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# Reading the Fine Print: Emerging Views on the Successorship Doctrine and Mandatory Arbitration Provisions

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# READING THE FINE PRINT: EMERGING VIEWS ON THE SUCCESSORSHIP DOCTRINE AND MANDATORY ARBITRATION PROVISIONS

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## I. INTRODUCTION

The Supreme Court addressed the question of whether a new employer is bound to the terms of the collective bargaining agreement ("CBA") between a predecessor employer and a union after a change in ownership in three cases often referred to as the "Successorship Trilogy." These cases extol the general, though controverted, rule that in forming its business, a new employer is not bound to its predecessor's collective bargaining agreement and is free to define its own terms of employment.

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However, to say that this rule is *general* implies a certain level of consistency between these foundational cases, while in reality a number of lower courts have found that their rationales are directly at odds.

The first, *John Wiley & Sons, Inc. v. Livingston*, held that a successor company could be bound to the arbitration provision of a preexisting CBA in a merger situation where all of the predecessor's assets and its entire workforce were transferred to the new employer.[1] A subsequent decision from the Court, *NLRB v. Burns International Security Services*, came to the opposing conclusion that an unconsenting, non-alter ego successor can never be bound to the terms of a preexisting CBA.[2] The third case in the Trilogy, *Howard Johnson Co. v. Hotel and Restaurant Employees*, seems to fall somewhere in between, preventing an employer from being held to a predecessor's CBA where there the takeover involved a wholesale transfer of assets and some retention of the predecessor's workforce.[3]

The lack of consensus between lower courts on how to reconcile these decisions has resulted in disagreement on the survivability of certain types of CBA provisions, most prominently those mandating arbitration of grievances between employer and union. This Article is intended to serve as an insight for labor attorneys and other interested readers into the successorship doctrine and offers clarifications and potential solutions to several of its lingering dilemmas.

Part Two begins by analyzing each case in the Trilogy, as well as subsequent decisions from the Supreme Court and lower courts. This is followed by an exploration into the preference for arbitration in national labor policy, detailing its origins in the National Labor Relations Act (NLRA), its purpose of protecting employees from sudden changes in the employment relationship and avoiding industrial strife, and its impact on the decisions in the Trilogy.

Part Three discusses the three judicially recognized exceptions to *Burns*'s rule prohibiting the enforcement of a preexisting agreement against a successor. The alter ego exception focuses on similarities between the old and new employers' *corporate identity*, while the "perfectly clear successor" and "voluntary adoption" exceptions take into account the new employer's *conduct* prior to and during the transition in ownership. It is concluded that a new employer may be bound to the substantive terms of preexisting CBA only if one of these exceptions applies.

Finally, Part Four examines the contrasting approaches taken by the Third Circuit in *Ameristeel Corp. v. International Brotherhood of Teamsters* and the Second Circuit in *Local 348-S, UFCW, AFL-CIO v. Meridian Management Corp.* on the issue of whether a duty to arbitrate may be imputed to a new employer even when the other substantive terms of a preexisting CBA would be unenforceable. Although the Second Circuit raises some salient policy concerns, the Third Circuit's rationale more appropriately

1. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).
2. NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 275 (1972).
3. Howard Johnson Co. v. Hotel & Rest. Emps., 417 U.S. 249, 256 (1974).

balances these interests with the cautionary admonition of *Burns* and *Howard Johnson* that such an extra-contractual duty is only proper under extremely limited circumstances. As a result, arbitration provisions—like other terms of a collective bargaining agreement—cannot be enforced against an unconsenting, non-alter ego successor if the integrity of the Trilogy is to be preserved.

## II. LAYING THE GROUNDWORK—THE SUCCESSORSHIP TRILOGY

### *A.* Wiley, Burns, *and* Howard Johnson

The Supreme Court first addressed the question of successor liability in *John Wiley & Sons, Inc. v. Livingston*. Two publishing companies, Interscience Publishers ("Interscience") and John Wiley & Sons ("Wiley") entered into a merger agreement wherein Interscience ceased its separate corporate existence.[4] Interscience had entered into a CBA with District 65, Retail, Wholesale and Department Store Union, AFL-CIO ("District 65") as its representative bargaining unit, but the CBA contained no provision making it binding on successor employers.[5] After the merger, Wiley retained all eighty former Interscience employees, including forty formerly represented by District 65, and rejected District 65's demand for recognition as a representative bargaining unit because, it contended, the merger had voided the CBA.[6] District 65 then brought suit against Wiley under § 301 of the Labor Management Relations Act (LMRA)[7] to compel arbitration of several disputes that it alleged were subject to the arbitration provision in the Interscience CBA.[8]

The Court began by recapitulating "the central role of arbitration in [e]ffectuating national labor policy" and preventing "industrial strife,"[9] noting that "[i]t would derogate from '[t]he federal policy of settling labor disputes by arbitration' . . . if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established[.]"[10] While acknowledging that general contract principles would preclude binding a party to an agreement to which it had not consented, the Court observed that CBAs are uniquely imbued with the concerns of national labor policy, including the preference for arbitration over litigation.[11] The pro-arbitration view derives from the

4. *Wiley*, 376 U.S. at 546.

5. *Id.*

6. *Id.*

7. 29 U.S.C. § 185 (1947).

8. *Wiley*, 376 U.S. at 546. District 65 sought primarily to arbitrate on the effect of the Wiley merger on certain provisions in the Interscience CBA regarding seniority rights, pension fund contributions, grievance procedures, severance pay, and vacation pay. *Id.*

9. *Id.* at 549 (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960)).

10. *Id.* at 549 (quoting United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960)).

11. *Id.*

perceived need to protect employees from "sudden change[s] in the employment relationship."[12] The Court stated that these "impressive policy considerations . . . are not wholly overborne by the fact that Wiley did not sign the contract being construed."[13]

The Court ultimately determined that Wiley was bound to the arbitration provision, even though it had not signed or otherwise assented to the Interscience CBA.[14] The Court—in a holding so cautiously confined that the Court later referred to it as "guarded" and "almost tentative"[15]—stated:

[T]he *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.[16]

The "appropriate circumstances" mentioned in *Wiley* were not clearly articulated, but the Court explained that "the lack of any substantial continuity of identity in the business enterprise before and after the change [in ownership]" and the new employer's conduct should be taken into account.[17] The Court found that Wiley's operations exemplified "substantial continuity of identity" in operations through "the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty."[18] Wiley was thus required to recognize District 65 as its representative bargaining unit and submit to arbitration to determine the enforceability of the Interscience CBA. In essence, *Wiley* held that, where a new employer's operations mimic those of its predecessor, the foundational contract principle of mutual assent is subordinate to federal labor policy and renders an arbitration provision from a preexisting agreement enforceable.

The Court examined a similar issue in *NLRB v. Burns International Security Services, Inc.*, in which an incumbent union filed an unfair labor practices charge against a new employer under sections 8(a)(1) and

12. *Id.*; *see infra* discussion at Part I.B.

13. *Id.* at 550.

14. *Id.* at 550–51.

15. Howard Johnson Co. v. Hotel & Rest. Emps., 417 U.S. 249, 256 (1974).

16. *Wiley*, 376 U.S. at 548 (emphasis added).

17. This portion, the most oft-cited language from *Wiley*, bears repeating in full here:

> "We do not hold that in every case in which the ownership or structure of an enterprise is changed the duty to arbitrate survives . . . . [T]here may be cases in which the lack of any substantial continuity before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved."

*Id.* at 551. It is important to note that the Court phrases the importance of substantial continuity of operations in the negative—*i.e.*, that a *lack of* substantial continuity is a determinative factor *against* successor liability. Some lower courts have erroneously interpreted this language inversely, holding that the *presence of* substantial continuity alone is *sufficient* to establish contractual liability. The problems with this approach and the direct conflicts it poses with *Burns* are discussed *infra* at Part IV.A.

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

8(a)(5)[19] of the NLRA.[20] After Burns International Security Services, Inc. ("Burns") replaced Wackenhut Corp. ("Wackenhut") as the security services provider at a Lockheed Aircraft Service facility and hired a majority of its security guards, Burns declined to recognize the union that had recently been certified as the bargaining unit for the guards or to honor its CBA with Wackenhut.[21] Observing the legislative history of federal labor laws and prior decisions of the NLRB, the Court held that "although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective bargaining contract negotiated by their predecessors but not agreed to or assumed by them."[22]

The *Burns* Court declined to apply the *Wiley* rationale for three reasons. First, the Court explained that *Wiley*'s holding was partially based on "a background of state law that embodied the general rule that in merger situations [sic] the surviving corporation is liable for the obligations of the disappearing corporation."[23] There was no similar merger in *Burns*; rather, the successor merely outbid its predecessor for a contract and did not purchase any assets from it.[24] Burns was obligated under section 8(a)(5) of the NLRA to recognize and bargain with the union because it hired a majority of its predecessor's represented employees.[25] However, this alone did not trigger the contractual obligations that typically flow from "a merger, stock acquisition, reorganization, or assets purchase[.]"[26]

Second, the Court stated that a successor's duty to honor a predecessor's CBA does not automatically attach when there is substantial continuity of identity between the two businesses.[27] While the new employer may be inclined, and in many cases well advised, to adopt the prior agreement in order to preserve the employees' expectations and reduce the likelihood of union turmoil, it cannot be legally forced to do so.[28] Third, the

19. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to provisions of section 159(a) of this title." 29 U.S.C. § 158(a)(5) (1974). Section 159(a) states that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ." 29 U.S.C. § 159(a) (1974).

20. NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 275 (1972). Although the *Burns* Court pointed out that *Wiley* was a suit to compel arbitration under the LMRA while *Burns* was an unfair labor practices suit under the NLRA, the prevailing view is that—despite this difference in the nature of the two claims—each decision remains applicable in suits involving both the LMRA and NLRA. *See Howard Johnson*, 417 U.S. at 256 ("It would be plainly inconsistent . . . to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under [§] 301" because to do so would make the employer's rights contingent "upon the forum in which the union presses its claims.").

21. *Burns*, 406 U.S. at 275.

22. *Id.* at 284.

23. *Id.* at 286.

24. *Id.*

25. *Id.* at 286–87.

26. *Id.*

27. *Id.* at 291.

28. *Id.*; *see also* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964) ("The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if

Court held that while "[p]reventing industrial strife is an important aim of federal labor legislation, . . . Congress has not chosen to make the bargaining freedom of employers and unions totally subordinate to this goal."[29] This concern is of great importance since employers will be discouraged from taking over businesses with financial or other operational woes if they can expect to be bound to an unappealing agreement between the failing business and a union.[30] Alternatively, a union may wish to renegotiate a CBA that includes concessions made to a smaller predecessor company that the unit is unwilling to make a larger, more economically powerful successor.[31] Consequently, the Court explained that *Wiley*'s focus on preventing industrial strife would best be achieved by a rule that stops short of imputing contractual terms to employers and unions that "do not correspond to the relative economic strength of the parties."[32]

Two years after *Burns*, the Court again addressed successor liability in *Howard Johnson Co. v. Hotel and Restaurant Employees*, in which Howard Johnson Co. ("Howard Johnson") acquired a restaurant, motor lodge, and other assets formerly belonging to a corporation operated by the Grissom family ("Grissom").[33] Only nine of the fifty-three workers formerly employed by the Grissom were hired after the corporate transition.[34] The union representing employees of the restaurant and motor lodge brought suit under section 301 of the LMRA, claiming that Howard Johnson's refusal to hire the entire pool of represented employees constituted an unlawful "lockout" in violation of the prior CBA between the union and Grissom, and seeking to compel Howard Johnson to arbitrate the issue of its liability under this agreement.[35]

Rather than directly address the conflict between *Wiley* and *Burns*, the *Howard Johnson* Court held that "even on its own terms, *Wiley* does not support the decision of the courts below" since there was clearly no substantial continuity in the workforces of Grissom and Howard Johnson.[36] Therefore, the Court did not need to reach the more difficult issue of whether, if substantial continuity existed, the factual circumstances would be appropriate to require Howard Johnson to arbitrate the extent of its liability under Grissom's CBA. Moreover, the Court factually distinguished *Wiley*, explaining that although there is generally no reason for separating situations involving mergers, consolidations, or sales of assets,

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employees' claims continue to be resolved by arbitration rather than by 'the relative strength of the contending forces[.]' ") (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960)).

29. *Burns*, 406 U.S. at 291.

30. *Id.* at 287–88.

31. *Id.* at 288.

32. *Id.*

33. Howard Johnson Co. v. Hotel & Rest. Emps., 417 U.S. 249, 250 (1974).

34. *Id.* at 252.

35. *Id.* at 252–53.

36. *Id.* at 256, 262–63.

the state laws governing the merger in *Wiley* created a reasonable expectation for the parties that the duty to arbitrate would remain in effect.[37] Finally, while making special efforts *not* to fill in the analytical gaps left by *Wiley* and *Burns*, the Court repeatedly expressed its preference for a broader application of *Burns* and a more stringent and cautious approach to *Wiley*.[38]

### B. *The* Steelworkers *Trilogy and National Labor Policy's Preference for Arbitration*

The starting point for any discussion of labor policy must begin with the congressional motivations behind the NLRA, also known as the Wagner Act, which governs the collective bargaining process between employers and unions.[39] Collective bargaining agreements are intended to regulate most aspects of the employer-union relationship and prevent the unfair outcomes that would result if disputes were decided based on "the relative strength, at any given moment, of the contending forces."[40] The NLRA states:

[The] protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.[41]

In furtherance of these goals, arbitration of disputes remains a fundamental tenet of labor relations intended to help prevent labor strikes and other forms of industrial strife.[42]

The Court in *Wiley* underscored this ideal, noting that "[t]he objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."[43]

In 1960, the Supreme Court expounded the national labor policy favoring arbitration in three cases known as the *Steelworkers* Trilogy.[44] In *United Steelworkers v. American Manufacturing Co.*, an employee brought

37. *Id.* at 257.

38. *Id.* at 256–64; *see also* Ameristeel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 272 (3d. Cir. 2001) (noting that *Howard Johnson* "downplays the significance of *Wiley* . . . and focus[es] on the limited factual context in which [it] arose," and at the same time "takes an expansive view of *Burns*, repeatedly extolling its reasoning").

39. 29 U.S.C. § 151–169 (2000).

40. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

41. 29 U.S.C. §151 (1947).

42. *Warrior & Gulf Navigation*, 363 U.S. at 578.

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

44. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); *Warrior & Gulf Navigation*, 363 U.S. at 574; Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

an action against his employer for compensation benefits after he was forced to leave work due to an injury.[45] The parties reached a settlement after a physician diagnosed the employee as being permanently partially disabled.[46] After two weeks, the union filed a grievance with the employer claiming that the employee was entitled to return to work under the seniority provision of the CBA.[47] When the employer refused to arbitrate, the union brought suit and the district court granted the employer's motion for summary judgment. The court held that the employee could not claim seniority rights because he had accepted the disability settlement.[48] The Sixth Circuit affirmed on separate grounds, finding that the grievance was "frivolous" and "not subject to arbitration."[49]

The Supreme Court reversed, finding that "courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim."[50] Instead, the Court urged that the dispute should have been submitted to arbitration.[51] The court admonished that "[w]hen the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function . . . entrusted to the arbitration tribunal."[52]

In *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, a union filed a grievance after an employer discharged a group of union employees and contracted out their former duties, alleging that the employer engaged in a partial lockout of union employees in violation of the CBA.[53] The district court dismissed the complaint on the ground that the CBA did not authorize arbitral review of managerial hiring practices and further held that the choice to contract out work was a permissible exercise of the employer's professional business judgment.[54] The Fifth Circuit affirmed, holding that the decision to contract out work fell under "matters which are strictly a function of management," which were excluded from the CBA's grievance procedure and thus not subject to arbitration.[55]

As it had done in *American Manufacturing Co.*, the Supreme Court reversed, emphasizing the indispensability of arbitration in labor disputes.[56] The Court described arbitration as a "substitute for industrial

45. *Am. Mfg. Co.*, 363 U.S. at 566.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 569.
51. *Id.*
52. *Id.*
53. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 575 (1960).
54. *Id.* at 577.
55. *Id.*
56. *Id.* at 578.

strife" and "part and parcel of the collective bargaining process[.]"[57] Furthermore, while acknowledging that the decision to contract out work was a function of management, the Court rejected the appellate court's determination that such decisions were necessarily excluded from the CBA's grievance procedure.[58] The Court explained that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[59] This issue—whether contracting out work was explicitly excluded from arbitration under the language of the CBA—was one that the arbitrator should determine.[60]

Finally, in *United Steelworkers v. Enterprise Wheel & Car Corp.*, a group of union employees was discharged after they left their positions in protest of another employee's termination.[61] The union filed a grievance, and when the employer refused to arbitrate, the union brought suit to enforce the CBA.[62] After the district court ordered arbitration, the arbitrator found that the employees acted improperly in leaving their positions, but that their punishment should have been at most a ten-day suspension and not termination.[63] As a result, the arbitrator "awarded reinstatement with back pay, minus pay for a 10-day suspension and such sums as these employees received from other employment."[64]

The district court ordered the employer to comply with the arbitration order after the employer's initial refusal.[65] The Fourth Circuit agreed that the district court had the authority to enforce the arbitration award, but nevertheless found the award to be unenforceable on two grounds.[66] First, it failed to specify the amounts that should be deducted from the backpay award; the court found that this defect could be cured by an order directing the parties to complete arbitration.[67] Second, the court found that the arbitrator's orders for backpay and reinstatement could not be enforced because the CBA had expired at the time of the award.[68]

The Supreme Court once again reversed.[69] Although the Court agreed with the Fourth Circuit that the parties should complete arbitration in order to reach a determination on the specific amounts of backpay due, it rejected the second basis for its decision.[70] The Court found that the arbitrator's rationale for extending the award of backpay past the date of

57. *Id.*
58. *Id.* at 583.
59. *Id.* at 582–83.
60. *Id.* at 585.
61. Enter. Wheel & Car Corp., 363 U.S. 593, 595 (1960).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 595.
66. *Id.* at 596.
67. *Id.*
68. *Id.*
69. *Id.* at 599.
70. *Id.*

expiration of the CBA and ordering reinstatement was unclear, but ambiguity in an arbitrator's opinion does not justify a court's refusal to enforce the award.[71] In a famous passage, the Court stated that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice."[72] The Court explained that issues of contract interpretation should be left to the limited discretion of the arbitrator, while courts should avoid unnecessary interference by declining to review the merits of an arbitration award.[73]

The *Steelworkers* Trilogy demonstrates the inviolate relationship between labor and arbitration that served as the primary motivation behind the Supreme Court's opinion in *Wiley*. Appreciation of this essential policy concern is essential if *Wiley* is to remain relevant in the successorship debate.

### C. Fall River *and a Post-Trilogy Framework for Successorship*

In *Fall River Dyeing & Finishing Corp. v. NLRB*, the Court provided three factors that must be taken into account in assessing operational continuity: (1) whether the nature of the businesses remains essentially the same after the change in employers; (2) whether the new employer's workers perform the same jobs under the same working conditions and supervisors; and (3) whether the new employer provides the same products and production processes and serves basically the same customer base.[74] *Fall River* presented a factual situation where the question of operational continuity was more difficult to answer, which may explain why the Court devised this list of objective criteria to aid its analysis.

Sterlingware Corp. ("Sterlingware"), a textile dyeing company located in Fall River, Massachusetts, produced dyed fabrics though two different processes—converting and commission dyeing.[75] Converting is the process of dyeing fabric purchased from a wholesaler and later selling the finished product to apparel manufacturers, while commission dyeing involves refinishing fabric supplied by private customers.[76] Feeling the economic effects of a market that had largely evaporated due to foreign competition, the company sold its machinery and other assets and terminated most of its workforce, leaving only a "skeleton crew" to ship out remaining orders.[77] After the company eventually went out of business, a former officer of Sterlingware entered into a partnership with the president of one of its largest customers for the purpose of starting an exclusively commission-based dyeing business utilizing Sterlingware's workforce and assets.[78]

71. *Id.* at 598.
72. *Id.* at 597.
73. *Id.* at 596.
74. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987).
75. *Id.* at 30.
76. *Id.*
77. *Id.* at 31.
78. *Id.* at 32.

After its formation, Fall River Dyeing and Finishing Corporation ("Fall River") began operating out of Sterlingware's former facility; of its initial stock of twelve supervisors, eleven were former Sterlingware employees.[79] Around this time, Fall River rejected a request for recognition as a representative bargaining unit by the United Textile Workers of America, AFL-CIO, Local 292 ("United Textile"), which had represented Sterlingware's employees for nearly thirty years.[80] Within six months, the company employed a full shift of fifty-five production workers—thirty-six of whom had formerly worked at Sterlingware—and started fulfilling customer orders.[81] In the subsequent months, Fall River's workforce continued to grow until eventually former Sterlingware employees had fallen out of the majority, though they still comprised approximately forty-nine percent of the workforce.[82]

A panel of the NLRB affirmed the decision of the administrative law judge that Fall River was a successor to Sterlingware and was obligated to negotiate with United Textile because, by the time it had hired a "substantial and representative complement" of its workforce, a majority were former Sterlingware employees.[83] After the First Circuit enforced the Board's order, the Supreme Court granted certiorari.[84] The Court noted that although Fall River had altered the nature of the business by eliminating conversion dyeing from its services, there was a large degree of similarity in the day-to-day operation of the facility due to the carryover in the workforce, machinery, working conditions, and supervisory personnel.[85] Acknowledging that substantial continuity should be determined from the perspective of the employees in order to promote industrial peace, these facts were found by the Court to be controlling on the issue of Fall River's status as a successor.[86] The Court also formally adopted the three-factor test used by the NLRB in assessing substantial continuity, which examines (1) the nature of the businesses; (2) the jobs, working conditions, and supervisors; and (3) the products, production processes, and customer bases.[87] The Court found that "[a]lthough petitioner abandoned converting dyeing in exclusive favor of commission dyeing, this change did not alter the essential nature of the employees' jobs[.]"[88] The Court found the second and third factors to be dispositive, stating that "both types of dyeing

79. *Id.* at 32–33.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 34–35.
84. *Id.* at 35–36.
85. *Id.* at 34.
86. *Id.* at 43.
87. *Id.* (citing Aircraft Magnesium, A Div. of Grico Corp., 265 N.L.R.B. 1344, 1345 (1982)).
88. *Id.* at 44.

involved the same production process[,] . . . [t]he job classifications of petitioner were the same as those of Sterlingware[,] . . . [and] petitioners' employees worked on the same machines under the direction of supervisors[,] most of whom were former supervisors of Sterlingware."[89]

How should the legal standard established in *Fall River* be applied to future cases? If the *Fall River* factors lead to a determination of substantial continuity—which is more of a discretionary standard than a quantifiable measurement—the new employer is deemed a "successor." This designation places on the employer a duty to recognize and negotiate in good faith with the incumbent union.[90] Although the successor is generally free to set the initial terms of employment for the workers hired from its predecessor, it must negotiate with any incumbent union regarding proposed changes in the represented employees' rights occurring under a preexisting CBA.[91] Failure to observe this duty by imposing unilateral changes to the represented employees' rights constitutes an unfair labor practice and may subject the employer to liability under section 8(a)(5) of the NLRA.[92] However, a determination of substantial continuity alone is insufficient to bind the successor employer to the substantive terms of the predecessor's CBA.[93] Such action requires an additional showing of contractual justifications for imputing the terms of the preexisting agreement to the new employer.[94]

### *D. Recent Decisions on Substantial Continuity*

In a case before the Second Circuit, Century Vertical Systems, Inc. ("Century") purchased another elevator maintenance company, Century Industrial Services ("Industrial"), but only hired four of its fourteen field employees.[95] Century filed a section 301 suit against the incumbent union, seeking a declaration that it was not bound by the arbitration provision in the Industrial CBA.[96] It was undisputed in the suit that Century had not adopted Industrial's CBA by consent or as an alter ego.[97] Nevertheless, the district court agreed with the union that Century's operations were "substantially continuous" with those of Industrial, and thus was required to arbitrate with the union pursuant to Industrial's CBA.[98]

However, the court of appeals reversed, determining that the meager overlap in the workforces of the two companies could not justify the imposition of a contractual duty to arbitrate.[99] The Second Circuit, in *Century*

89. *Id.*
90. NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 281 (1972).
91. *Id.* at 294–95.
92. *Id.*; 29 U.S.C. § 158(a)(5) (2006).
93. *See Burns*, 406 U.S. at 284.
94. *See supra* discussion at Part III.
95. Century Vertical Sys., Inc. v. Local No. 1, Int'l Union of Elevator Constructors, No. 09-4257, 379 Fed. Appx. 68, 71 (2d Cir. May 28, 2010).
96. *Id.* at 70.
97. *Id.* at 71.
98. *Id.* at 70.
99. *Id.* at 71.

*Vertical* and its prior opinion in *Meridian Management*[100], labors under an erroneous interpretation of the successorship analysis laid out in the Trilogy. The court seemingly conflates or disregards the importance of distinguishing the duty under *labor law* to bargain with a predecessor's union from the duty under *contract law* to abide by the terms of the predecessor's CBA. The court instead merges these two duties into a more homologous concept of general successor liability, under which a successor is not only required to recognize an incumbent union, but must honor the arbitration provision in a CBA which it has not adopted either formally or informally. As will be discussed, this view is directly at odds with the Supreme Court's holdings in *Burns* and *Howard Johnson* that an unconsenting, non-alter ego successor cannot be bound to the terms of the predecessor's CBA, regardless of the parallels in workforce or operations, since the substantial continuity analysis is only relevant to the issue of union recognition.

In a case from a Wisconsin district court, Republic Airway Holdings, Inc. ("Republic") acquired Midwest Airlines, Inc. ("Midwest") and made it a subsidiary, although Midwest continued to operate independently for a brief period.[101] After Midwest officially ceased operations, Republic hired 37 of Midwest's 344 total pilots and assigned them to employment with several of its other subsidiaries.[102] The union representing the pilots filed suit against Republic for various grievances under the CBA it had formerly entered into with Midwest. Additionally, the union sought an order declaring that Republic was a successor to Midwest and was bound to its CBA.[103]

The district court rejected this argument, pointing out that the union took too expansive a view of the limited holding in *Wiley* and ignored the clear directive of *Burns* that a successor cannot be bound to the substantive terms of an existing CBA based solely on similarities in workforce and operations between it and a predecessor.[104] The court further determined that the factual circumstances of the case resembled those in *Howard Johnson*, where the successor purchased all of the predecessor's assets but only retained a small fraction of its employees.[105] Thus, the court held that Republic did not bear sufficient continuity with Midwest to justify imposition of a duty to abide by the CBA.[106]

100. Local 348-S, UFCW, AFL-CIO v. Meridian Mgmt. Corp., 583 F.3d 65 (2d Cir. 2009), discussed *infra* at Part IV.A.

101. Freitas v. Republic Airways Holdings, Inc., No. 11-C-358, 2011 WL 5506679, at *1 (E.D. Wisc. Nov. 10, 2011).

102. *Id.*

103. *Id.* at *3.

104. *Id.* at *4.

105. *Id.* at *6.

106. *Id.*

## III. BINDING A SUCCESSOR AFTER *BURNS*—THE ALTER EGO, PERFECTLY CLEAR SUCCESSOR, AND VOLUNTARY ADOPTION EXCEPTIONS

The message of *Burns* is clear: even if there is substantial continuity and the new employer is required to recognize and negotiate with an incumbent union, it cannot be bound to the substantive terms of its predecessor's CBA to which it has not consented.[107] Metaphorically speaking, the successor can be forced to sit at the table with the union members, but it cannot be forced to eat the meal they have prepared. In order to force the terms of the CBA on the successor, there must be some additional contractual justification to override the *Burns* rule that an unconsenting successor cannot be bound to the preexisting agreement. There are three commonly accepted situations where this can occur: (1) where there has been a corporate merger, as in *Wiley*; (2) where the successor is an alter ego of the predecessor; and (3) where the successor has consented to the CBA through its express or implicit conduct.

### *A. Alter Ego*

Under the alter ego theory, a successor may be bound to a predecessor's CBA when there has not been a bona fide change in ownership.[108] "[T]he focus of 'the alter ego doctrine . . . is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations.' "[109]

In determining whether two employers are alter egos, courts examine whether they share "substantially identical management, business purpose, operation, equipment, customers and supervision, as well as ownership."[110] An additional factor that courts must consider is whether the formation of the new employer was spurred by anti-union animus or an attempt to avoid the effects of labor laws.[111] Although anti-union animus may be determinative for a finding of alter ego status, "if there is substantial evidence demonstrating that other factors are present, lack of anti-union animus will not defeat an alter ego finding."[112] However, one complication faced by courts on this issue is disagreement over the proper method of proving anti-union animus or subversive intent.[113]

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107. *Id.*

108. Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942).

109. Truck Drivers Local Union No. 807, I.B.T. v. Reg'l Imp. & Exp. Trucking Co., 944 F.2d 1037, 1044 (2d Cir. 1991) (quoting Carpenters Local Union No. 1846 v. Pratt–Farnsworth, Inc., 690 F.2d 489, 507–08 (5th Cir. 1982)).

110. Crawford Door Sales Co., 226 N.L.R.B. 1144 (1976) (citations omitted).

111. *Southport Petroleum*, 315 U.S. at 105; A&P Brush Mfg. Corp. v. NLRB, 140 F.3d 216, 219 (2d Cir. 1998).

112. Goodman Piping Prods., Inc. v. NLRB, 741 F.2d 10, 11–12 (2d Cir. 1984).

113. *Compare* Alkire v. NLRB, 716 F.2d 1014, 1020 (4th Cir. 1983) (whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations), *with* NLRB v. Scott Printing Corp., 612 F.2d 783, 787 (3d Cir. 1979) (whether there is

In *J. Vallery Electric, Inc. v. National Labor Relations Board*, the Fifth Circuit held that two companies were alter egos based on their common ownership and management and the corporations' unlawful motive to avoid paying for unionized labor as required by a CBA.[114] Vallery Electric, Inc. ("Vallery") used non-union labor on numerous electrical contracting projects in violation of a CBA with an electrical workers union that permitted only union labor.[115] After being repeatedly admonished by the union business manager for doing so, the president formed a new company, J. Vallery Electric, Inc. ("J. Vallery"), that did not use union labor.[116] The Fifth Circuit found that the companies maintained essentially identical workforces, management, and services.[117] The court further found that the lack of consideration received by the officers for their capital contributions and the president's anti-union statements demonstrated that "there was not even a pretense of an arm's length relationship" when the new company was formed.[118] The Fifth Circuit therefore held that the new company was bound by the preexisting CBA.[119]

On the other hand, a New York district court held that a defendant company, A&M Heating, Air Conditioning, Ventilation & Sheet Metal, Inc. ("A&M"), was not the alter ego of its predecessor, Hudson Heating, Inc. ("Hudson") and therefore was not bound by the arbitration clause in its CBA.[120] Although Hudson and A&M shared the same business purpose and their operations covered the same general geographic area, they were owned, managed, and controlled by different individuals.[121] In addition, the two companies had not previously been affiliated with any of the same projects or customers.[122] Finally, there was no evidence that A&M was formed with anti-union animus, but rather as a means of reinventing the owner's business under a new name in order to attract union workers after the plaintiff union ordered its members to leave the job site and refused to refer other workers to A&M.[123]

### *B. "Perfectly Clear" Successor*

In *Burns*, the Court explained that although a successor employer is usually allowed to set the initial terms of employment for the workers retained after it takes over a predecessor's business, "there will be instances in which it is *perfectly clear* that the new employer plans to retain all of the

substantial evidence that the new business was created for the primary purpose of continuing the predecessor's business while avoiding its obligation to bargain with the incumbent union).

114. J. Vallery Elec., Inc. v. NLRB, 337 F.3d 446 (5th Cir. 2003).

115. *Id.* at 448.

116. *Id.* at 448–49.

117. *Id.* at 451.

118. *Id.* at 452.

119. *Id.* at 454.

120. Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. A & M Heating, Air Conditioning, Ventilation & Sheet Metal, Inc., 314 F. Supp. 2d 332 (S.D.N.Y. 2004).

121. *Id.* at 347–49.

122. *Id.* at 349.

123. *Id.* at 350.

employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes the terms."[124] The NLRB has limited the application of the "perfectly clear" successor theory to two situations: where the successor has either (1) actively or passively "misled employees into believing that they would all be retained without change in their wages, hours, or conditions of employment," or (2) invited the employees to accept employment without first communicating adequately its intention to adopt new terms of employment.[125] This exception to the *Burns* rules is necessitated by the fact that employees who have received what they perceive as an offer of employment, and are not informed that their contractual rights will be altered, "will place significant reliance on that situation and forego other employment opportunities."[126]

### C. *Implicit Adoption*

If a new employer expressly or impliedly assumes its predecessor's CBA or some part thereof, it may be held to the terms of that agreement.[127] The Ninth Circuit has held that "[t]o determine whether a party has adopted a contract by its conduct, the relevant inquiry is whether the party has displayed 'conduct manifesting an intention to abide by the terms of the agreement.' "[128] For example, where an employer voluntarily implements some terms of the predecessor's CBA, it will be deemed to have adopted the agreement in full even though it has not signed or formally adopted it.[129] This frequently happens when a successor makes payments to employee health, pension, or other fringe benefit accounts in accordance with the payment schedule from a preexisting CBA.[130] This principle has also been extended to a successor's acceptance of a predecessor's CBA by conformity with the arbitration procedures outlined therein.[131]

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124. *Burns*, 406 U.S. at 294–95. In general, however, the successor's duty to bargain with the incumbent union does not take effect until the successor hires a representative complement—typically a majority—of the predecessor's employees. *Id.* at 295.

125. Spruce Up Corp., 209 N.L.R.B. 194, 195 (1974) (footnote omitted).

126. Canteen Corp. v. NLRB,103 F.3d 1355, 1364 (7th Cir. 1997) (citing Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. NLRB, 595 F.2d 664, 674–75 (D.C. Cir.1978).

127. Hosp. & Inst'l Workers Local 250 v. Pasatiempo Dev. Corp., 627 F.2d 1011, 1012 (9th Cir. 1980) (citing NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 272 (1972); Howard Johnson Co. v. Hotel & Rest. Emps., 417 U.S. 249, 249 (1974)).

128. S. California Painters & Allied Trade Dist. Council No. 36 v. Best Interiors, Inc., 359 F.3d 1127, 1133 (9th Cir. 2004) *(quoting* NLRB *v. Haberman Constr. Co.,* 641 F.2d 351, 356 (5th Cir. 1981).

129. *See, e.g., id.* at 1133; Brown v. C. Volante Corp., 194 F.3d 351, 354–55 (2d Cir. 1999); *Haberman Constr. Co.*, 641 F.2d at 356–57; Arco Elec. Co. v. NLRB, 618 F.2d 698, 699–700 (10th Cir. 1980).

130. *See* Seabury Const. Corp. v. Dist. Council of N.Y. & Vicinity of United Bros. of Carpenters & Joiners of Am., 461 F. Supp. 2d 193, 198 (S.D.N.Y. 2006); Trustees of Utah Carpenters' & Cement Masons' Pension Trust v. Indus. Power Contractors Plant Maint. Servs., No. 2:09CV929DAK, 2011 WL 6130932, at *4–5 (D. Utah Dec. 8, 2011).

131. *See* Local 32BJ v. Coby Grand Concourse, LLC, No. 04-9580, 2006 WL 692000, at *4 (S.D.N.Y. Mar. 16, 2006).

However, the circumstances in which this theory applies are exceedingly narrow.[132] To illustrate the reserve with which courts apply this theory, the Second Circuit has approved the NLRB's use of a "clear and convincing" standard of proof in making the determination of whether there has been an assumption of a CBA.[133]

## IV. The Question of Arbitration Provisions

### A. *The Conflicting Views of* Ameristeel Corp. *and* Meridian Management Corp.

In 2001, the Third Circuit addressed the *Wiley-Burns-Howard Johnson* dichotomy in *Ameristeel Corp. v. International Brotherhood of Teamsters*, finding that a successor employer had no duty to arbitrate with the incumbent union under its predecessor's CBA.[134] Ameristeel Corp. ("Ameristeel"), a steel manufacturer, bought a facility owned by Brocker Rebar Co. ("Brocker Rebar") and hired forty-four of its fifty unionized employees and four of its executives; Ameristeel was thus required to recognize and bargain with the incumbent union.[135] However, in the purchase agreement and multiple dealings with the union, Ameristeel maintained that it was not bound by the terms of Brocker Rebar's CBA.[136] The union filed a grievance against Brocker Rebar and Ameristeel, challenging what it viewed as unilateral changes in the terms of employment by Ameristeel.[137] After the district court granted Ameristeel's motion to enjoin arbitration of the dispute, the Third Circuit reversed.[138]

The court's opinion, written by Judge Rendell, found *Burns*'s proclamation that an unconsenting, non-alter ego successor cannot be bound to the substantive terms of a predecessor's CBA "more persuasive . . . than the limited holding in *Wiley*."[139] As a result, Ameristeel could not be bound to the terms of Brocker Rebar's CBA because it had formally rejected the agreement multiple times and had never taken any actions to indicate an intent to abide by its terms.[140] The court also attempted to correct the widespread misunderstanding of the difference between the requirement that an employer recognize and negotiate with an incumbent

132. *See, e.g.*, *Pasatiempo Dev. Corp.*, 627 F.2d at 1012 (holding that a successor employer who retained its predecessor's policy for resolution of grievances prior to arbitration was not an adoption of the agreement to arbitrate); United Steelworkers of Am. v. S. Bend Lathe, Inc., 633 F. Supp. 1342 (N.D. Ind. 1986) (holding that a successor employer's use of arbitration procedures similar to those of its predecessor did not show implicit adoption of an arbitration provision).

133. Local 32B-32J Serv. Employees Int'l Union, AFL-CIO v. NLRB, 982 F.2d 845, 850 (2d Cir. 1993); *see also* U.S. Can Co., 305 N.L.R.B. 1127, 1135 (1992).

134. Ameristeel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 277 (3d. Cir. 2001).

135. *Id.* at 265–66.

136. *Id.* at 266.

137. *Id.*

138. *Id.*

139. *Id.* at 273.

140. *Id.*

union based on its substantial continuity with a predecessor, and the separate notion that the employer may be bound to the predecessor's CBA if one of the exceptions enumerated in *Burns* applies.[141]

Finally, the court acknowledged the "vital role that arbitration plays in labor disputes," but insisted that arbitration would be ineffectual in certain cases because of *Burns*'s rule insulating employers from liability under a preexisting CBA.[142] The futility of arbitration in cases where there is no legal or contractual basis for successor liability was also a central theme of the Supreme Court's opinion in *Wiley*.[143]

The *Ameristeel* court pointed out that no purpose would be served by arbitration because the arbitrator would have no contract to construe or terms to enforce and would therefore not be able to provide any remedy that could receive judicial sanction.[144] The court explained that requiring Ameristeel to submit to arbitration on the issue of its liability under Brocker Rebar's CBA "would create the paradoxical situation in which Ameristeel would be forced to arbitrate the extent of its obligations under the CBA, and yet, because it has no such obligations, the arbitrator would be powerless to enforce these obligations."[145] Moreover, the court preempted any argument that the arbitrator could provide a remedy based on general *equitable* principles, stating that "such an award would be illegitimate because it would 'simply reflect the arbitrator's own notions of industrial justice . . . .' "[146]

Chief Judge Becker issued a dissent arguing that *Wiley* controlled disposition of the case, and thus Ameristeel should be required to arbitrate the issue of its liability under the prior CBA.[147] The dissent further asserted that the majority's ruling "relegated *Wiley* to the dustbin of history" by ignoring its factual similarities with *Ameristeel*, improperly characterizing *Wiley* and *Burns* as being "in irreconcilable conflict," and unnecessarily expanding *Burns*'s reach.[148]

Eight years later, in *Local 348-S UFCW, AFL-CIO v. Meridian Management Corp.*, the Second Circuit found, under facts similar to *Ameristeel*, that a successor was obligated to arbitrate the issue of its extent of liability

141. "The 'substantial continuity' concept . . . should properly be viewed as a *necessary* but not a *sufficient* condition for the imposition of arbitration on an unconsenting successor." *Id.* at 269. "[W]hile the existence of substantial continuity is a necessary ingredient, its presence does not necessarily render the new entity bound." *Id.* at 272 n.3. Indeed, continuity of operations and the degree to which a successor is bound to a predecessor's CBA are separable concepts and are subject to different standards of review. *See supra* note 71.

142. *Ameristeel*, 267 F.3d at 276.

143. "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964). The Court further stated that "just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." *Id.*

144. *Ameristeel*, 267 F.3d at 276.

145. *Id.* at 276–77.

146. *Id.* at 277 (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

147. *Id.* at 278 (Becker, J., dissenting).

148. *Id.* at 281–82 (Becker, J., dissenting).

under its predecessor's CBA, even though it was not necessarily bound to the other substantive terms of the agreement.[149] Meridian Management Corp. ("Meridian"), which provided engineering and janitorial services for a terminal within New York's JFK International Airport, entered into a subcontract with Christi Cleaning Services ("Christi") to perform its janitorial services.[150] Christi and a union representing the terminal employees had entered into a CBA mandating certain levels of contributions to employee health and welfare funds and directing all disputes related to the CBA to arbitration.[151] Meridian later terminated the subcontract with Christi, hired over half of Christi's former employees, and began performing the janitorial responsibilities itself.[152] When Meridian denied the union's request for recognition as the bargaining unit for the former Christi employees, it brought suit under section 301, seeking to compel Meridian to arbitrate the issue of its obligations under the Christi CBA.[153]

The Second Circuit, in an opinion written by Judge Hall, concluded that the issue of Meridian's liability under the preexisting CBA should be determined through arbitration.[154] The court stated:

Although the obligation to arbitrate arises out of the agreement, and the case law clearly establishes that a successor is not automatically obligated by the substantive terms, requiring arbitration on this issue is the most efficient and fair means by which the parties can settle their dispute, particularly in cases like this one where the dispute arises out of the employer's refusal to honor a particular term of the CBA. The duty to recognize the union is separate from the duty to arbitrate grievances arising out of the existing CBA, and the two have different purposes.[155]

Applying the three *Fall River Dyeing* factors, the court determined that there was a high level of continuity between the old and new employers.[156] The nature of the businesses was nearly identical since Christi and Meridian both performed janitorial services for other corporate entities.[157] Second, Meridian's employees performed the same basic type of jobs in the same location and under the same working conditions as they had under Christi.[158] Third, Meridian provided the same services to the Port Authority of New York, and thus the products and customer bases were identical.[159] Under these facts, the court held that there had been no notable changes in operations after the change in ownership from the employees' perspectives.[160] As a result, the court found that Meridian was a successor

149. Local 348-S, UFCW, AFL-CIO v. Meridian Mgmt. Corp., 583 F.3d 65 (2d Cir. 2009).
150. *Id.* at 66.
151. *Id.*
152. *Id.*
153. *Id.* at 67.
154. *Id.* at 76.
155. *Id.*
156. *Id.* at 75.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*

and was bound to the arbitration provision in the Christi CBA.[161] The court stated that viewing arbitration provisions as distinct from other substantive terms of a CBA for purposes of successorship was the most effective way to balance the competing interests articulated in *Wiley*, *Burns*, and *Howard Johnson*.[162]

Two factors weigh against the result reached by the Second Circuit in *Meridian Management* and favor the approach adopted by the Third Circuit in *Ameristeel*. Initially, every other circuit to address the issue has recapitulated *Burns*'s reasoning that a successor cannot be bound to the substantive provisions of a CBA to which it has not agreed.[163] As noted in Judge Livingston's dissent in *Meridian Management*, the majority opinion disregarded well-settled precedent that a successor employer may only be held to the terms of a predecessor's CBA when one of the common law justifications for successor liability applies.[164] Because this was not the case, the dissent argued that the decision would require "*all* successor employers who hire the bulk of a predecessor's employees . . . not only to bargain with and recognize a union but also to arbitrate with it the extent to which it is bound by the previous CBA."[165] This, the dissent argued, signified an ill-advised divergence from the rationales of *Burns* and *Howard Johnson*.[166]

Second, *Meridian Management*'s holding does not successfully advance the interests of either employer or employee and creates inefficient and potentially divisive policies for future labor relations. In examining the Second Circuit's "myopic" conclusion that the imposition of an extra-contractual duty to arbitrate on employers somehow protects employee rights, another commentator observed:

The long-term effect of this decision is that it encourages future successor employers to question whether to retain their predecessors' unionized employees. Any employer cognizant of this decision who is in a situation similar to Meridian will undoubtedly weigh the benefits of retaining experienced workers with the possibly lengthy and expensive pitfalls of litigating, appealing, arbitrating, and potentially relitigating an erroneous arbitration award. This decision assures these employers that they can avoid this hassle by simply firing their predecessor's employees.[167]

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161. *Id.*

162. *Id.* at 76.

163. *See* 3750 Orange Place Ltd. P'ship v. NLRB, 333 F.3d 646, 654 (6th Cir. 2003); Ameristeel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 277 (3d. Cir. 2001); Road Sprinkler Fitters Local Union No. 669 v. Indep. Sprinkler, 10 F.3d 1563, 1566–67 (11th Cir. 1994); New England Mech., Inc. v. Laborers Local Union 294, 909 F.2d 1339, 1342 (9th Cir. 1990; *Pasatiempo*, 627 F.2d at 1012; Int'l Union of Radio & Mach. Workers v. NLRB, 604 F.2d 689, 693 (D.C. Cir. 1979).

164. *Meridian Mgmt.*, 583 F.3d at 79 (Livingston, J., dissenting).

165. *Id.* at 80.

166. *Id.* at 80–81.

167. Kevin A. Teters, *Successor Employer's Obligations Under A Preexisting Collective Bargaining Agreement: The Second Circuit Misinterprets Supreme Court Decisions and Sets A Harmful Precedent*, 76 J. AIR L. & COM. 143, 150 (2011) (footnotes omitted).

Indeed, if a successor employer knows that by hiring a majority of the predecessor's workforce, it is not only required to recognize their representative bargaining unit but is shackled to a CBA that may be adverse to its own business interests, what motivation would the employer have to retain these employees? It seems much more likely that the employer would simply terminate the majority or all of the former workers to eliminate any possibility that it be deemed "substantially continuous." This harsh reality was not addressed by the Second Circuit, even though it bears directly on *Wiley*'s central theme of adopting a policy for successor liability that safeguards the rights of both employers and employees in order to avoid labor unrest and industrial strife.

### *B. The Path Forward—Synthesizing an Effective Successorship Paradigm*

Deriving an effective methodology from the Trilogy requires a thorough examination of the three decisions—including the factual particularities and legal ramifications of each—that many courts have been reluctant to perform. Although *Wiley* and *Burns* are clearly at opposite ends of the spectrum of successorship, they can be reconciled. Synthesizing the two only requires the same compromise that was central to the holding in *Howard Johnson*—that *Wiley*'s effect on the duty to arbitrate be limited to situations involving virtual identity of business operations between the predecessor and successor employers, and that *Burns*'s prohibition on contractual liability be applied in all other scenarios.

This view results in a two-step analysis for successor liability, which first asks whether there is *substantial continuity of identity* between the old and new businesses. There must be substantial continuity of identity in both the *workforces* and *operations* of the two businesses before a successor can become obligated to recognize and bargain with an incumbent union.[168] Continuity of workforces is generally found where a new employer hires a majority of the predecessor's represented employees.[169] Continuity of operations is a fact-based determination focusing on whether the new company has " 'acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.' "[170] This type of continuity is measured under the totality of the circumstances with an eye toward whether "those employees

168. Howard Johnson Co. v. Hotel & Rest. Emps., 417 U.S. 249, 263 (1974); *see also* Citisteel USA, Inc. v. NLRB, 53 F.3d 350, 356 (D.C. Cir. 1995) ("[T]he obligation of a new employer to recognize a union rests on two preconditions: 'a majority of the employees must have worked for the predecessor employer, and there must be continuity of operations.' ") (quoting United Mine Workers Local 1329 v. NLRB, 812 F.2d 741, 743 (D.C. Cir. 1987)).

169. *Howard Johnson*, 417 U.S. at 263.

170. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987) (citing Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973)); *see also* Monroe Sander Corp. v. Livingston, 377 F.2d 6, 12 (2d Cir. 1967).

who have been retained will understandably view their job situations as essentially unaltered."[171]

If substantial continuity exists, the second part of the successorship analysis comes into play, namely, whether there are *additional contractual justifications* for holding the successor to the provisions of the predecessor's CBA. To date, the only circumstances recognized where this can occur are the three theories discussed in *Burns*. First, the successor is contractually bound where it is an alter ego of the predecessor. Second, where the new employer makes it "perfectly clear" to the predecessor's employees prior to the transition that they will be retained without change to their terms of employment, the employees are entitled to continue to enjoy such rights. Finally, where the employer takes actions consistent with the intent to adopt and abide by the terms of the preexisting CBA, it may not subsequently disclaim that agreement.

## V. CONCLUSION

The successorship doctrine has been stifled by confusion and uncertainty since its inception. The efforts of the Supreme Court and the circuits to salvage anything cogent from the quagmire of *Wiley*, *Burns*, and *Howard Johnson* have proven less than fruitful. Through a careful analysis, however, it is possible to extrapolate a framework from the Trilogy that honors both the legal precedent and the policies that underlie federal labor legislation. Courts should first take into consideration the level of continuity between two companies utilizing the *Fall River* factors in determining whether the employer must recognize and bargain with the incumbent labor union. However, courts should avoid binding a successor to terms of a predecessor's CBA unless one of the three common law exceptions to *Burns*—alter ego, "perfectly clear" successor, or implicit adoption—applies under the facts of the case.

Furthermore, arbitration provisions should not be allowed to survive where other substantive terms of a CBA would be unenforceable against the successor; such a system undermines employer bargaining freedom and will only result in the conducting of futile arbitration proceedings. By limiting *Wiley*'s application to instances of complete identity between the old and new employer, and applying *Burns* and its three recognized exceptions in all other factual scenarios, the murkiness surrounding successorship can be clarified and the rights of employers, unions, and workers granted the most sensible form of protection.

171. *Golden State Bottling*, 414 U.S. at 184; Pa. Transformer Tech., Inc. v. NLRB, 254 F.3d 217, 223 (D.C. Cir. 2001); *see also Citisteel*, 53 F.3d at 354 (successor liability is a factual determination that will be upheld on appeal unless it is unsupported by the evidence or the result of arbitrary or erroneous action by the court) (citing *Fall River*, 482 U.S. at 43); *but see* Coosemans Specialties, Inc. v. Gargiulo, 485 F.3d 701, 705 (2d Cir 2007) (the extent of a successor employer's obligations under a predecessor's CBA is a question of law that is reviewed de novo).