisors.[100] The Court noted that "most of [Fall River's supervisors] were former supervisors of Sterlingwale."[101] Fall River, while not disputing this fact, nevertheless asserted that there had been "a major changeover in the supervisory hierarchy. The number of supervisors has been substantially reduced from 18 to 12, including the employment of 4 new supervisors who had not been previously employed by Sterlingwale. The former plant manager has been terminated and not rehired by Fall River."[102] In other words, eight of Fall River's twelve supervisors had been employed by Sterlingwale. Since the Court's function is only to assess whether the Board acts rationally and reasonably,[103] the Court correctly decided not to view this change in supervisors as evidence of discontinuity between the old and new employers.

The final factor—whether there is a change in the products or services offered[104]—is, in this case, related to the question of whether the old and new employers used the same methods of production.[105] Although the change from primarily converting dyeing to exclusively commission dyeing did not involve a change in production methods, there is a strong argument that it constituted a fundamental change in the services provided. The Board concluded that "[t]he enterprise is not identical, but it is similar."[106] In reaching this conclusion, the Board failed to consider the change in services in light of the other facts of the case. This difference in services resulted in "substantial changes in Fall River's operation when compared to Sterlingwale: a smaller manufacturing plant, [fewer] employees, [fewer] work shifts, [and] longer working hours."[107] The change in services also resulted in a change in financing and marketing methods.[108] As Justice Powell commented, "[t]his difference [in services] alone would not be determinative, but it hardly is irrelevant."[109]

It should be noted that the precise issue before the Court was whether the Board's finding of "substantial continuity in the employing enterprise"[110] was based on a rule which was "rational and consistent with the Act,"[111] and "supported by substantial evidence on the record."[112] Six members of the Court were persuaded that

98. Brief for Petitioner, *supra* note 39, at 17–18.
99. *See Fall River*, 775 F.2d at 439 (Torruella, J., dissenting).
100. *See Aircraft Magnesium*, 265 N.L.R.B. at 1345.
101. *Fall River*, 107 S. Ct. at 2236.
102. Brief for Petitioner, *supra* note 39, at 20.
103. *See Fall River*, 107 S. Ct. at 2235.
104. *See Aircraft Magnesium*, 265 N.L.R.B. at 1345.
105. *See supra* text accompanying notes 82–83.
106. *Fall River*, 272 N.L.R.B. at 840.
107. *Fall River*, 775 F.2d at 439 (Torruella, J., dissenting); *see supra* text accompanying notes 97–99.
108. *Fall River*, 107 S. Ct. at 2242 n.4 (Powell, J., dissenting).
109. *Id.*
110. *Fall River*, 272 N.L.R.B. at 840.
111. *Fall River*, 107 S. Ct. at 2235.
112. *Id.*

the Board's conclusion met this standard; three members were not. Justice Powell concluded that "the undisputed evidence shows that petitioner is a completely separate entity from Sterlingwale."[113] Judge Torruella's dissent expressed this view in even stronger language: "There is no question in my mind but that there has been *no continuity* between the operations of Sterlingwale and Fall River."[114] It is difficult to determine on which factors the Court or the dissenters relied most heavily in assessing the rationality of the Board's decision. Therefore, as in any set of cases in which the result depends on the "totality of the circumstances," it is difficult to use this case to predict the result of future cases.[115] It remains clear, however, that the Court is willing to go to great lengths to find rationality in the Board's decisions.

B. *The Union's Majority Status*

The next issue before the Court was whether Fall River could lawfully refuse to bargain with Local 292, notwithstanding a finding of "substantial continuity in the employing enterprise."[116] Under subsection 8(a)(5) of the Act, an employer is only required to bargain with the "representatives of his employees,"[117] subject to the exclusivity principle of subsection 9(a).[118] If a union is not the representative of the employees, the employer not only has no duty to bargain with it, but also is not permitted to do so.

In administering subsection 8(a)(5), the Board, with the support of the courts, has for many years applied an irrebuttable presumption that, for one year following the certification of a union as the bargaining representative of a group of employees, the union enjoys the support of a majority of the employees.[119] In the absence of "unusual circumstances," the employer may not escape its subsection 8(a)(5) duty to bargain by introducing evidence that the union does not in fact represent the employees.[120] This is a sensible rule. It increases stability and continuity in bargaining relationships, thereby promoting industrial peace, which is the primary purpose of the Act.[121] Continual litigation over a union's majority status would frustrate this legislative goal. In addition, the irrebuttable presumption is not inconsistent with democratic principles. Like voters in an election of a government official, employees may not change the results of a union certification election simply

113. *Id.* at 2243 (Powell, J., dissenting).

114. *Fall River*, 775 F.2d at 439 (Torruella, J., dissenting) (emphasis in original).

115. *See* Comment, *Successorship and the Obligation to Bargain: Clarifying the Steps Toward a Highly Subjective Analysis*, 27 WASHBURN L.J. 685, 705 & n.214 (1988); *see also* Comment, *Criteria for Determining Employer Successorship—Factor Analysis*, Burns, *and the Need for a New Standard*, 11 WAKE FOREST L. REV. 437, 456–57 (1975) (making a similar observation about the *Burns* decision).

116. *See Fall River*, 107 S. Ct. at 2232–35.

117. 29 U.S.C. § 158(a)(5) (1982).

118. 29 U.S.C. § 159(a) (1982). For the text of § 9(a), see *supra* note 14.

119. *See* Brooks v. NLRB, 348 U.S. 96 (1954).

120. *Id.* at 98.

121. *See* 29 U.S.C. § 151 (1982).

because they change their minds the next day.[122] The Court in *Burns* approved of the application of the irrebuttable presumption to a successor employer.[123]

A union also enjoys a rebuttable presumption of majority support for a reasonable time even after one year has passed since certification.[124] In *Fall River*, the Court considered whether the rebuttable presumption should be extended to successor employer situations.[125] This was an important issue in the case because there was substantial evidence, which the Board refused to consider, that a majority of the employees were in fact dissatisfied with Local 292.[126]

The Court concluded that the rebuttable presumption is applicable to successor employers.[127] The Court reasoned that, after a transition in employers, employees

> might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it. Without the presumptions of majority support and with the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence.[128]

This reasoning would be appropriate if offered in support of the presumptions of majority support which the Board has historically applied. It would also be appropriate as a justification for the holding in *Burns* that the irrebuttable presumption applies to a successor employer if the transition in employers occurs during the certification year. As the Court correctly pointed out more than thirty years ago, "[a] union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out."[129]

The extension of this reasoning to the situation presented in *Fall River*, however, is unwarranted. In *Fall River*, unlike successorship cases in which the union was recently certified,[130] "[t]he certification status of the union[] is lost in ancient history."[131] Under such circumstances, there is little need to give the union "ample time for carrying out its mandate." Furthermore, there are countervailing considerations. The Court's reasoning in *Fall River* implicitly assumes that the employees are not capable of making rational decisions. In fact, one of the primary underlying premises of the NLRA is that the government's role is only to facilitate collective bargaining, not to control it.[132] Congress assumed that employees have the intelligence and information necessary to select a bargaining representative; the certifica-

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122. *See Brooks*, 348 U.S. at 99.

123. NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 278–79 (1972).

124. Celanese Corp. of Am., 95 N.L.R.B. 664, 672 (1951).

125. *Fall River*, 107 S. Ct. at 2233–35.

126. *See infra* text accompanying notes 135–45.

127. *Fall River*, 107 S. Ct. at 2235.

128. *Id.* at 2234.

129. Brooks v. NLRB, 348 U.S. 96, 100 (1954).

130. *E.g.*, *Burns*, 406 U.S. at 274 (certification election held less than four months before the transition in employers).

131. Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131, 1145 (7th Cir. 1974) (Pell, J., dissenting).

132. H. K. Porter Co. v. NLRB, 397 U.S. 99, 107–08 (1970).

tion provisions of the Act merely provide a mechanism for them to make this choice. The Court's decision frustrates this democratic objective by imposing an artificial barrier to a finding that Fall River's employees were dissatisfied with their union after the change in employers.

In the limited situation presented by *Fall River*, where a transition in employers occurs long after the certification year, a presumption that the incumbent union enjoys the support of a majority of the employees is inappropriate. The Act's democratic goals will more likely be advanced if

> a union seeking to represent a successor's workforce [is] required to follow the normal methods of establishing its representation rights by petitioning for and winning an NLRB election. If a majority of the successor's employees do, in fact, support the predecessor's union, it will be an easy matter for that union to promptly obtain authorization cards from that majority, seek recognition from the successor and, failing voluntary recognition, petition the NLRB for an employee election. Not only is this the preferred method of establishing representation rights, it will usually be quicker and more effective than asserting and litigating unfair labor practice charges based on "presumptions" of majority support.[133]

After finding that the rebuttable presumption applied, the Court concluded that Fall River was obligated to bargain with the Union.[134] In so holding, the Court ignored evidence which demonstrated the employees' lack of support for the Union. The Court did not explain why this evidence did not overcome the presumption.

When Sterlingwale laid off its employees, it failed to provide the health and welfare benefits and severance pay that were required by the collective bargaining agreement.[135] Evidence showed that the employees were dissatisfied with the Union's failure to secure these benefits.[136] This dissatisfaction is understandable; employees who wished to maintain their life and health insurance coverage were forced to pay the premiums themselves.[137] More importantly, eighty percent of Fall River's employees signed petitions stating that they did not desire representation by Local 292.[138] This evidence is especially significant in light of the seven-month break in operations,[139] because employees might be expected to blame their union for such a hiatus in their employment.[140] The NLRB refused to consider these petitions, because they were signed after the date when the employer's bargaining obligation arose.[141] However, since there was independent evidence that the employees were dissatisfied

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133. Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of the Petitioner at 19, Fall River Dyeing & Finishing Corp. v. NLRB, 107 S. Ct. 2225 (1987) (No. 85-1208). Although Justice Powell did not go this far in his dissenting opinion, he did suggest that "it certainly would be reasonable to assume that the more remote the certification, the weaker the presumption should be that the union retains majority support." *Fall River*, 107 S. Ct. at 2242 n.1 (Powell, J., dissenting). *But see* NLRB v. Band-Age, Inc., 534 F.2d 1, 5 (1st Cir. 1976) (holding that the rebuttable presumption applies because, among other things, given a more complex rule, it would be too difficult to differentiate between situations in which it applies and situations in which it does not apply).

134. *Fall River*, 107 S. Ct. at 2235.

135. Brief for Petitioner, *supra* note 39, at 3–4; *see also Fall River*, 107 S. Ct. at 2234 n.7.

136. *Fall River*, 107 S. Ct. at 2234 n.7.

137. Brief for Petitioner, *supra* note 39, at 4, 10.

138. *Id.* at 8, 10–11.

139. *See supra* text accompanying notes 53–63.

140. *See* Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759, 767 (1975).

141. *See Fall River*, 107 S. Ct. at 2240 n.18.

with the Union many months before that date,[142] the petitions can hardly be considered irrelevant. On the contrary, they substantiate the independent evidence of employee dissatisfaction with the Union.[143]

Because the Board excluded relevant evidence which strongly suggests the employees' dissatisfaction with the Union, the Court at least should have remanded the case to the Board with directions to consider this evidence. The function of the rebuttable presumption is to place on the employer the burden of proof to show either that the incumbent union does not represent a majority of the employees or that the employer has a good faith doubt of the union's majority.[144] Both the Board and the Court essentially treated the presumption as irrebuttable and thus did not even follow the rule they purported to establish.[145] As a result, they reached a conclusion that was unfair to both the employer and the employees.

IV. CONCLUSION

With the Supreme Court's approval, the NLRB has unnecessarily broadened the successor employer doctrine, producing the unjust result in this case. Fall River was found to be obligated to bargain with Local 292, even though Fall River's connection with Sterlingwale was tenuous and the employees did not support the Union. The Board's willingness to find successorship in cases such as this benefits neither employees nor employers. Potential employers may prefer not to invest in and revitalize an enterprise to avoid risking a determination of successorship.[146] Thus, investment is directed away from traditionally unionized industries. On the other hand, the decision in *Fall River* may encourage unions to demand recognition by new employers, even when this is not in the best interests of the employees.

The Board has developed seven sound criteria for assessing the continuity between the old and the new employer. It is possible that one of these criteria—continuity of the business operations—backfired on Fall River. The Board gave very little weight to the seven-month hiatus between Sterlingwale's demise and the beginning of Fall River's operations. One explanation is that such a hiatus can be easily manufactured by a new employer who wishes to avoid a duty to bargain with the union which represents his predecessor's employees; all he must do is shut down for several months. The Board may have wanted to discourage employers from implementing this tactic. If this is the correct explanation for the decision, then the

142. *See supra* text accompanying notes 135–37.

143. *See* Royal Coach Lines, Inc. v. NLRB, 838 F.2d 47, 54 (2d Cir. 1988) (applying a similar principle in a voluntary recognition case).

144. Terrell Machine Co., 173 N.L.R.B. 1480, 1480–81 (1969), *enforced*, 427 F.2d 1088 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970).

145. This is typical of the Board's treatment of the rebuttable presumption of majority status. Once the presumption is established, the Board very rarely finds that it has been rebutted. *See, e.g.*, B & B Gallo Pest Control Servs., Inc., 265 N.L.R.B. 535, 539 (1982); Plymouth Locomotive Works, Inc., 261 N.L.R.B. 595, 605–06 (1982). *But see* City Supply Corp., 217 N.L.R.B. 950, 953 (1975) (effectively holding that the presumption was rebutted when employer had only three employees, two of whom quit their jobs and were replaced, and the other of whom died). If the Board's position is that a practically irrebuttable presumption of majority status should apply even after the certification year, it should so state, although the case for such a presumption is obviously weaker than the case for a truly rebuttable presumption.

146. *See* Note, *supra* note 52, at 574.

Board overcompensated, because there is substantial evidence other than the hiatus indicating a lack of continuity between the employers.

The Board's successorship criteria and its presumption of majority support are designed to promote industrial peace, but, as *Fall River* illustrates, they often do so at the expense of industrial democracy. The Board should adopt a more balanced approach to these problems. Of course, the successorship doctrine is essential to preserve employees' expectations and to ease transitions in business ownership. However, the doctrine should be more narrowly applied in future cases.

Marc A. Tenenbaum