

LABOR POLICY AND PRIVATE DETERMINATION OF SUCCESSOR LIABILITY: ILLINOIS' SUCCESSOR CLAUSE STATUTE

The sale of a business that employs a union workforce creates uncertainty as to the buyer's and seller's duties under an unexpired collective bargaining agreement. Labor unions often attempt to define these duties by bargaining for a "successor clause" in the agreement. A successor clause purports to bind a purchaser, who becomes a "successor" employer, to the terms of the agreement in the event of a transfer of the business.¹ The existence of a successor clause raises two questions. First, should the clause be enforced? Second, against whom should the clause be enforced—the successor or the predecessor? Answers to these questions touch on the bases of labor law and public policy. The federal courts² and the National Labor Relations Board (NLRB or Board)³ have struggled to define the duties of successor and predecessor employers and to strike a balance between the often conflicting interests of the employ-

1. Successor language in collective bargaining agreements varies considerably. Commonly, the language appears in the form of a boiler plate "successors and assigns" clause in the preamble to the agreement. The preamble may state that "[t]his agreement is made by and between [the company] its successors and assigns . . ." Walker Bros., 41 Lab. Arb. (BNA) 844 (1963) (Crawford, Arb.). Some successor clauses contain more specific sale or transfer language. For example, "[t]he provisions of this Agreement shall be binding on the company and its successors and assigns and . . . shall not be effected or changed in any respect by the consolidation, merger, sale, transfer or assignment of any of the company. . . ." Wyatt Manu. Co., Inc. 82 Lab. Arb. (BNA) 53 (1983) (Goodman, Arb.). Other successor clauses expressly require the employer to condition a sale of the business on the purchaser's assumption of the collective bargaining agreement: "[t]his agreement shall be binding on any and all successors and assigns of the Employer . . . The Employer shall make it a condition of transfer that the successor or assigns shall be bound by the terms of this agreement." Sexton's Steak House, Inc. 76 Lab. Arb. (BNA) 576 (1981) (Ross, Arb.). See generally Marsack & Eaton, *Successorship Law: The Impact on Business Transfers and Collective Bargaining*, 65 MARQ. L. REV. 213, 229-39 (1981) (separates successor clauses into three categories: no contractual obligations, mild contractual obligations, and strong contractual obligations).

Successor clauses are becoming more common in collective bargaining agreements. See BNA, BASIC PATTERNS IN UNION CONTRACTS 5 (10th ed. 1983) ("[Successor] clauses appear in 34% of the agreements included in this study, compared to 29% in the 1979 study."). See also BNA, BASIC PATTERNS IN UNION CONTRACTS 8 (8th ed. 1975) (1975 study showed only 22% of the agreements contained successor clauses).

2. Section 301 of the Labor Management Relations (Taft-Hartley) Act (LMRA), 29 U.S.C. § 185(a) (1982), gives federal courts jurisdiction over actions alleging breach of a collective bargaining agreement. See *infra* note 138 and accompanying text for the text of § 301.

3. Congress created the National Labor Relations Board (NLRB or Board) to administer the federal labor laws. The NLRB has the power to adjudicate claims alleging unfair labor practices which violate the federal labor laws. See *infra* notes 115-120 and accompanying text.

ers, unions, employees, and the public.⁴

The Illinois General Assembly recently attempted to answer these questions when it enacted section 2571 of the Illinois Labor Code.⁵ This statute places affirmative duties on the predecessor employer⁶ and enforces the predecessor's collective bargaining agreement against a successor employer when the agreement contains a successor clause.⁷ This legislation, which is representative of other state legislation, evidences a policy of employee protection and a general dissatisfaction with the federal law's treatment of successor liability.⁸ However, the federal labor laws⁹ threaten this statute with preemption.¹⁰

This Note reexamines the federal labor law treatment of successor liability and discusses state statutes that attempt to define the enforceability of a successor clause in a collective bargaining agreement. Part I summa-

4. Predecessor employers have an interest in controlling their own businesses and in the freedom to transfer their businesses without restraints. Similarly, successor employers have an interest in their ability to restructure the purchased company's operations and make workforce and work assignment changes free from the constraints of the predecessors' collective bargaining agreements. Employee interests include job security and the maintenance of rights, such as seniority or vacation time, secured under collective bargaining agreements with the predecessors. Unions have an interest in their own survival as bargaining representatives of the employees. The public has an interest in peaceful resolution of labor disputes and stability in the labor market. The public may also have an interest in allowing optimum operation of businesses and efficient allocation of resources. For a discussion of these interests, see Marsack & Eaton, *supra* note 1, at 215-17.

5. ILL. ANN. STAT. ch. 48, para. 2571 (Smith-Hurd 1987). This statute became effective January 1, 1988.

6. ILL. ANN. STAT. ch. 48, para. 2571 § 1(d) (Smith-Hurd 1987). The predecessor employer must disclose to the successor employer the existence of the collective bargaining agreement and the successor clause and condition the sale on the successor's agreement to be bound by the clause. *See infra* text accompanying notes 99-100.

7. ILL. ANN. STAT. ch. 48, para. 2571 § 1(a) (Smith-Hurd 1987). The collective bargaining agreement is enforceable against the successor regardless of whether the successor received notice of the agreement's existence from the predecessor. ILL. ANN. STAT. ch. 48, para. 2571 § 1(d) (Smith-Hurd 1987). *See infra* text accompanying notes 101-04.

8. Illinois Governor James R. Thompson, although cautioning that the statute may be unconstitutional, stated that it "constitutes sound public policy for Illinois." Letter from Governor James R. Thompson to the Illinois House of Representatives 85th General Assembly (Sept. 10, 1987) (discussing why he had approved rather than vetoed the legislation).

9. This Note uses "labor laws" to refer generally to the National Labor Relations Act (NLRA or Act), 29 U.S.C. §§ 151-169 (1982). Congress enacted the NLRA as the Wagner Act in 1935 to provide recognition and bargaining rights to organized labor. Wagner Act ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1982)). Subsequent amendments to the NLRA include the Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C. §§ 141-87 (1982)), and the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, 73 Stat. 519 (1959) (codified as amended in scattered sections of 29 U.S.C.).

10. *See infra* text accompanying notes 115-143.

rizes the judicially created "federal successorship doctrine" which limits the enforceability of the predecessor's collective bargaining agreement against a successor employer. Part II discusses union efforts to negotiate successor clauses and enforce them against predecessor employers. Part III examines the Illinois statute, its possible federal preemption, and policy concerns that operate in opposition to such statutes. This Note concludes that federal labor law preempts the Illinois statute and that the blanket enforcement of successor clauses which the statute embodies is unwise because it fails to consider the intent of the parties to the collective bargaining agreement containing a successor clause and because it increases enforcement of the agreement against the successor employer rather than against the predecessor employer.

I. SUCCESSOR LIABILITY: THE FEDERAL SUCCESSORSHIP DOCTRINE

The federal labor laws do not specifically address the obligations of a successor employer under an unexpired collective bargaining agreement.¹¹ To fill this void, the NLRB and the federal courts have developed a federal "common law" defining purchaser liability.¹² The resultant "successorship doctrine"¹³ stems from policies embodied in the federal labor laws: the parties' private determination of terms of employ-

11. See Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach*, 57 MINN. L. REV. 1051, 1053 n.3 (1973).

12. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957) (A need for uniformity in labor relations prompted the creation of a federal common law "fashioned from the policy of our national labor laws."). See generally Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883 (1986). See also *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548 (1964) (A court may utilize state law "so far as it is of aid in the development of correct principles," but the result is federal common law.).

This federal common law includes the determination of when a purchaser is a "successor." A purchaser must be deemed a successor before it can be subject to any obligations under a collective bargaining agreement. See *infra* notes 38-41 and accompanying text.

13. The doctrine developed primarily through three Supreme Court decisions: *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249 (1974); *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972); and *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). *Howard Johnson* and *Wiley* were decided in the context of a LMRA § 301 suit to compel the successor to submit to arbitration under the predecessor's agreement. *Burns* concerned review of an unfair labor practice proceeding brought before the NLRB alleging that the successor violated LMRA § 8(a)(5) by failing to recognize and bargain with the union. Although successorship decisions rely on the application of labor law and policy to the particular facts of each case, a detailed factual analysis of these cases is beyond the scope of this Note. Instead, this Note focuses on the policy concerns embodied in these decisions. Many commentators have analyzed these decisions at great length. For a list of such articles see Comment, *The Successorship Doctrine: In Search of a New Focus*, 17 WILLAMETTE L. REV. 405, 407 n.3 (1981).

ment,¹⁴ and peaceful resolution of labor disputes through the arbitration process.¹⁵ The successorship doctrine attempts to balance the interests of the parties involved in a business transfer without losing sight of these labor policy goals.¹⁶

A. *The General Rule and Successor Clauses*

The successorship doctrine provides generally that a successor is not bound by the substantive terms of its predecessor's unexpired collective bargaining agreement unless the successor assumes those terms.¹⁷ This rule applies regardless of the existence of a successor clause in the predecessor's agreement.¹⁸ Thus, it effectuates the national labor policy favor-

14. See *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 282 (1972), discussed *infra* text accompanying notes 21-26. See also, NLRA § 1, 29 U.S.C. § 151 (1982) (purpose of Act to promote industrial peace through free collective bargaining).

15. See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964), discussed *infra* text accompanying notes 28-31.

16. The Supreme Court in *Local 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411 (1980) stated:

labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The "policy of the Act" is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily in it.

Id. at 428.

17. A successor may expressly assume the collective bargaining agreement or impliedly assume it by failing to express a contrary intent. A successor may avoid assumption of the agreement by expressly stating those terms of the agreement it will not accept and setting up its own initial terms of employment. *Crystal & Spizzo, A Successors and Assigns Clause: The Duty to Adopt the Seller's Labor Contract*, 1 *COMPLEAT LAWYER* 41, 46-47 (Winter 1984) (outlining steps a buyer should take to assure nonassumption of the predecessor's collective bargaining agreement). See also *Burns*, 406 U.S. at 284. Even when a successor is not bound by the substantive terms of the agreement, the successor may have a duty to bargain with the union or a duty to arbitrate the extent of its obligations. *Id.* See *infra* Part I(B) & (C) for further discussion of these duties.

18. *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 258 n.3 (1974). In *Howard Johnson*, the union instituted a proceeding pursuant to § 301 of the Labor Management Relations Act to compel the purchaser, Howard Johnson Co., to arbitrate the extent of its obligations to the seller's employees. *Id.* at 253. The Court refused to bind Howard Johnson to the arbitration clause of the predecessor's agreement and held that Howard Johnson was not a "true successor" within the meaning of the federal successorship doctrine. The Court based this decision on the "lack of substantial continuity of identity in the workforce." For a discussion of the factors creating "true successor" status see *infra* notes 38-41 and accompanying text. The Court stated that a successor clause could not bind a purchaser absent a substantial continuity of workforce. *Id.* at 258 n.3. Such an observation implies that if a purchaser met the substantial continuity requirement the successor clause could bind him to the substantive terms of the collective bargaining agreement. Subsequent circuit court opinions, however, have rejected this implication. See *Bartender & Culinary Workers, Local 340 v. Howard Johnson Co.*, 535 F.2d 1160, 1161-62 (9th Cir. 1976) (The court refused to impose the substantive terms of the predecessor's collective bargaining agreement on

ing private determination of labor agreements without governmental imposition of specific terms.¹⁹

This policy formed the basis for the Supreme Court's decision in *N.L.R.B. v. Burns International Security Services, Inc.*²⁰ In *Burns*, the Court refused to enforce the NLRB's order compelling the successor to honor the terms of the labor contract negotiated by the predecessor.²¹ The Court stated that the Board's order, in effect, forced the successor to accept contract terms and therefore violated the policy of private determination embodied in section 8(d) of the National Labor Relations Act.²² Section 8(d) provides for negotiations between the union and employer but does not obligate either to agree to specific terms.²³

In addition, the Court emphasized that economic considerations make binding a successor to the substantive terms of the predecessor's collective bargaining agreement unwise. The Court expressed concern that binding a successor to the terms of the agreement would inhibit the pred-

the successor even though the agreement contained a successor clause, and the successor made no changes in employees, and continued the same operations at the same facility under the same name.).

19. In addition, the rule facilitates the efficient redeployment of resources under new circumstances. See *infra* notes 21-22 and accompanying text.

20. 406 U.S. 272 (1972). In *Burns* the union filed a complaint with the NLRB alleging that the purchaser's refusal to honor the predecessor's collective bargaining agreement constituted an unfair labor practice. The Board agreed and the purchaser, Burns, sought judicial review. *Id.* at 276.

21. *Id.* at 291. The Board had stated, "[w]e find therefore, that Burns is bound to that contract as if it were a signatory thereto, and that its failure to maintain the contract in effect is violative . . . of the Act." William J. Burns Int'l Detective Agency, 182 N.L.R.B. 348, 349-50 (1971). The *Burns* Court pointed out that this Board finding conflicted with previous Board decisions that consistently held a successor is not bound to the substantive terms of the agreement. *Burns*, 406 U.S. at 284.

22. 29 U.S.C. § 158(d) (1982). *Burns*, 406 U.S. at 282-87. The Board argued that failure to bind the successor as a matter of law would jeopardize the stability of labor relations and that "employees [would] face uncertainty and a gap in the bargained-for terms and conditions of employment, as well as the possible loss of advantages gained by prior negotiations." *Id.* at 285. These may represent some of the same concerns that Illinois and other state legislatures sought to address when enacting successor clause statutes. The court, however, expressed economic concerns, *id.* at 284, and further stated that allowing the Board to compel the successor to accept the agreement "would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Id.* at 287 (quoting *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)).

23. 29 U.S.C. § 158(d) (1982) (duty to bargain "does not compel either party to agree to a proposal"). Some commentators have questioned the Court's reliance on § 8(d). See Silverstein, *The Fate of Workers in Successor Firms: Does Law Tame the Market?* 8 INDUS. REL. L.J. 153, 166-67 (1986) (requiring the successor to be bound does not require Board interference with the substance of the agreement); Note, *The Unenforceable Successorship Clause: A Departure from National Labor Policy*, 30 UCLA L. REV. 1249, 1261 n.77 (1983) (§ 8(d) appears to apply only after the parties have failed to reach an agreement).

cessor's ability to transfer a failing business.²⁴ A potential buyer may be unwilling to purchase a failing business if he will be saddled with the terms and conditions of a predecessor's collective bargaining agreement. The agreement may prevent a successor from implementing changes necessary to ensure the successful continuation of the business.²⁵ Finally, the Court emphasized that concessions made by either the union or the successor should be based on "economic power realities" and not NLRB or judicial intervention.²⁶

B. *The Duty to Arbitrate*

In proceedings under section 301 of the Labor Management Relations Act to compel arbitration,²⁷ courts have balanced the policy of private determination with the preference for labor dispute resolution through arbitration and, in the process, have provided some protection to employee interests. In *John Wiley & Sons, Inc. v. Livingston*²⁸ the Supreme Court stated that employees require protection from a change in control²⁹ and indicated a willingness to allow limited intervention in the bar-

24. *Burns*, 406 U.S. at 287-88. This restraint on alienation may frustrate the "need to redistribute the assets of an unprofitable business into the economy." Note, *supra* note 23, at 1264.

25. *Burns*, 406 U.S. at 287-88. A purchaser of a failing business may find it necessary to undertake "changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these charges impossible and may discourage and inhibit the transfer of capital." *Id.* One student commentator addresses these concerns by arguing that a successor should be bound to the terms of the predecessor's agreement unless the business transfer was based on economic necessity. Note, *supra* note 23, at 1275-80.

26. *Burns*, 406 U.S. at 288. The Court stated that the Act allows the parties to bargain for the protections that they deem appropriate based on their relative bargaining strength. The Court concluded that if the terms of the employment contract did not correspond with the parties, relative economic strength industrial strife would ensue. Free collective bargaining, however, would ensure labor peace. *Id.* For the role of economic power realities in defining successor status, see *infra* notes 35-41 and accompanying text.

27. 29 U.S.C. § 185 (1982).

28. 376 U.S. 543 (1964). *Wiley* arose in the context of a merger which caused the dissolution of the original employing entity. Ordinarily, successorship analysis ignores distinctions among mergers, consolidations, or purchases of assets. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 182 n.5 (1973). However, one possible distinction may exist because the dissolution of the original employing entity through a merger deprives the union and employees of a proceeding against the predecessor employer. See, *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 257 (1974) (Court distinguished *Wiley* because *Howard Johnson* involved a sale of assets and the predecessor employer remained in existence whereas in *Wiley* the predecessor disappeared in the merger and if the union did not have some remedy against the successor, it could not enforce the agreement).

29. *Wiley*, 376 U.S. at 549. The Court stressed a lack of consideration of employee interests in

gaining process to effectuate the federal preference for arbitration. Although this policy does not require that a successor adopt all substantive terms of the predecessor's collective bargaining agreement, the courts may bind a successor to the arbitration provision of the agreement.³⁰ Therefore, a court may compel a successor to arbitrate the extent of its obligations under the predecessor's collective bargaining agreement. As a result, a successor may become bound to certain terms of the preexisting agreement.³¹

C. *The Duty to Bargain*

The policy of private determination of employment terms by free collective bargaining also provides some protection to a union's status as bargaining representative. Unions have successfully alleged to the Board that the purchaser engages in an unfair labor practice by refusing to bargain with the union as representative of the employees.³² Although the Court in *Burns* refused to bind the successor to the substantive terms of the predecessor's agreement, it held that the NLRB could order a successor employer to recognize and bargain with an incumbent union.³³ This

sale negotiations and stated "[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." *Id.*

30. See *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (characterizing arbitration as a "substitute for industrial strife" and a "part and parcel of the collective bargaining process itself"). *Wiley*, 376 U.S. at 548. The court qualified this duty to arbitrate, however, by holding that the duty to arbitrate would not survive a business transfer absent substantial continuity of the business enterprise, i.e., the purchaser would have to qualify as a "successor." *Id.* at 551. See *infra* text accompany notes 39-41.

31. In *United Steelworkers v. Reliance Universal, Inc.*, 335 F.2d 891, 895 (3rd Cir. 1964), for example, the court stated that an arbitrator should consider any new circumstances resulting from the business transfer to determine the successor's obligations and that any terms of the preexisting agreement that remain as an "embodiment of the law of the shop" should apply to the successor. *Id.* at 895. The precedential value of *Reliance* is, however, in doubt after *Howard Johnson v. Detroit Local Joint Executive Bd.*, 417 U.S. 249 (1974) (refusing to extend *Wiley* to a successor who did not hire many of the predecessors employees).

32. Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5) (1982). This mandate is subject to the provisions of § 159(a). Section 159(a) provides that "[r]epresentatives designated or selected for the purpose 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) (1982).

33. *Burns*, 406 U.S. at 281-90. However, the Court determined that a successor employer is ordinarily free to unilaterally establish the initial terms of employment. *Id.* at 294. See *supra* text accompanying notes 20-26.

duty to bargain arises when a successor employer retains a majority of the predecessor's employees, and therefore keeps a certified bargaining unit intact.³⁴

D. The Definition of Successor

The duty to arbitrate and the duty to bargain have some basis in the "economic power realities" of the parties³⁵ because for either of these duties to apply, a purchaser must qualify as a successor. In making this determination, the Board in duty to bargain cases³⁶ and the federal courts in duty to arbitrate cases³⁷ apply a "substantial continuity" test.³⁸ Under this test, successor status turns on whether a majority of the successor's employees were previously employed by the predecessor.³⁹ Therefore, if the labor market is elastic and a purchaser may readily replace the predecessor's employees, the purchaser can avoid successor status.⁴⁰ On the other hand, a purchaser may find it necessary or more

34. *Id.* at 287. In *Burns*, the employees recently had elected the union as their bargaining representative and the purchaser then hired a majority of the predecessor's employees. *Id.* The Supreme Court expanded this holding in *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S.Ct. 2225 (1987). In *Fall River* the Court held that the successor's duty to bargain is not limited to situations where the employees recently certified the union as their representative. The court stated that where a union has a rebuttable presumption of majority status, that status continues despite the business transfer, and regardless of a seven months hiatus in operations. *Id.* at 2235.

35. *Burns*, 406 U.S. at 288. See *supra* note 22 and accompanying text.

36. See *Mondovi Foods Corp.*, 235 N.L.R.B. 1080, 1082 (1978).

37. See *Howard Johnson v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 260 (1974).

38. *John Wiley & Sons Inc. v. Livingston*, 376 U.S. 543, 551 (1964).

39. In *Mondovi*, 235 NLRB at 1082, the Board stated that after a threshold finding that a majority of the successor's employees were those of the predecessor, it considers a variety of factors in applying the substantial continuity test. *Id.* at 1082. Factors that provide for substantial continuity include continuation of business operations without interruption, use of the same facilities, production of the same products and services, and retention of the same customers. *Id.* at 1082. The weight of each of these factors, however, is uncertain. *Id.* at 1082. See also *Fall River*, 107 S.Ct. at 2237, where the Court stated, "We do not find determinative of the successorship question the fact that there was a 7-month hiatus between [the predecessor's] demise and [the successor's] start-up." The Court instead chose to focus on the employee's perspective and "whether 'those employees who have been retained will understandably view their job situations as essentially unaltered.'" *Id.* at 2236 (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973)).

In *Howard Johnson*, 417 U.S. 249, the Supreme Court applied this "majority of employees" test in a duty to arbitrate context. Justice Douglas dissented from this holding. He argued that the successor inquiry should focus on the other factors: continued business without interruption, same facilities, same products, and same general operation. *Id.* at 267-69 (Douglas, J., dissenting). Douglas characterized reliance on majority of employees as a "sheer bootstrap" argument. "The effect is to allow any new employer to determine for himself whether he will be bound, by the simple expedient of arranging for the termination of all of the prior employer's personnel." *Id.* at 268-69.

40. However, the purchaser cannot refuse to hire the employees of the predecessor solely be-

efficient to hire the predecessor's employees.⁴¹ The purchaser would then qualify as a successor within the meaning of the federal doctrine.

II. UNION EFFORTS TO BIND THE PREDECESSOR EMPLOYER

In response to the federal successorship doctrine holding that a successor is not bound by the terms of an unexpired collective bargaining agreement unless he assumes them, unions often argue that successor clauses require the predecessor to condition a sale of the business on the purchaser's assumption of the agreement. In determining the effect of a successor clause on a predecessor, as with a successor, courts have balanced the interests of the employer and employee through the policies of free collective bargaining and arbitration.

A. *Successor Clause: A Mandatory Subject of Bargaining*

Section 8(d) of the NLRA advances the policy of private determination of contract terms, requiring employers and unions to meet and negotiate in good faith concerning "wages, hours and other terms and conditions of employment."⁴² These topics are mandatory subjects of bargaining⁴³ and either party's refusal to bargain over them constitutes an unfair labor practice.⁴⁴ Issues unrelated to wages, hours, or terms and

cause of their union membership or to avoid having to recognize the union. Such discrimination is prohibited as an unfair labor practice under § 8(a)(3) of the NLRA. 29 U.S.C. § 158(a)(3) (1982). Subject to this limitation, a purchaser is free to hire a whole new workforce. *Howard Johnson*, 417 U.S. at 263.

41. Underlying the court's rationale, then, is the notion that "the operation of a market economy will impose sufficient control on successor discretion to make explicit protection of worker interests unnecessary." Silverstein, *supra* note 23, at 160. See *Burns*, 406 U.S. at 291. ("In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the pre-existing contract rather than to face uncertainty and turmoil."). *Id.* See also Fasman & Fischler, *Labor Relations, Consequences of Mergers and Acquisitions*, 13 EMPL. REL. L.J. 14, 29 (1987). A purchaser who repudiates the existing contract would lose the protection of any no-strike clauses and if the union retained representative status it would be free to strike when the ownership was transferred. *Id.* at 29.

42. 29 U.S.C. § 158(d) (1982). Section 8(d) further provides that "such an obligation does not compel either party to agree to a proposal or require the making of a concession." *Id.* See *infra* text accompanying notes 20-23.

43. *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). The broad language of § 8(d) requires that the NLRB, subject to judicial review, determine the scope of the mandatory bargaining requirement. See *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

44. An employer's refusal to bargain constitutes an unfair labor practice under § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1982), a union's refusal under § 8(b)(3) of the NLRA, 29 U.S.C. § 158(b)(3) (1982). Refusal to bargain subjects the uncooperative party to an NLRB order to bargain and to a variety of sanctions for noncompliance. NLRA § 10, 29 U.S.C. § 160 (1982).

conditions of employment are permissive subjects of bargaining.⁴⁵ Permissive subjects normally entail an employer's relationship with third persons. The Act does not require employers and unions to bargain over permissive subjects.⁴⁶

Union proposals in collective agreement negotiations may include a successor clause requiring the employer to condition a transfer of the business on the buyer's assumption of the agreement.⁴⁷ Although this type of successor clause carries the indicia of a permissive bargaining topic because it concerns the employer's relationship with a third party, the Tenth Circuit in *Lone Star Steel Co. v. NLRB*⁴⁸ upheld an NLRB finding that such a clause⁴⁹ is a mandatory subject of bargaining.⁵⁰ This holding allows a union to bargain to an impasse over such a clause and to submit the issue to arbitration.⁵¹ In reaching this conclusion, the court

45. This characterization stems from the labor law policy of deference to management prerogatives in making business decisions. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). See also *Allied Chemical & Alkali Workers of America, Local No. 1 v. Pittsburgh Plate & Glass Co.*, 404 U.S. 157, 178 (1978) (mandatory subjects include only those issues that settle an aspect of the employer-employee relationship).

46. See *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (Employers and unions are "free to bargain or not to bargain, and to agree or not to agree" about permissive bargaining subjects.). A party's insistence on bargaining about a permissive subject can constitute a lack of good faith in the negotiations and violate § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982). *Id.* at 352.

47. For an example of typical language, see *supra* note 1.

48. 639 F.2d 545 (10th Cir. 1980).

49. In *Lone Star*, the union proposed the following clause: "Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement." *Id.* at 548.

50. *Id.* at 556. The *Lone Star* court reviewed the Board's application of two tests: first, whether the proposed subject of bargaining "vitally affects" the terms and conditions of employment, *id.* at 554; *Allied Chemical Workers & Alkali Workers of America, Local No. 1 v. Pittsburgh Plate & Glass Co.*, 404 U.S. 157, 178 (1978); see *infra* text accompanying note 52; and second, whether the clause deals with the employer's decision to sell or instead with the effects of that decision, *Lone Star*, 639 F.2d at 556, see *supra* note 45, *infra* notes 57-58 and accompanying text.

51. *Lone Star*, 639 F.2d at 553. If an issue is a mandatory subject of bargaining, the proponent of a proposal regarding the subject may bargain to impasse and submit resolution of the issue to arbitration. If not mandatory, the subject is permissive and the proponent may not insist on it to impasse. See *supra* text accompanying notes 42-46.

In *Lone Star*, the company found the successor clause unacceptable. The parties failed to reach an agreement through negotiation and the union went on strike. The company then filed an unfair labor practice charge against the union. The company alleged that the successor clause violated the "hot cargo" provisions of § 8(e) of the Act, 29 U.S.C. § 158(e) (1982). *Id.* at 547-48. Section 8(e) provides in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise

emphasized that an issue involving third parties may be a mandatory subject of bargaining if it "vitaly affects" the terms and conditions of employment.⁵² The court rejected Lone Star's contention that the Board's application of this test was clearly erroneous because the Board failed to consider the employer's freedom to dispose of capital assets.⁵³ First, the court interpreted the Board's decision as a correct resolution of the competing interests, including the employer's freedom to dispose of capital assets.⁵⁴ Second, the court found Lone Star's reliance on previous Supreme Court decisions in successor cases misplaced.⁵⁵ The successor cases were efforts to bind a successor employer to its predecessor's obligations by operation of law. In contrast, *Lone Star* raised the issue of "an agreement that a successor would be bound by the previous bargaining contract."⁵⁶

Lone Star further argued that the successor clause would inhibit management's discretion to sell the business and therefore constituted a permissive subject of bargaining.⁵⁷ The court rejected this argument, concluding that the successor clause addressed only the effect of a decision to sell (in other words, maintaining the terms and conditions of the workers' employment) and not the decision itself.⁵⁸ Therefore the clause

dealing in any of the products of any other employer or to cease doing business with any other person . . .

29 U.S.C. § 158(e) (1982) (emphasis added).

The NLRB held and the court affirmed that the sale or transfer of an entire business enterprise did not constitute "doing business with" in the meaning of § 8(e) and therefore a successor clause would not violate § 8(e). 639 F.2d at 549.

52. *Id.* at 554 (quoting *Allied Chemical*, 404 U.S. at 179).

53. 639 F.2d at 554-55.

54. *Id.* at 555 n.21. The court went on to state that accepting the employer's "contention would mean that an employer's freedom to rearrange his business would not be balanced . . . by some protection to the employees from a sudden change in the employment relationship." *Id.*

55. *Id.* at 555 n.21, 556. Lone Star cited *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972) and *Howard Johnson Co. v. Detroit Local Exec. Bd.*, 417 U.S. 249 (1974), in support of its position that the proposed successor clause must be a permissive subject of bargaining. This follows, Lone Star argued, because imposing the affirmative duty to bargain is the functional equivalent of the restraints disallowed in *Burns* and *Howard Johnson*. *Lone Star*, 639 F.2d at 554.

Rejecting the argument, the court distinguished successor cases because in those decisions the Supreme Court expressed concern over the Board compelling a successor to honor terms it did not agree to, while in the case of a predecessor the Board merely requires that the parties negotiate and come to their own terms. *Id.* at 555.

56. *Id.* at 555-56 (emphasis added).

57. *Id.* at 556. Lone Star relied on *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), which held that a decision to sell is a prerogative of management and not subject to bargaining.

58. *Lone Star*, 639 F.2d at 556. *Accord* *General Motors Corp., GMC Truck and Coach Divi-*

did not impinge on management's discretion.

Lone Star advances employee protection through private determination by the parties. It increases the likelihood that the parties will actually bargain over specific successor language. Through proposals and counterproposals the parties can negotiate and decide for themselves the extent of their duties in the event of a sale of the business. The company can calculate the importance of free transferability of its business and negotiate accordingly.⁵⁹ Similarly, the union, as bargaining representative of the employees, can determine the importance of requiring the company to condition a sale of the business on the buyer's assumption of the agreement and negotiate accordingly.⁶⁰

B. *Union Efforts to Bind Predecessors to Successor Clauses*

In *Howard Johnson Company v. Detroit Local Joint Executive Board*⁶¹ the Supreme Court suggested that a union could move to enjoin a sale of the business on the ground that in violation of the successor clause, the predecessor employer failed to condition the sale on the buyer's assumption of the collective bargaining agreement.⁶² Unions have followed this suggestion and have successfully enjoined sales and mergers pending arbitration of the predecessor's duties under the collective bargaining agreement.⁶³ Furthermore, arbitrators have found that successor clauses can obligate an employer to condition a sale of the business on the successor's assumption of the collective bargaining agreement.⁶⁴

sion, 191 N.L.R.B. 951, *petition for review denied*, 470 F.2d 422 (D.C. Cir. 1972) (decision to sell not a mandatory subject of bargaining but the effects of the decision are).

59. If management is concerned that in a time of economic hardship the successor clause will jeopardize its ability to sell the business, it may negotiate for appropriate conditions limiting the application of the successor clause. The clause could provide that if a sale or transfer of the business becomes an economic necessity the parties will renegotiate the successor clause. When faced with a possible failure of the business, the union may be willing to agree to some concessions to make the business more attractive to a potential employer.

60. One possible alternative to a traditional successor clause is a clause requiring that the buyer notify the union of sale negotiations and of the buyer's intent with respect to the collective bargaining agreement.

61. 417 U.S. 249 (1974).

62. *Id.* at 258 n.3. "The Union apparently did not explore another remedy which might have been available to it prior to the sale, *i.e.*, moving to enjoin the sale . . . on the ground that this was a breach by the [predecessor] of the successorship clauses in the collective-bargaining agreements." *Id.*

63. *See infra* notes 65-87 and accompanying text.

64. *See infra* notes 89-93 and accompanying text.

1. Standards for Granting Pre-Sale Injunctions

In determining whether a pre-sale injunction is appropriate, courts attempt to strike a balance between the federal labor policy opposing judicial interference in labor disputes and the policy promoting peaceful resolution of labor disputes through voluntary arbitration. Therefore, a court may enjoin an employer's action only if the injunction is necessary to effectuate the parties' agreement to arbitrate.⁶⁵ Because of this limitation, the union must first establish that the collective bargaining agreement mandates arbitration of the issue of enforcing the successor clause.⁶⁶

Generally, if the collective bargaining agreement contains a broad arbitration clause⁶⁷ a court will apply a presumption of arbitrability⁶⁸ and conclude that a grievance to enforce a successor clause is one the parties intended to submit to arbitration.⁶⁹ However, some courts express con-

65. See *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 407 (1976) (Court refused to issue injunction where underlying dispute not subject to arbitration provision of the agreement); *Boys Market, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970) (created exception to the federal labor law's broad prohibition of federal court injunctions in labor disputes); *Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276, 281-83 (7th Cir. 1981) (court issued status quo injunction pending arbitration).

66. In *Panoramic Corp.*, 668 F.2d at 283, the court stated that "[i]njunctive relief against employer breaches of collective bargaining agreements . . . [are] available, in aid of arbitration, where the underlying dispute is subject to mandatory arbitration under the labor contract and where an injunction is necessary to prevent arbitration from being rendered a meaningless ritual." *Id.* See also *UAW v. Goodyear Aerospace Corp.*, 656 F. Supp. 1283, 1286 (N.D. Ohio 1986) (employer can obtain an injunction if a strike is subject to mandatory arbitration).

67. A typical collective bargaining agreement provides a grievance procedure and an arbitration clause which allows the parties to submit many unresolved grievances to arbitration. A broad arbitration clause may provide, for example, that the parties agree to arbitrate "any dispute between the parties involving the interpretation or application of any provisions of this agreement." *Nursing Home & Hospital Union v. Sky Vue Terrace*, 759 F.2d 1094, 1097 (3rd Cir. 1985).

68. The Supreme Court stated this presumption in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). "An 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. Doubts should be resolved in favor of coverage." *Id.* at 582-83.

69. See *UAW v. Goodyear Aerospace*, 656 F. Supp. 1283, 1286 (N.D. Ohio 1986) (court used presumption to determine arbitrability of a successor clause) (citing *United Steelworkers v. Warrior and Gulf Navigation Co.* 363 U.S. 574, 582-83 (1960) where the Court stated that doubts as to an arbitration clause's coverage should be resolved in favor of arbitration)). However, in *Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276, 283 (7th Cir. 1981), the court indicated a willingness to apply some scrutiny to the question rather than broadly applying the presumption, although the *Panoramic* court did not reach the question of the arbitrability of the successor clause dispute because the employer conceded it. The court also discussed the statements of commentators that indi-

cern over summarily applying the presumption.⁷⁰ They reason that a court cannot compel arbitration unless the court finds that the parties had agreed contractually to submit that issue to arbitration.⁷¹

If the court finds the successorship dispute arbitrable, the court may compel arbitration but cannot issue an injunction prohibiting a sale pending arbitration unless the union meets the traditional requirements for injunctive relief.⁷² The union must show: 1) breach or threatened breach of the agreement; 2) that irreparable harm will result absent the injunction; and 3) that the hardship placed on the union if the injunction is denied outweighs the hardship to the employer if the injunction is granted.⁷³

In determining whether there is a threatened breach of the agreement, courts consider the existence of an interested purchaser and the extent of any sale negotiations.⁷⁴ Courts also consider evidence of an employer's intent not to include in the sale contract a provision binding the purchaser to the collective agreement.⁷⁵

Irreparable harm to the union and employees consists mostly of frustration of the arbitration process.⁷⁶ If the court allowed an employer to

cate a fear that broad application of the presumption in injunction actions against employers would alter the relative bargaining power of the parties. *Id.* at 283-84.

70. *See* *Nursing Home & Hospital Union No. 434 v. Sky Vue Terrace, Inc.*, 759 F.2d 1094, 1097 (3rd Cir. 1985) (court refused to apply presumption and scrutinized the arbitration clause); *International Union United Automobile, Aerospace and Agriculture Implement Workers of America v. Lester Engineering Co.* 718 F.2d 818, 823-24 (1983) (although arbitration clause should be read "indulgently" a court should also scrutinize the management prerogative clause); *Panoramic*, 668 F.2d 276, 283, discussed *supra* note 66.

71. *Sky Vue Terrace*, 756 F.2d at 1097; *Lester Engineering*, 718 F.2d at 823.

72. *See Panoramic*, 668 F.2d 276. The court in *Panoramic* did not require that the union show a likelihood of success on the merits, however. The court stated that the union must show only that its claim is sound enough to prevent arbitration from being a "futile endeavor." *Id.* at 284-85. *See infra* text accompanying notes 88-89. *See also Sky Vue Terrace*, 759 F.2d at 1098. (Enjoining an employer must be necessary to "ensure the arbitral process will not be frustrated. . .").

73. *Sky Vue Terrace*, 759 F.2d at 1098; *Panoramic*, 668 F.2d at 284-89; *UAW v. Goodyear Aerospace Corp.*, 656 F. Supp. 1283, 1286 (N.D. Ohio 1986).

74. *See Goodyear Aerospace Corp.*, 656 F. Supp. at 1291 (The court considered the company's public announcement that it intended to sell the division relevant to the threatened breach inquiry.)

75. *Id.* at 1291. In *Goodyear Aerospace Corp.*, the employer had expressly refused the union's request to include a provision in the sales contract that required the buyer to assume the collective bargaining agreement. *Id.*

76. The Third Circuit in *Panoramic* stated that in the context of a pre-sale injunction "[i]rreparable injury means not simply any injury resulting from a breach of contract that would not be fully redressed by an arbitral award, but rather 'injury so irreparable that a decision of the [arbitration] Board in the union[s] favor would be but an empty victory.'" *Panoramic*, 668 F.2d at 285-86 (quoting *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528,

complete the sale prior to arbitration of the employer's responsibilities, the arbitrator would be faced with a "fait accompli";⁷⁷ the arbitrator's decision that the employer had a duty to condition the sale would prove useless.⁷⁸ In the event of a completed sale, if the arbitration clause covered the alleged breach of the successor clause, the union could seek damages from the predecessor through the arbitrator,⁷⁹ or initiate an action to enforce the collective bargaining agreement against the successor under the federal successorship doctrine.⁸⁰ However, the damage proceeding may not provide the union and employees with an adequate remedy⁸¹ and the successor action ordinarily would fail.

Injunctions provide the union with significant leverage and may limit the employer's freedom to transfer the business. Courts effectively address the competing interests, however, by a thorough analysis of the balance of hardships in each case.⁸² Absent the injunction, the employees may face permanent job loss, reduction in salary, and loss of seniority or other benefits.⁸³ Constrained by the injunction, an employer may lose the opportunity to sell the business, and suffer economic hardship from

534 (1960)). The court characterized this inquiry as focusing "into a single concept the twin ideas of irreparable injury and frustration of arbitration." 668 F.2d at 286.

77. *UAW v. Goodyear*, 656 F. Supp. at 1287.

78. *Id.*

79. *See, e.g., Local No. 381, Int'l Union of Operating Engineers v. Tosco Corp.*, 823 F.2d 265 (8th Cir. 1987). In *Tosco*, the union brought a post-sale action to compel the predecessor to arbitrate the union's claims for severance pay and enforcement of the collective bargaining agreement. The district court refused to compel arbitration, reasoning that the successor was not obligated to accept the terms of the predecessor's collective bargaining agreement as a matter of law. The Eighth Circuit, however, found that the district court addressed the wrong question. The Eighth Circuit found that the question concerned whether the predecessor had an obligation to condition the sale on the purchaser's assumption of the existing collective bargaining agreement, not whether a purchaser was obligated to assume those terms under the successorship doctrine. The question arose directly out of the collective bargaining agreement between the predecessor and the union and therefore the court could compel the predecessor to arbitrate. *Id.* at 267.

80. *See supra* notes 11-26 and accompanying text. One court has upheld a union action against the purchaser for tortious interference with contract. *See Mine Workers v. Eastover Mining Co.* 623 F. Supp. 1041 (W.D. Va. 1985) (purchaser tortiously interfered with the union and seller's contractual relationship by inducing the seller to sell the business without language in the purchase contract binding the purchaser).

81. *See Panoramic*, 668 F.2d at 286 (agreeing that an action for damages would be available but expressing concern that where a permanent loss of jobs is threatened, the damages remedy would be inadequate).

82. *Id.* at 289. The court stated that the issuance of injunctions against business transfers "could in many cases be extremely disruptive and costly. Hence, we emphasize the need for searching analysis of the facts and law peculiarly applicable to each case when confronted by a request for the sort of injunction sought here." *Id.*

83. *Id.* at 288. The Panoramic employees faced a permanent loss of employment. *Id.*

continuing deficit operations or closing the business.⁸⁴

While a balance of hardships turns on the specific facts of each case, some common factors exist. The threatened permanent loss of jobs weighs heavily in a court's decision to grant an injunction.⁸⁵ However, courts will consider whether an employer's decision is compelled by economic necessity or whether it is part of an ordinary business decision.⁸⁶ If the decision to sell results from economic necessity, the possible harm to the employer company and the public may outweigh the employees' potential job loss.⁸⁷

2. Arbitration Decisions

Courts do not require that the union show a likelihood of prevailing on the merits of its claim when considering a petition for injunctive relief.⁸⁸ Thus, the courts will not analyze the successor clause to determine whether the language supports a contention that the seller must condition the sale on the buyer's assumption of the labor agreement. Such an analysis would constitute judicial interference in the arbitral process.⁸⁹ However, this rule has resulted in injunctive relief from a sale where the relevant language appears merely as a boiler plate "successors and as-

84. *Id.* at 288-89. Panoramic alleged that it would lose the opportunity to accept an offer of a \$4.5 million purchase price, and would be forced to operate a business it wished to sell. However, the Supreme Court in *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 534-35 (1960), stated that hardships to the employees may outweigh the employer's hardship of maintaining a costly operation.

85. *UAW v. Goodyear Aerospace Corp.*, 656 F. Supp. 1283, 1292 (N.D. Ohio 1986).

86. *Id.* In *Goodyear*, the parent company alleged that the sale of its subsidiary was necessary to raise capital to fend off a hostile takeover attempt. *Id.* at 1295.

87. *Id.* But see *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 534-35 (employee hardships may outweigh cost of maintaining operation).

Courts have also considered other factors when balancing the hardships. In *Goodyear*, the court denied the motion for an injunction. The court weighed not only the company's need to raise capital, but also the company's intention to find a buyer who would continue to run the business and keep the current workforce in place. The court also expressed concern that only one third of the employees were union members covered by the contract. In addition, the court considered, but did not give much weight to, the impact of the injunction on the community in which the business was located. *Goodyear* at 1295. See also *Northcross v. Board of Education*, 444 F.2d 1184 (6th Cir. 1971) (court discussed the public interest when considering balance of hardships).

88. See *supra* note 72. Proving likelihood of success on the merits is traditionally a precondition to a preliminary injunction. *E.g.*, *United States v. Price*, 688 F.2d 204 (3d Cir. 1982).

89. *Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276, 284 (7th Cir. 1981). The court stated that a requirement that the union show a likelihood of prevailing on the merits would "intrude significantly on the arbitrator's function and would constitute . . . judicial preemption of the arbitral process." *Id.*

signs" clause in the preamble of the agreement.⁹⁰

The arbitrator's primary concern is to determine the parties' intent when they entered the agreement.⁹¹ To determine intent, arbitrators focus on the actual language of the successor clause. The successor clause must "clearly and unambiguously" require the employer to obtain the purchaser's assumption of the collective bargaining agreement as a condition of sale.⁹² Absent other circumstances, general "successors and assigns" language in the preamble of the agreement is usually insufficient to force the employer to make the sale conditional.⁹³ Other circumstances that may affect the arbitrator's decision include the bargaining history of the parties.⁹⁴ An arbitrator may review early drafts of the agreement and compare those with the final draft to determine the parties' final intent.⁹⁵ By focusing on the language of the successor clause and the party's bargaining history, the arbitrator assures that the parties get what they sought in bargaining.

III. STATE SUCCESSOR STATUTES AND FEDERAL PREEMPTION

In an effort to protect employees, state legislatures have enacted statutes that require enforcement of successor clauses against both the prede-

90. *Id.* at 278. The *Panoramic* contract merely provided that it was "binding on the employer, its successors and assigns." *Id.* The injunction granted in *Panoramic* apparently resulted in cancellation of the transaction. See Wall St. J., Feb. 2, 1982 at 1.

91. *Gallivan's, Inc.*, 79 Lab. Arb. (BNA) 253, 259-60 (1982) (Gallagher, Arb.).

92. *Id.* at 254. See also *Martin Podany Associates*, 80 Lab. Arb. (BNA) 658, 662 (1983) (Gallagher, Arb.) ("clear contractual language" imposing a requirement of assumption). An example of language that "clearly and unambiguously" binds an employer is language that states "[t]he Employer shall make it a condition of transfer that the successor or assigns shall be bound by the terms of this agreement." *Sexton's Steak House, Inc.*, 76 Lab. Arb. (BNA) 576 (1981) (Ross, Arb.) (arbitrator enjoined sale until the seller complied with this language).

93. See *Gallivan's Inc.*, 79 Lab. Arb. (BNA) 253, 258 (1982) (Gallagher, Arb.) ("The obligation to require assumption is imposed if it is set out in express terms; it is not imposed if the clause is nothing more than a recitation that successors are to be bound."); *National Tea Co.*, 59 Lab. Arb. (BNA) 1193, 1197-98 (no obligation to require assumption where language does not specifically require it); *Walker Bros.*, 41 Lab. Arb. (BNA) 844 (1983) (Crawford, Arb.) (general successors and assigns clause may be nothing more than boiler plate language having no significance to the parties). See also *Fasman & Fischler*, *supra* note 41 at 26-27 and n.11 (compares arbitration decisions where union seeking damages for seller's failure to require that the buyer assume the collective bargaining agreement); *Crystal & Brodecki*, *Are Successors and Assigns Clauses Really Binding?*, 38 LAB. L.J. 547, 558-59 (1987).

94. *Gallivan's Inc.*, 79 Lab. Arb. (BNA) 253, 255-56 (1982) (Gallagher, Arb.) (arbitrator took extreme care to track the negotiations from initiation to final agreement).

95. *Id.* at 255.

cessor and successor employer.⁹⁶ These statutes face preemption under several federal labor law doctrines.⁹⁷ More significantly, these statutes may be unwise due to their inflexibility and interference with private determination of labor contracts. First, these statutes fail to consider the language of the specific successor clauses and the intent of the parties. Second, these statutes enforce the agreement against the wrong party—the purchaser rather than the seller.

A. *The Illinois Successor Clause Statute*

The Illinois successor clause statute parallels the statutes of several other states.⁹⁸ The statute places an affirmative duty on an employer who is a party to a collective bargaining agreement with a successor clause to disclose to a successor the existence of the collective bargaining agreement and successor clause.⁹⁹ This disclosure requirement demands more than mere notice to the purchaser. The statute states that the predecessor shall satisfy his disclosure requirement by including in the contract of sale a statement that the successor is bound by the successor clause.¹⁰⁰ This provision forces an employer to condition the sale on the purchaser's acceptance of the unexpired collective bargaining agreement whether the language of the successor clause requires it or not.

The statute also provides that the collective bargaining agreement is binding upon and enforceable against the successor employer¹⁰¹ for not

96. See, e.g., CAL. LAB. CODE § 1127 (Deering 1976); ILL. ANN. STAT. ch. 48, para. 2571, 2572 (Smith-Hurd 1987); MASS. GEN. LAWS ANN. ch. 149, § 179(C) (West 1979); OHIO REV. CODE ANN. § 4113.30 (Pages 1978).

97. See *infra* text accompanying notes 109-43. Several state legislatures foresaw this problem and provided an exemption for employers who are subject to the National Labor Relations Act, 29 U.S.C. §§ 151 et. seq. (1982), or the Railway Labor Act, 45 U.S.C. §§ 151 et. seq. (1982). See CAL. LAB. CODE § 179(c) (Deering 1976); MASS. GEN. LAWS ANN. ch. 149 § 179(c) (West 1979); OHIO REV. CODE ANN. § 4113.30 (D)(2) (Pages 1978). These exemptions leave only limited situations in which the state provisions could apply. See Note, *supra* note 26, at 1273-74 (California statute was enacted in 1976 and as of 1983 no reported case had applied it to bind a successor employer to the predecessor's agreement). The Illinois statute, by contrast, contains no such exemption.

98. See *supra* note 96. The statutory language is substantially the same in each of these statutes.

99. ILL. ANN. STAT. ch. 48, para. 2571(d) (Smith-Hurd 1987).

100. *Id.*

101. ILL ANN. STAT. ch. 48, para. 2571(a) provides:

Where a collective bargaining agreement between an employer and a labor organization contains a successor clause, such clause shall be binding upon and enforceable against any successor employer who succeeds to the contracting employer's business, until the expiration date of the agreement therein stated. No such successor clause shall be binding upon or enforceable against any successor employer for more than 3 years from the effective date

more than three years from the effective date of the agreement,¹⁰² even if the predecessor did not disclose its existence to the successor.¹⁰³ Neither the Illinois statute nor its legislative history gives any guidance to the interpretation of the "binding upon and enforceable against" language. One could argue that this language binds the successor to the substantive terms of the agreement—a statutorily forced assumption of the agreement—or instead merely implies a duty to arbitrate—binding the successor only to the arbitration provision.¹⁰⁴ The statute taken as a whole and the three-year time limit on the "binding upon and enforceable against" language support the argument that the legislature intended to bind the successor to the substantive terms of the agreement.¹⁰⁵

The enforcement provision of the Illinois statute provides that "whoever" violates the Act is guilty of a business offense punishable by a fine not to exceed \$5,000.¹⁰⁶ "Whoever" is broad enough to include both a predecessor who fails to disclose the existence of the agreement and a successor who refuses to accept the agreement. The statute does not address who may enforce the provision or whether a private right of action exists. Thus, the question remains whether the statute may be enforced in a criminal or civil action, or both.¹⁰⁷

of the collective bargaining agreement between the contracting employer and the labor organization.

The statutory definition of successor includes, "any purchaser [who] conducts or will conduct substantially the same business operation, or offer the same service, and use the same physical facilities, as the contracting employer." ILL. ANN. STAT. ch. 48, para. 2571(b) (Smith-Hurd 1987). This definition includes several of the factors the federal courts use to determine successor status. See *supra* notes 35-41 and accompanying text.

102. ILL. ANN. STAT. ch. 48, para. 2571(a) (Smith-Hurd 1987); see *supra* note 101.

103. ILL. ANN. STAT. ch. 48, para. 2571(d).

104. See *supra* notes 28-31 and accompanying text and *supra* note 101.

105. See *supra* note 101. Although para. (a) states that "the successor clause shall [not] be binding upon or enforceable against" a successor for not more than three years, para. (d) states that failure to disclose the collective bargaining agreement does "not affect the enforceability of such collective bargaining agreement against a successor employer." ILL. ANN. STAT. ch. 48, para. 2571(a),(d) (Smith-Hurd 1987) (emphasis added). In addition, it wouldn't make sense to impose a duty to arbitrate for three years after the date of the agreement.

106. ILL. ANN. STAT. ch. 48, para. 2572 (Smith-Hurd 1987).

107. It is likely that the statute would provide a private right of action. The \$5,000 fine alone may not provide an effective deterrent to violating the statute. A successor or a predecessor may be willing to pay the fine in order to avoid the provisions of the statute.

Further, a court may find it fair to allow a successor who is bound to a contract for three years (or fined) to recover from a predecessor who violated the act by not warning the successor of the existence of the successorship clause.

The Massachusetts statute expressly provides for both criminal and civil enforcement. MASS. GEN. LAWS ANN. ch. 149, § 179(c) (West 1979).

B. Federal Labor Law Preemption

Prior to passage of the Illinois statute, Illinois legislative analysts generally concluded that the statute would be preempted by the federal labor laws.¹⁰⁸ The preemptive effect of federal law stems from the supremacy clause of the Constitution.¹⁰⁹ The NLRA contains no provision expressly stating a congressional intent to preempt state and local regulation.¹¹⁰ When Congress does not specifically address the issue, "courts sustain a local regulation unless it conflicts with federal law or would frustrate the federal scheme, or unless courts discern from the totality of circumstances that Congress sought to occupy the field to the exclusion of the states."¹¹¹

Courts have developed several separate but related labor law preemption doctrines which are relevant to the Illinois statute. In *San Diego Building Trades Council v. Garmon*,¹¹² the Supreme Court outlined two separate preemption inquiries. The NLRA preempts a state or local regulation if: 1) the state seeks to regulate activity that falls within the NLRB's jurisdiction over unfair labor practices; or 2) the state seeks to regulate activity that Congress intended to leave unregulated, and thereby upsets the balance of power between labor and management established by the Act.¹¹³ A third preemption doctrine preempts state regulation or state causes of action that interfere with the federal courts' jurisdiction over violations of collective bargaining agreements.¹¹⁴

108. MATHIS, ILLINOIS SENATE REPUBLICAN STAFF ANALYSIS, HOUSE BILL 332 (June 10, 1987); D. GROSS, ILLINOIS SENATE DEMOCRATS ANALYSIS, HOUSE BILL 332 (May 28, 1987); C. MELAMED, ILLINOIS HOUSE DEMOCRATS ANALYSIS, HOUSE BILL 332 (April 26, 1987); J. MEULLER, ILLINOIS HOUSE REPUBLICAN STAFF ANALYSIS, HOUSE BILL 332 (April 22, 1987). These analysts concluded that the Illinois statute would likely be preempted by federal law except in two circumstances: when a private firm becomes the employer of a bargaining unit formerly employed by a governmental body, or when a bargaining unit is transferred from the control of one governmental body to another.

109. U.S. CONST. art. VI, cl. 2.

110. Congress has not exercised its authority to occupy the field of labor legislation to the total exclusion of the states. The Supreme Court has stated "[w]e cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971).

111. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

112. 359 U.S. 236 (1959).

113. *Id.* at 243-44.

114. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). Congress granted this jurisdiction in § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1982).

1. NLRB Jurisdiction

Congress created the NLRB and vested it with authority to interpret and administer the provisions of the Act. Through the Board, Congress sought to achieve uniformity in the substantive law governing labor relations and uniformity in national labor policy.¹¹⁵ Therefore, the NLRA preempts state regulation that impinges on the Board's authority and jurisdiction. In *Garmon*,¹¹⁶ the Supreme Court delineated the Board's jurisdiction. The Court stated that "when an activity is arguably subject to section 7 or section 8 of the Act, the states as well as the federal courts must defer to the exclusive jurisdiction of the National Labor Relations Board if the danger of state interference with national labor policy is to be averted."¹¹⁷ The federal courts have provided additional focus to the general *Garmon* inquiry. The NLRB's primary jurisdiction will preempt a state law or state cause of action if the litigant's state law cause of action is identical to that which the litigant could present to the NLRB—if the predicate issues and the remedies in the two forums are substantially the same.¹¹⁸

115. See *San Diego Bld'g. Trades Council v. Garmon*, 359 U.S. 236, 242-43 (1959). The Court stated that in order to achieve the desired uniformity, it was crucial that Congress entrust the interpretation and enforcement of the NLRA to a "centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Id.* at 242. See also *Garner v. Teamsters Local 776*, 346 U.S. 445, 490-91 (1953) (expressing concern that differing judicial policies would result in conflicting interpretations of the NLRA).

116. 359 U.S. 236 (1959).

117. *Id.* at 245. Section 7 of the Act grants employees the right to organize and join labor organizations, to bargain collectively, and to engage in other concerted activities. 29 U.S.C. § 157 (1982). Section 8 lists activities which constitute unfair labor practices. 29 U.S.C. § 158 (1982). For example, an employer can not interfere with employee rights guaranteed under § 7, 29 U.S.C. § 158(a)(1), or refuse to bargain with employee representatives, 29 U.S.C. § 158(a)(5). A labor organization cannot refuse to bargain with the employer if it is the representative of those employees, 29 U.S.C. § 158(b)(3), or picket or threaten to picket under certain circumstances, 29 U.S.C. § 158(b)(7). See also *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1968) (*Garmon* prohibits states from regulating activity that the NLRA protects, prohibits, or arguably protects or prohibits).

118. See *Belknap Inc. v. Hale*, 463 U.S. 491, 510 (1983). In *Belknap*, the Supreme Court held that a state law tort action alleging that the employer misrepresented facts to replacement workers was not preempted by the NLRA. *Id.* The Court determined the state cause of action was not sufficiently similar to an action that the parties would bring before the Board. *Id.* See *Sears, Roebuck & Co. v. San Diego County*, 436 U.S. 180 (1978). In *Sears* the plaintiff brought a state law trespass action against union picketers. Although the picketing itself was arguably protected by § 7 or arguably prohibited by § 8, the state law cause of action was not preempted. The litigant's state action for trespass would address issues such as the location of the picketing, whereas a Board action would address the object of the picketing. See also Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277, 291 (1980) (*Sears* creates less predictability through its possible

The Illinois statute provides that a successor clause in a collective bargaining agreement can bind a successor to accept the terms of the agreement.¹¹⁹ If the union brought an action in Illinois state court to enforce this statute, the state court could compel the successor to accept the terms of the unexpired collective bargaining agreement. However, in an NLRB proceeding the question would be the successor's duty to bargain.¹²⁰ In *Burns*, the Court stated that the Board had the power to require a successor to recognize and bargain with the union but could not enforce the substantive terms of the existing agreement against the successor.¹²¹

The courts recognize two exceptions to the NLRB's primary jurisdiction. If the state regulates a matter that is "merely a peripheral concern" of the NLRA, the state statute will survive preemption analysis.¹²² This exception stems from the view that if a matter is peripheral to the NLRA, then the need for uniformity and centralized decision-making is less.¹²³ Therefore, conflict between the state statute and national labor policy is unlikely.¹²⁴ However, the courts have construed this exception narrowly.¹²⁵ Even a broad construction provides no harbor for the Illinois successor clause statute. The parties' obligations under a collective bargaining is hardly a peripheral concern of the NLRA. Congress enacted the NLRA to promote the process of collective bargaining and

narrowing of federal labor preemption); Note, *NLRA Preemption of State and Local Plant Relocation Laws*, 86 COLUM. L. REV. 407, 416 n.78 (1986).

119. See *supra* note 101.

120. The union could bring an unfair labor practice claim pursuant to § 8 of the NLRA, 29 U.S.C. § 158 (1982). See *supra* notes 20-22 and accompanying text.

121. *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). See *infra* notes 20-24 and accompanying text.

122. *San Diego Bld'g Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

123. *Id.* See also *Garner v. Teamsters Local 776*, 346 U.S. 485, 490-91 (1953) (expressing need for uniformity under the federal labor laws).

124. See *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 137-38 (1976).

125. See *New York Tel. Co. v. New York State Labor Dept.*, 440 U.S. 519 (1979) (New York program providing unemployment compensation to striking workers not preempted because not intended to regulate labor relations); *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966) (peripheral concern exception applied because claim limited to matter historically of deep local concern); *Massachusetts Nursing Ass'n v. Dukakis*, 726 F.2d 41 (1st Cir. 1984) (hospital cost containment legislation not preempted; court also relied on local interest exception); *Metropolitan Life Insurance Co. v. Whaland*, 119 N.H. 894, 410 A.2d 635 (1979) (state law governing group accident and health insurance policies of peripheral concern to NLRA even though medical benefits are mandatory subject of bargaining). See also Note, *supra* note 118 at 417 n.82.

thereby reduce industrial strife.¹²⁶

The second exception exists where the regulated activity concerns interests "deeply rooted in local feeling and responsibility."¹²⁷ The states retain these powers because of the lack of compelling congressional direction in the NLRA evincing an intent to deprive the states of these powers.¹²⁸ Although the states have a public interest in protecting employees from job loss, courts construe this exception narrowly and almost exclusively apply it in the area of common law torts.¹²⁹

2. *Balance of Power*

The NLRA establishes a balance of power between labor and management. Section 7 of the Act guarantees some economic power to employees through the protection of certain activities.¹³⁰ Section 8 proscribes other activities by employers and employees as unfair labor practices.¹³¹ Congressional silence as to other activities reflects an intent that some aspects of the labor-management relationship be left to the "free play of economic forces."¹³² Therefore, the NLRA preempts state law that disturbs the economic balance of power by regulating conduct that Congress sought to leave unregulated.¹³³

126. NLRA § 1, 29 U.S.C. § 151 (1982). *See supra* note 8. The Illinois statute represents the state's "views concerning the accommodation of the same interests" addressed by the NLRA and is therefore preempted. *Wisconsin Employment Relations Comm'n*, 427 U.S. at 140 n.4.

127. *Garmon*, 359 U.S. at 244.

128. *Id.*

129. *See Sears, Roebuck & Co. v. San Diego County Dist. Council*, 436 U.S. 180 (1978) (state cause of action allowed in trespass); *Farmer v. United Bd. of Carpenters* 430 U.S. 290, 297 (1977) (allowed state cause of action for intentional infliction of emotional distress against union); *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1956) (state cause of action for malicious libel); *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986) (states interest in protecting citizens from misrepresentation overridden by need to enforce uniform labor law); Note, *supra* note 118, at 416-17. *But see Massachusetts Nursing Ass'n v. Dukakis* 726 F.2d 41, 44 (1st Cir. 1984) (seemed to extend local interest exception to hospital cost containment legislation, although may have also relied on peripheral concern exception).

130. 29 U.S.C. § 157 (1982). For examples of protected activities see *supra* note 117.

131. 29 U.S.C. § 158 (1982). For examples of unfair labor practices see *supra* note 117.

132. *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976) (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)). *See Belknap v. Hale*, 463 U.S. 491, 499 (1983) (This preemption doctrine "proscribes state regulation and state-law causes of action concerning . . . conduct that was to remain a part of the self-help remedies left to the combatants in labor disputes."); Cox, *Labor Law Preemption Revisited* 85 HARV. L. REV. 1337, 1352 (1972) (Congress intended some aspects of the labor-management relationship to be left to economic forces, free from local or federal regulation).

133. *See Teamsters Union v. Morton*, 377 U.S. 252 (1964) (Even if the regulated conduct is not prohibited or protected by NLRA, state law will be preempted if its application would upset the

The Illinois statute regulates in an area Congress sought to leave unregulated. The NLRA does not address successor liability¹³⁴ and the policies embodied in the Act compel the conclusion that this was not a mere congressional oversight. The Act emphasizes the freedom of the parties to bargain over employment terms.¹³⁵ The Act expressly states that the duty to bargain does not compel either party to concede contract terms.¹³⁶ The terms themselves are left to the relative bargaining powers of the parties. The Illinois statute, in effect, forces a successor to concede to the terms of a contract that he has neither negotiated nor signed. Therefore, the statute upsets the balance of power contemplated by the Act.

In addition, the Illinois statute interferes with the relative bargaining powers of the predecessor employer and the union. By providing a blanket requirement that an employer must condition a sale of his business because of the mere existence of a successor clause, the Illinois legislature has foreclosed any bargaining over the content of the clause.¹³⁷ The employer must either agree to condition the sale of his business or make what may be larger than normal concessions in other areas to avoid the inclusion of a successor clause.

3. Section 301 Preemption

A third preemption analysis centers on section 301's authorization of direct suits in federal district court for violations of collective bargaining agreements.¹³⁸ The courts have interpreted this statute to authorize—even mandate—the creation of a federal common law governing the interpretation and enforcement of federal labor contracts.¹³⁹ Section 301

balance of power between labor and management.). The Supreme Court has applied the peripheral concern exception to economic balance of power preemption arguments. *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 504-05 (1984). The Court also indicated that the local interest exception does not apply. *Id.*

134. See *Slicker*, *supra* note 11, at 1053 n.3.

135. NLRA § 8(d), 29 U.S.C. § 158(d). See *supra* notes 20-26 and accompanying text.

136. NLRA § 8(d), 29 U.S.C. § 158(d). See *supra* note 23.

137. A successor clause is a mandatory subject of bargaining. See *supra* notes 42-58 and accompanying text.

138. Section 301 of the Labor Management Relations Act states “[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties. . . .” 29 U.S.C. § 185(a) (1982).

139. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 488, 456 (1957), discussed *supra* note 12. Under § 301 state courts have concurrent jurisdiction but must apply federal law.

preempts state laws that "purport to define the meaning or scope of a term" in a collective bargaining agreement.¹⁴⁰ It also preempts state causes of action when they are "substantially dependent upon analysis of the terms" of a collective bargaining agreement.¹⁴¹

Section 301 does not preempt all state laws concerning employment or collective bargaining agreements. A state law may establish rights or obligations that are independent of the labor contract but are related to it in some way.¹⁴² Courts inquire whether the agreement of the parties can alter the effect of the state statute. If the parties can, by agreement, contract away the protections of the state statute, the courts will find the statute not sufficiently independent of the contract and therefore preempted.¹⁴³

The Illinois statute purports to define the meaning of a successor clause and it fails to determine if the predecessor's duties are subject to arbitration. Therefore, the statute fails under section 301 preemption analysis. If the dispute is arbitratable, the federal courts, through their preference for peaceful dispute resolution through the arbitration process,¹⁴⁴ provide an avenue for determining both the union's and employer's intent when they included the successor clause in their labor contract.¹⁴⁵ The Illinois statute instead provides that the employer must condition the sale on the existence of a successor clause, regardless of what the parties intended.

IV. CONCLUSION

Although under the above analysis the Illinois statute is preempted by federal law, it raises the opportunity to question federal labor policies as they apply to the enforcement of successor clauses. If a change in those labor policies is to come, however, it must come from Congress. The

140. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985). In *Allis Chalmers*, § 301 preempted a Wisconsin tort statute that provided employees a cause of action against their employer for the employer's bad faith in processing an insurance claim. To determine if the employer acted in bad faith, the court had to determine the scope of the employer's duties, which were defined in the collective bargaining agreement. *Id.* at 216-19.

141. *I.B.E.W. v. Hechler*, 107 S.Ct. 2161 n.3 (1987). In *Hechler* the Court held that § 301 preempted an employee's common law negligence action against the union because the union's duty of care, in this context, was defined in the collective bargaining agreement. *Id.* at 2167-68.

142. *Allis-Chalmers*, 471 U.S. at 212.

143. *Id.* at 213.

144. *See supra* note 30 and accompanying text.

145. *See supra* note 68-80 and accompanying text.

policy of employee protection embodied in the Illinois statute is admirable, but the blanket enforcement of successor clauses against successors may be an unwise procedure to effectuate that policy. The statute provides governmental intervention at the expense of private negotiation and determination of employment terms, and it provides certainty in successorship obligations at the expense of an ability to balance all of the interests involved.

Employees are not without protections under the current policies. In the successorship area where economic interests, such as entrepreneurial flexibility, are at stake, the courts provide some employee protections while relying on the market to provide others. More importantly, in the predecessor context, unions can protect the employees they represent through the existing policy of private determination of employment terms. Because successor clauses are a mandatory subject of bargaining, unions can require that an employer bargain over a successorship provision and the parties can determine for themselves the extent of their respective obligations. Once the parties have defined their obligations, they should be held to them. The union can bargain for specific successor language in the labor contract—language that expressly requires the employer to condition a sale or transfer of the business on the buyer's assumption of the collective bargaining agreement. Such language would be binding and enforceable against the predecessor employer.

The Illinois statute unnecessarily interferes with the parties' ability to define their obligations because it statutorily defines the parties' intent. Conversely, current application of national labor policy to the successorship area provides a fact-based definition of successor and predecessor obligations and effectively balances the interests of the parties involved. If employees want more protection from a sale or transfer of the business, they must bargain for it or seek congressional change of current labor policy.

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