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Navigating the Labor Law Successorship Doctrine: Why "Substantial Continuity" is Insufficient to Find a Duty to Arbitrate Under a Preexisting Collective Bargaining Agreement

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I. INTRODUCTION

Bruce Springsteen, icon of the working class[1] and well-known resident of the Third Circuit,[2] might have to put his pen to paper and pick to guitar once again in chronicling a new wrinkle in the plight of the workingman. However, Mr. Springsteen, the fittingly named "Boss,"[3] would be venturing into "the treacherous waters of the [United States] Supreme Court's labor law successorship doctrine[,]" which has a "history of bedeviling courts" and fellow bosses[4] alike.[5] The two most recent courts to be bedeviled by the successorship doctrine are the neighboring Second and Third Circuits. Their respective holdings in *Local 348-S v. Meridian Management Corp.* and *AmeriSteel Corp. v. International Brotherhood of Teamsters* created a split between the circuits regarding the duty of successor employers to arbitrate.[6]

The successorship doctrine is set forth in a trilogy of United States Supreme Court decisions, *John Wiley & Sons, Inc. v. Livingston*,[7] *NLRB v. Burns International Security Services, Inc.*,[8] and *Howard Johnson Co. v. Hotel and Restaurant Employees*[9] (collectively, the "Successorship Trilogy" or "Trilogy"). These cases outline the duties imposed on a successor employer by an existing collective bargaining agreement ("CBA") between the predecessor

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[1] Chet Flippo, *Blue-Collar Troubadour*, PEOPLE, Sept. 3, 1984, at 68.
[2] Bruce Springsteen, *'We Are a Confused But Noble Race... '*, N.J. MONTHLY, Nov. 15, 2010, http://www.njmonthly.com/articles/lifestyle/people/we-are-a-confused-but-noble-race.html.
[3] Oliver Brett, *What's in a nickname?*, BBC NEWS (Jan. 15, 2009, 1:29 PM), http://www.news.bbc.co.uk/2/hi/7829013.stm.
[4] I.e., employers and labor unions.
[5] AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 267 (3d Cir 2001); Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65, 79 (2d Cir. 2009) (Livingston, J., dissenting); Edward B. Rock & Michael L. Wachter, *Labor Law Successorship: A Corporate Law Approach*, 92 MICH. L. REV. 203, 203 (1993) ("Courts have struggled repeatedly to define the legal obligations of the buyer of a business that has unionized workers.")
[6] *See generally* Martin Flumenbaum & Brad S. Karp, *Successor Employers Bound By Prior Collective Bargaining Pact*, 242 N.Y.L.J. 83 (Oct. 28, 2009) (noting that *Meridian* creates a split with the Third Circuit).
[7] 376 U.S. 543 (1964) (holding that a successor employer could be bound to arbitrate with an incumbent union if substantial continuity of identity in the business enterprise exists).
[8] 406 U.S. 272 (1972) (noting that a successor employer is not automatically bound to the substantive terms of the CBA between the predecessor employer and the incumbent union).
[9] 417 U.S. 249 (1974) (holding that if substantial continuity of identity in the business enterprise does not exist, a successor employer will not be bound to arbitrate with an incumbent union).

employer and incumbent labor union.[10] However, *Wiley* and *Burns* have been viewed as standing in "direct conflict" with one another and have created a "tension . . . in this trilogy," which *Howard Johnson*, the last case of the three, does not resolve.[11]

The two main unresolved issues of the trilogy, with which *AmeriSteel* and *Meridian* struggle, are whether (1) an unconsenting successor employer has a duty to arbitrate any disputes with the incumbent union under the terms of the pre-existing CBA and (2) "the issue of whether and to what extent [the unconsenting successor] is bound by the [pre-existing CBA's] terms."[12] Regarding the first issue, in *AmeriSteel*, the Third Circuit arrived at the correct result by not requiring the successor to arbitrate after hiring the majority of the surviving predecessor's employees, but did so using logic that the dissent viewed as "flatly contradict[ing] the holding of *Wiley*."[13] In contrast, in *Meridian*, the Second Circuit does require such arbitration, but does so by relying too heavily upon the "substantial continuity of identity" factor established in *Wiley*. In doing so, it has set a dangerous precedent that will incentivize "would-be successor employers to simply [not hire] the unionized employees and start over."[14]

Forcing new employers to arbitrate under the terms of an old CBA, whenever "substantial continuity of identity" in an existing workforce is present, will cause employers to refrain from rehiring unionized employees, so that they can "elude the grasp of the successorship doctrine."[15] Adopting *Meridian*'s approach will cause new employers to "weigh the benefits of retaining experienced workers with the possibly lengthy pitfalls of litigating, appealing, arbitrating, and

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[10] *See generally* Flumenbaum, *supra*, at 83 (discussing successor employer obligations).
[11] *AmeriSteel*, 267 F.3d at 268, 270.
[12] *Meridian*, 583 F.3d at 66.
[13] *AmeriSteel*, 267 F.3d at 281 (Becker, C.J., dissenting).
[14] *Meridian*, 583 F.3d at 86 (Livingston, J., dissenting).
[15] Saks & Co. v. NLRB, 634 F.2d 681, 690 (2d Cir. 1980) (Meskill, J., dissenting).

potentially relitigating" when a duty to arbitrate is imposed on them.[16] Furthermore, choosing not to hire the predecessor's unionized workers, in an attempt to avoid a duty to arbitrate, will lead to inexperienced workers occupying these newly vacant positions, potentially resulting in an inferior work product and a greater probability of vicarious liability arising from employee negligence.[17] As a consequence, more skilled laborers would be unemployed, leading to greater industrial strife and social turmoil.[18] Therefore, from a public and economic policy standpoint, it would be more beneficial, in terms of long-term effects, not to impose a duty to arbitrate on successor employers in all instances.

This Comment proposes, in a similar vein as Judge Livingston's dissent in *Meridian*, that a bright-line rule be imposed, requiring a duty to arbitrate under the terms of a pre-existing CBA (1) when a successor employer has implicitly or explicitly assumed the contract, (2) when a successor employer is an alter ago of the predecessor, (3) when a successor employer is a product of a merger with the predecessor, by which the predecessor ceases to exist, or (4) when both the "substantial continuity" test is satisfied *and* another analogous basis exists for imposing contractual liability (*e.g.*, supporting state law).[19] In developing this argument, Part II sets forth the policy of the National Labor Relations Act ("NLRA") and describes the collective bargaining process. This section also discusses the limitations placed on private employers and labor unions by the NLRA, the purpose and status of a CBA, and the impact of the duty to bargain when placed on employers. Part III then addresses the Supreme Court precedent on a successor employer's duty to arbitrate by discussing the Successorship Trilogy. Part IV turns to the current

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[16] Kevin A. Teters, Case Note, *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).
[17] Wilson McLeod, *Rekindling Labor Law Successorship In an Era of Decline*, 11 HOFSTRA LAB. L.J. 271, 299 (1994).
[18] *See, e.g., Wiley*, 376 U.S. at 549; *Burns*, 406 U.S. at 282.
[19] *See Meridian*, 583 F.3d at 84 (Livingston, J., dissenting).

split between the Courts of Appeals and the existing conflict in the Trilogy. Finally, Part V urges the Courts of Appeals to adopt a bright-line rule in imposing a duty to arbitrate on successor employers because such a rule would balance competing interests and conform to the parties' reasonable expectations.

II. BACKGROUND

A. Overview of the National Labor Relations Act and CBAs

The main body of labor law governing collective bargaining between private employers and employees is the NLRA.[20] The NLRA grants employees the right to affiliate themselves with labor unions and to bargain collectively with employers via unions or self-chosen representatives.[21] The fundamental purpose of collective bargaining is to establish wages, hours of employment, and other conditions of employment.[22] These negotiated terms, rights, and duties of the parties are then organized into and agreed to by both parties in a written contract known as a CBA,[23] which governs the relationship between labor unions and employers.[24]

Under United States law, CBAs are not treated like ordinary contracts; rather, they enjoy an exalted status.[25] A CBA is "more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."[26] The CBA covers the complete employment relationship and "calls into being a new common law – the common law of a particular industry or of a particular plant."[27] Despite the fact that a CBA is created by two

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[20] 29 U.S.C. §§ 151–169 (2000).
[21] 29 U.S.C. § 157.
[22] 29 U.S.C. § 159.
[23] 29 U.S.C. § 158(d).
[24] Mark E. Zelek, *Labor Grievance Arbitration in the United States*, 21 U. MIAMI INTER-AM. L. REV. 197, 197 (1989).
[25] *Wiley*, 376 U.S. at 550.
[26] United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578–579 (1960) (citing Dean Shulman, *Reason, Contract, and the Law in Labor Relations*, 68 HARV. L. REV. 999, 1004–05 (1955)).
[27] *Id.* at 579.

parties, it is by no means "in any real sense the simple product of a consensual relationship."[28] Under normal contract principles, a successor employer would not be bound to a predecessor's contract without consent.[29] However, a CBA "is not an ordinary contract" and can be imposed on a successor employer.[30]

In two well-defined scenarios, a successor employer is obliged to honor the pre-existing CBA. First, when it has expressly or impliedly assumed the CBA[31] and, second, when it is simply an "alter ego" of the predecessor employer.[32] A successor employer will be bound when it expressly assumes the CBA by voluntarily agreeing to the terms of the pre-existing CBA.[33] Likewise, when there is sufficient evidence to support a finding that a successor employer has impliedly agreed to be bound by the CBA, the successor is bound by the former CBA.[34] For example, in *Audit Services, Inc. v. Rolfson*,[35] a successor employer that continued making trust fund contributions on behalf of union workers and not doing so for non-union workers was bound to the CBA because it displayed a pattern of conforming to the terms of the CBA.

In the second scenario, under the "alter ego" doctrine, the successor employer is "merely a disguised continuance of the old employer."[36] Instances where a successor employer is in fact an alter ego of the predecessor "involve a mere technical change in the structure or identity of the

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[28] *Wiley*, 376 U.S. at 550.
[29] *Id.*
[30] *Id.*
[31] Southward v. South Cent. Ready Mix Supply Corp., 7 F.3d 487, 493 (6th Cir. 1993) ("[I]f a successor voluntarily assumes the obligations of its predecessor's CBA, then it will be bound by its predecessor's CBA.")
[32] *Meridian*, 583 F.3d at 79 (Livingston, J., dissenting).
[33] In Re Plaza Mission Bottling Co., 14 B.R. 428 (Bankr. E.D.N.Y. 1981) (President of the subsequent company expressly stated at a meeting held prior to the formation of the new company that he would continue to observe the terms and conditions set forth in the CBA); United Steelworkers of America v. Deutz-Allis Corp., No. 86-0166-CV-W-0, 1986 WL 6852, (W.D. Mo. Mar. 11, 1986) (successor announced in a letter that it had assumed the labor contract).
[34] *See, e.g.*, NLRB v. Pine Valley Div. of Ethan Allen, Inc., 544 F.2d 742 (4th Cir. 1976) (successor employer continued to deduct union dues and made contributions to union's welfare account from employee paychecks, therefore successor conformed to the terms of the CBA).
[35] 641 F.2d 757 (9th Cir. 1981)
[36] Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942).

employing entity, frequently to avoid the effect of the labor laws, without any substantial change in ownership or management."[37] The factors considered are whether the two entities have substantially identical stockholders, officers, directors, management, operations, equipment, and customers.[38] An example of an alter ego successor relationship is when a family-operated business passes from the patriarch to another family member, who is also involved in operations, and that successor attempts to define the business as a new and separate entity.[39] Because the new business entity shares the same management and is substantially identical to the predecessor, it would be found to be an alter ego.[40] However, the duties of successorship beyond these two situations are contested.

B. Overview of an Employer's Duty to Bargain

In order to initiate the collective bargaining process that results in a CBA, the NLRA imposes a duty to bargain on employers when a majority of their employees are represented by a labor union.[41] Even after the parties agree upon the terms of a CBA, the employer remains bound to negotiate and bargain by this duty throughout the relationship between the parties.[42] For instance, an employer cannot make a unilateral change to any condition or requirement included in the CBA without notifying the union and providing it with an opportunity to negotiate.[43]

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[37] *Howard Johnson*, 417 U.S. at 261 n.5.
[38] Railroad Maintenance Laborers' Local 1274 v. Kelly Railroad Contractors, Inc., 591 F.Supp. 889, 896 (N.D. Ill. 1984) ("Important factors to consider are whether the two entities have substantially identical management, business purpose, operation, equipment, customers, supervisors and ownership . . . The substantial continuity of the work force is frequently a major issue in alter ego determinations.")
[39] *See generally* Midwest Precision Heating and Cooling, Inc. v. NLRB, 408 F.3d 450 (8th Cir. 2005).
[40] *Id.* at 459.
[41] 29 U.S.C. § 158(a)(5).
[42] Union-Tribune Pub. Co., 353 NLRB No. 2, at *12 (2008).
[43] *Id.*

However, successor employers are not always held to the duty to bargain when a predecessor employer transfers its business to the successor.[44] Even outside the two clear instances discussed, the duty to bargain as a successor employer arises when an employer acquires an organized business and there is "continuity of the business enterprise" between the old employer and new employer.[45] In *Fall River Dyeing & Finishing Corp. v. NLRB*,[46] the Supreme Court put much confusion to rest regarding a successor employer's duty to bargain by establishing a factor-based test to determine the necessary "continuity of identity of the business enterprise."[47] The existence of substantial continuity in the context of assessing a duty to bargain is determined by looking at: (1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production process, produces the same products, and basically has the same body of customers.[48]

Since successorship obligations will not be imposed when these factors are not met by a successor employer, a savvy employer therefore may attempt to avoid satisfying these factors, most notably by not hiring a majority of the predecessor's unionized employees in order to evade the duty to bargain.[49] However, the refusal to hire an employee because of union membership constitutes an unfair labor practice, in violation of the NLRA.[50] Accordingly, unions sometimes claim that the absence of a majority of the predecessor's employees in the successor's work force to be attributable to discriminatory hiring by the successor.[51]

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[44] B. Glenn George, *Successorship and the Duty to Bargain*, 63 NOTRE DAME L. REV. 277, 279 (1988).
[45] *Id.*
[46] 482 U.S. 27 (1987).
[47] *Meridian*, 583 U.S. at 74.
[48] *Id.*; *Fall River*, 482 U.S. at 43.
[49] George, *supra*, at 290.
[50] 29 U.S.C. 158(a)(3).
[51] George, *supra*, at 290.

C. Overview of Arbitration's Role in Labor Law

As comprehensive as a CBA might be, it is virtually impossible to provide for every contingency. Inevitably, disputes between the union and the employer will arise.[52] Usually, the parties acknowledge this reality and provide for an arbitration clause in the CBA, so that these disputes can be resolved through a grievance process culminating in binding arbitration.[53] Arbitration has played a central role in effectuating national labor policy,[54] and it is federal policy to resolve labor disputes arising out of a CBA through arbitration.[55] Arbitration has been described as "the substitute for industrial strife," and as "part and parcel of the collective bargaining process itself."[56]

III. THE SUCCESSORSHIP TRILOGY

A. John Wiley & Sons, Inc. v. Livingston

In *Wiley*, the Supreme Court first introduced the idea that a successor employer could be bound by an arbitration clause in a CBA between the predecessor employer and its unionized employees.[57] In that case, Interscience Publishers, Inc. ("Interscience"), the predecessor employer, merged with John Wiley & Sons, Inc. ("Wiley"), and ceased to do business as a separate entity.[58] Prior to the merger, an AFL-CIO union had represented certain Interscience employees and had entered into a CBA with Interscience.[59] After the merger, Wiley retained all of Interscience's employees, but failed to recognize the union as a bargaining agent or fulfill any

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[52] Jared S. Gross, Note, *In Search of* Wiley*: Struggling to Bind Successor Corporations to Their Predecessor's Collective Bargaining Agreement*, 29 OKLA. CITY U.L. REV. 113, 117 (2004).
[53] Paul Trapani, Note, *Old Presumptions Never Die: Rethinking the Steelworker's Trilogy Presumption of Arbitration in Deciding the Arbitratability of Side Letters*, 83 TUL. L. REV. 559, 559–560 (2008).
[54] *Wiley*, 376 U.S. at 549.
[55] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).
[56] *Wiley*, 376 U.S. at 549; *Warrior & Gulf Navigation Co.*, *supra*, at 578.
[57] *AmeriSteel*, 267 F.3d at 268.
[58] *Wiley*, 376 U.S. at 545.
[59] *Id.* at 544.

obligations under the Interscience CBA.[60] The union then brought suit against Wiley to compel arbitration under the CBA, claiming that Wiley was bound by the agreement's arbitration provision.[61] Wiley argued that it was never a party to the CBA and that the merger effectively terminated the Interscience CBA.[62]

The Supreme Court concluded that Wiley had a duty to arbitrate with the union under the pre-existing CBA.[63] In arriving at that decision, the Court laid the groundwork for determining whether a successor employer has a duty to arbitrate. It held that "[s]ubstantial continuity of identity in the business enterprise" before and after the change must exist in order to require arbitration under the pre-existing CBA.[64] In *Wiley*, the Court regarded the "wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty[,]" as satisfying the "substantial continuity" condition.[65] However, the Court left the "substantial continuity" concept undefined, leaving lower courts confused as to whether a duty to arbitrate was limited to the merger context, and as to what was "substantial" enough when a business continued after a change in ownership.[66]

However, it should be noted that state successor liability law helped buttress the decision to require Wiley to arbitrate.[67] The Court looked to New York Corporation Law, which holds that a merged corporation is liable on all contracts of both predecessor corporations.[68] While

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[60] *Id.* at 545–546.
[61] *Id.* at 545.
[62] *Id.* at 547.
[63] *Meridian*, 583 F.3d at 68.
[64] *Wiley*, 376 U.S. at 551.
[65] *Id.*
[66] *See Meridian*, 583 F.3d at 74; *AmeriSteel*, 267 F.3d at 268.
[67] *Id.* at 548.
[68] *See Id.*; *Meridian*, 583 F.3d at 80 (Livingston, J., dissenting).

"the Supreme Court did not rely principally on common law successor liability rules in *Wiley*, it did refer to those principles as a partial explanation for its result."[69]

Wiley also reiterated general principles of national labor policy, the role of arbitration, and the status of CBAs in forming its opinion.[70] The Court held that national labor policy favored arbitration as the means of settling labor disputes.[71] Arbitration is a means of protection against industrial strife and is a central component in the CBA relationship.[72] Thus, the *Wiley* Court believed that, in examining successor employer disputes, a balancing test must be applied that attempts equally to protect employees from a sudden change in the employment relationship and unconsenting employers from being bound to a contract to which they were not a party.[73] The Court stressed that under the principles of law governing ordinary contracts, an unconsenting successor could not be bound, but that a CBA is "not an ordinary contract" since national labor policy recognizes its importance.[74]

B. NLRB v. Burns International Security Services

In *Burns*, the Court did not address whether a duty to arbitrate existed; instead, it looked to whether a successor employer could be bound by the substantive terms of the previous CBA.[75] In *Burns*, Wackenhut Corporation ("Wackenhut") provided security protection services for Lockheed Aircraft Service Co. ("Lockheed") at one of its plants under a one-year service agreement.[76] Once the contract had expired, Lockheed called for bids from various companies supplying these services, and Burns International Security Services, Inc. ("Burns") outbid

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[69] *Meridian*, 583 F.3d at 81 (Livingston, J., dissenting).
[70] *See Wiley*, 376 U.S. at 549.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 550.
[74] *Id.*
[75] *AmeriSteel*, 267 F.3d at 269.
[76] *Burns*, 406 U.S. at 274.

Wackenhut, winning the security contract.[77] Burns hired a majority of Wackenhut's employees already employed at the plant, but refused to honor the existing CBA between Wackenhut and the incumbent union.[78] The union filed an unfair labor practice charge with the National Labor Relations Board ("NLRB"), and the NLRB ordered Burns to honor the Wackenhut CBA.[79]

In its decision, the Supreme Court first found that Burns had a duty to recognize and bargain with the incumbent union because a majority of the employees hired were already represented by a union as a bargaining agent and the bargaining unit was unchanged.[80] According to the Court, "[t]he source of [Burns'] duty to bargain with the union is not the CBA but the fact that it voluntarily took over a bargaining unit that was largely intact."[81]

Second, the Court held that the successor employer, Burns, could not be bound against its will by the substantive terms of the pre-existing CBA.[82] In reaching this decision, the Court stated that Section 8 of the Labor Management Relations Act[83] and legislative history of labor laws hold that "although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a [CBA] negotiated by their predecessors but not agreed to or assumed by them."[84] While recognizing the general principles underlying labor disputes, the Court held that the goal of preventing industrial strife did not override the "bargaining freedom of employers and unions."[85] It reasoned that binding a successor employer to the substantive terms of a pre-existing CBA could result in "serious

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[77] *Id.* at 275.
[78] *Id.* at 276.
[79] *Id.*
[80] *Id.* at 280–281.
[81] *Id.* at 287.
[82] *Id.* at 282.
[83] 29 USCS § 158(8)(d).
[84] *Burns*, 406 U.S. at 274.
[85] *Id.* at 287.

inequities."[86] One such inequity is the restraint on the flow of capital because potential employers would be unwilling to rescue failing businesses if they cannot negotiate their own CBAs.[87] Finally, the Court held that contract terms between employers and unions should "correspond to the relative economic strength of the parties."[88] Therefore, forcing successor employers into unconsented contracts would offset the "balance of bargaining advantage."[89]

Burns provides ambiguous direction for the lower courts because it partially contradicts *Wiley* and does not address whether an arbitration clause comprises one of the substantive terms of a CBA.[90] *Wiley* establishes that an unconsenting successor employer may have a duty to arbitrate with an incumbent union, by which means the substantive terms of the pre-existing CBA may be implicitly imposed on the successor.[91] In spite of this, *Burns* holds that an unconsenting successor employer cannot be bound to the substantive terms of a pre-existing CBA, even if substantial continuity of identity exists. Such a holding leaves courts wondering if it is still acceptable to force successors to arbitrate and potentially be found liable for the CBA.[92]

Despite the glaring contradiction, the Court managed to provide some clues in reconciling the cases. The *Burns* Court suggested that *Wiley* occurred against a backdrop of state successor liability law, providing guidance on what, in addition to substantial continuity, is influential in compelling arbitration.[93] Furthermore, the Court has identified two levels of liability for successor employers, the duty to arbitrate and the obligation to adopt substantive terms of a previous CBA. *Burns* provides guidance regarding the heightened duty to adopt a prior CBA, which typically occurs when the CBA provisions are assumed and under the alter ego

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[86] *Id.*
[87] *Id.* at 287–288.
[88] *Id.* at 288.
[89] *Id.*
[90] *AmeriSteel*, 267 F.3d at 271.
[91] *Id.* at 270.
[92] *Id.*
[93] *Burns*, 406 U.S. at 286.

doctrine, and distinguishes the substantial continuity factor and how it applies to the successor's duties.[94]

C. Howard Johnson Co. v. Hotel and Restaurant Employees

Two years after *Burns*, *Howard Johnson* took up the issue of labor law successorship with many hoping that the Supreme Court would clear up the conflicting reasoning of *Wiley* and *Burns*.[95] However, they were disappointed because the Court refused to "decide . . . whether there [was] any irreconcilable conflict between *Wiley* and *Burns*."[96] Instead, *Howard Johnson* simply answered the question of whether a new employer had a duty to arbitrate in a fact pattern that contrasted with *Wiley*.[97] Where *Howard Johnson* succeeds is in its ultimate outcome and reiteration of salient factors to be used in determining where a successor employer has a duty to arbitrate.

In *Howard Johnson*, Grissom, the predecessor employer, agreed to its sell equipment and lease its restaurant and motor lodge, which had all been operated by Grissom, to Howard Johnson.[98] Howard Johnson did not agree to the CBA between Grissom and the incumbent union and hired only nine out of 53 of the union-represented, former Grissom employees.[99] The union then filed an action against Howard Johnson citing its failure to hire all of Grissom's employees as an illegal "lockout."[100] The union sought to compel Howard Johnson "to arbitrate the extent of [its] obligations to the Grissom employees under the bargaining agreements."[101]

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[94] *Id.* at 282; 287.
[95] *See AmeriSteel*, 267 F.3d at 271.
[96] *Howard Johnson*, 417 U.S. at 256.
[97] *AmeriSteel*, 267 F.3d at 271.
[98] *Howard Johnson*, 417 U.S. at 251.
[99] *Id.* at 251–252.
[100] *Id.* at 252.
[101] *Id.* at 252–253.

In arriving at a decision, the Court chose to compare the salient distinctions between the facts presented in *Wiley* with the facts of the case at hand.[102] First, it emphasized the fact that *Wiley* involved a merger, "as a result of which the initial employing entity completely disappeared."[103] In contrast, *Howard Johnson* only involved the sale of some assets, and the original employer remained in existence.[104] This distinction was significant because, in *Wiley*, state successorship liability law "embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation."[105] Recognition of such state liability law supports a finding of a duty to arbitrate because it "may have been fairly within the reasonable expectations of the parties."[106]

Second, the Court stressed the importance of the fact that, in *Howard Johnson*, the former employer continued to exist, and accordingly the union "[had] a realistic remedy to enforce their contractual obligations[,]" whereas, in *Wiley*, the former employer ceased to exist, thus making arbitration essential between the union and the successor employer.[107] Third, and most important, in *Wiley* "the surviving corporation hired *all* of the employees of the disappearing corporation[,]" where in *Howard Johnson*, the new employer "hired only a small fraction of the predecessor's employees."[108]

Accordingly, the Court found that, based on these factors, there was no substantial continuity of identity in the business enterprise before and after Howard Johnson became the new employer. Therefore, Howard Johnson had no duty to arbitrate under the CBA.[109] Furthermore, the Court shed additional light on the scope of the "substantial continuity" factor,

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[102] *Meridian*, 583 F.3d at 71.
[103] *Howard Johnson*, 417 U.S. at 257.
[104] *Id.*
[105] *Id.* (quoting *Burns*, 406 U.S. at 286) (internal quotation marks omitted).
[106] *Id.* at 257.
[107] *Id.*
[108] *Id.* at 250, 258 (original emphasis included).
[109] *Id.* at 263.

in emphasizing that it includes "a substantial continuity in the identity of the work force across the change in ownership."[110] The Court held that the requisite continuity of the work force was present in *Wiley* because a "wholesale transfer" of employees occurred between employers; however, *Howard Johnson* does not meet this requirement because only a minority of employees were hired by the new employer.[111]

Howard Johnson did not make great strides, in terms of advancing and clarifying the successorship doctrine. *Howard Johnson* chose not to deal with the conflict of *Burns* and *Wiley*, and "instead walked a very narrow path."[112] However, aside from its shortcomings, *Howard Johnson* did constructively underscore the importance of "substantial continuity." *Howard Johnson*'s main contribution was its holding that a lack of substantial continuity would place a case outside the ambit of *Wiley*.[113] *Howard Johnson* merely applied the principles in *Wiley* to a situation where substantial continuity was easily recognized as not being present. In *Howard Johnson*, the Court "simply pointed out that, consistent with *Wiley*, and on *Wiley*'s own terms, the lack of substantial continuity meant that the Court needed to look no further" in determining whether a successor must submit to arbitration against its will.[114] *Howard Johnson* acknowledged and reinforced the policy outlined in *Burns*, in maintaining that a successor may be bound to arbitrate, but it will not be automatically bound to the substantive provisions of the predecessor's CBA or have any obligation to hire the predecessor's employees.[115]

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[110] *Id.*
[111] *Id.*
[112] *AmeriSteel*, 267 F. 3d at 271.
[113] *Id.*
[114] *Id.* at 272.
[115] *Id.*

IV. THE CIRCUIT SPLIT

In the wake of the Successorship Trilogy, lower federal courts have had no difficulty following *Burns*' mandate, in finding that unconsenting successor employers are not bound by the substantive terms of their predecessors' CBAs.[116] However, they have struggled with reconciling the holdings of the three Supreme Court cases.[117] Specifically, the courts have struggled with applying the duty to arbitrate to successor employers.[118] In *AmeriSteel*, the Third Circuit emphasized *Burns*, in finding no duty to arbitrate on successors despite the "substantial continuity of identity" factor being satisfied.[119] The Third Circuit held that continuity is necessary but not sufficient to find a duty to arbitrate, and, in light of *Burns*, no substantive terms can ever be imposed by an arbitrator, thus rendering arbitration futile.[120] Later, the same problem presented itself to the Second Circuit in *Meridian*, where a circuit split was created after the court held that "substantial continuity of identity" was sufficient in finding a duty to arbitrate for the successor.[121] The following section will explain the current circuit split and how these lower federal courts interpreted the conflict in the Trilogy.

A. AmeriSteel Corp. v. International Brotherhood of Teamsters

In *AmeriSteel*, AmeriSteel Corporation ("AmeriSteel"), a successor employer, purchased various assets of Brocker Rebar, the predecessor employer, including a manufacturing facility.[122] A CBA existed between Brocker Rebar and its employees' union, but AmeriSteel repeatedly insisted that it was not bound to it and therefore, had no duty to arbitrate under its terms.[123] However, AmeriSteel hired the majority of the union employees who had worked for Brocker

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[116] *See Id.* at 275–276.
[117] *Id.* at 277–278 (Becker, C.J., dissenting).
[118] *See generally, Id.*; *Meridian*, 583 F.3d at 79 (Livingston, J., dissenting).
[119] *AmeriSteel*, 267 F.3d at 265.
[120] *Id.*
[121] *Meridian*, 583 F.3d at 78.
[122] *AmeriSteel*, 267 F.3d at 265.
[123] *Id.* at 266.

Rebar and, thus, was obligated to bargain with the union.[124] Bargaining broke down between the parties, and AmeriSteel refused to recognize the union.[125] Thereafter, the union requested arbitration pursuant to the arbitration clause in the CBA.[126] AmeriSteel refused and sought to enjoin the union from proceeding to arbitration with AmeriSteel as a party.[127]

The Third Circuit attempted to navigate the Successorship Trilogy by examining each case individually.[128] In reviewing *Wiley*, the court found the holding to be limited to the merger context in which a predecessor employer disappears.[129] The Third Circuit then went on to identify "substantial continuity of identity" to be a necessary ingredient in finding a duty to arbitrate, yet not the sole factor in forcing a successor to arbitrate with the incumbent union.[130]

The court held that *Howard Johnson* did not resolve the conflict between *Wiley* and *Burns*, but believed that *Howard Johnson* did, however, make known the Supreme Court's focus when comparing *Wiley* and *Burns*.[131] *Howard Johnson* took "an expansive view of *Burns*, repeatedly extolling [*Burns*'] reasoning" and "downplay[ing] the significance of *Wiley*."[132] In reading the Trilogy, "*Burns* . . . provides more persuasive guidance than the limited holding in *Wiley*."[133] In holding *Burns* in higher regard than *Wiley*, the court found that, if an unconsenting successor were held to arbitrate under an existing CBA, "the substantive terms of the CBA could be enforced, and thus *Burns* cannot survive intact."[134] In applying *Burns*, the court found that AmeriSteel could not be bound by the substantive terms of the CBA; therefore no arbitration

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[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.* at 267.
[129] *Id.* at 268–269.
[130] *Id.* at 272, n.3.
[131] *Id.* at 271–272.
[132] *Id.* at 272.
[133] *Id.* at 273.
[134] *Id.* at 272.

award granted to the union, which necessarily would be based on the substantive terms of the CBA, could receive judicial sanction. [135] Thus, AmeriSteel could not be obligated to arbitrate, as the arbitration would serve no purpose.[136] Since there is an inability to hold successor employers to the substantive terms of a former CBA, AmeriSteel was found to have no obligations under the Brocker Rebar CBA.[137]

B. Local 348-S v. Meridian Management Corp.

In *Meridian*, Meridian Management Corporation ("Meridian") was awarded a contract by the Port Authority of New York and New Jersey to provide engineering and janitorial services at the Jamaica Air Train Terminal at John F. Kennedy International Airport.[138] Meridian elected to subcontract the janitorial services to Cristi Cleaning Services, Inc. ("Cristi") under a one-year contract.[139] At the time Meridian and Cristi entered the subcontract, Cristi had an existing CBA with a labor union representing its janitorial employees.[140] Meridian later lawfully terminated its subcontract with Cristi and decided to perform the janitorial services itself.[141] In doing so, Meridian chose to retain the majority of the Cristi employees who had previously worked at the terminal.[142] The incumbent union then requested that Meridian recognize it as the bargaining representative for the employees.[143] Meridian declined to do so and, in addition, refused to make CBA-mandated contributions to the union's Health and Welfare Fund.[144] The union sought to compel Meridian to submit to arbitration as required by the CBA.[145] Meridian, however, argued

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[135] *Id.* at 274.
[136] *Id.* at 265, 274.
[137] *Id.* at 277.
[138] *Meridian*, 583 F.3d at 66.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.* at 66–67.
[144] *Id.* at 67.
[145] *Id.*

that it was not a party to the CBA, and it should not be bound by any of its terms, including the arbitration clause.[146]

The Second Circuit followed *AmeriSteel*'s methodology in first analyzing each case in the Successorship Trilogy to find whether Meridian was required to arbitrate the issue of whether and to what extent it was bound by the former CBA.[147] However, unlike *AmeriSteel*, the Second Circuit determined the emphasis of the Trilogy to be the "central role of collective bargaining and arbitration in furthering the goals of national labor policy – specifically by avoiding industrial strife and encouraging the peaceful resolution of labor disputes."[148] In particular, *Meridian* found the protection of workers from sudden changes in the employment relationship to be of paramount importance when examining the successorship doctrine.[149]

The majority in *Meridian* placed supreme importance, when considering whether a duty to arbitrate exists, on the issue of whether there existed substantial continuity of identity of business enterprise, with a singular emphasis on the composition of the work force.[150] With this in mind, the court held that the duty to arbitrate should not be limited to mergers, as in *Wiley*, and contended, instead, that continuity of identity can occur in a variety of situations.[151] The court noted that Meridian hired the majority of Cristi's employees, who continued doing the same work in the same location that they had done for Cristi, and, therefore, found that there was a "substantial continuity of identity" between Meridian and Cristi.[152] Further, the court highlighted that the employees had worked for Meridian the entire time, even though Meridian

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[146] *Id.*
[147] *Id.* at 66.
[148] *Id.* at 72.
[149] *Id.*
[150] *Id.* at 74.
[151] *Id.*
[152] *Id.* at 74–75.

had no legal relationship with the workers, because Meridian was the general contractor when Cristi was performing under the subcontract between the parties.[153]

In considering these facts, the court found that, while Meridian's status as a successor employer does not automatically bind it to the substantive terms of the pre-existing CBA, it maintained substantial continuity of identity of business enterprise, including the composition of its work force, and, therefore, was required to arbitrate with the union under the terms of the former CBA.[154] Sufficient "indicia of substantial continuity" existed, so the issue of the extent to which a successor employer is bound by the substantive terms of a former CBA becomes a question for the arbitrator.[155] The court held that once submitted to arbitration, the arbitrator is "to bring his informed judgment to bear" in which, if any, of the provisions of the CBA will be imposed on the successor employer.[156] However, the court did not suggest any criteria for deciding this question, but did note that the arbitration procedure will follow the terms of the arbitration clause in the predecessor's CBA, so long as one exists.[157] The court found that enforcing a duty to arbitrate is the "most effective way to balance those interests recognized by the Supreme Court[,]" and is more effective than anything attempted or accomplished by the parties privately bargaining new terms to govern the relationship.[158]

The court concluded by recognizing and rejecting the Third Circuit's reasoning in *AmeriSteel*.[159] According to the Second Circuit, *AmeriSteel* "eviscerates the protection of employees represented by incumbent unions" and contradicts the holding of *Wiley*.[160]

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[153] *Id.* at 75.
[154] *Id.* at 66, 76.
[155] *Id.* at 76.
[156] Local 1115 v. B & K Investments, Inc., 436 F.Supp. 1203, 1208 (S.D. Fl. 1977); *Burns*, 406 U.S. at 286.
[157] *Meridian*, 583 F.3d at 83.
[158] *Id.* at 76.
[159] *Id.* at 78.
[160] *Id.*

V. ANALYSIS

While *Meridian* properly upholds the principle, expressed in *Wiley*, that an unconsenting successor employer can be bound to arbitrate under appropriate circumstances, the court errs in holding that a "substantial continuity of identity of business enterprise" is the only factor to consider in determining whether a duty to arbitrate exists. On the other hand, *AmeriSteel* ultimately provides the proper outcome in the circuit split, in holding that a successor is not bound to arbitrate when only a "substantial continuity of identity of business enterprise" exists. *AmeriSteel* correctly identifies "substantial continuity" as a "necessary ingredient," yet not the sufficient condition for finding a duty to arbitrate in a successor employer.[161] However, *AmeriSteel* fails to advance that logic in formulating its ultimate solution that no duty to arbitrate exists, and instead, contradicts *Wiley*, in forming an overbroad conclusion "that an arbitration clause of a CBA can never be enforced against an [unconsenting] successor."[162] *AmeriSteel* finds that the duty to arbitrate, found to be enforceable in *Wiley*, should not have been ordered because unconsenting successors cannot be forced to arbitrate when it will serve no purpose.[163] In finding that, as a logical consequence of *Burns*, a duty to arbitrate would be futile for unconsenting successors, *AmeriSteel* implies that *Wiley* has been overruled by *Howard Johnson* and *Burns*.[164] However, the Supreme Court has never acknowledged overruling *Wiley* in either *Burns* or *Howard Johnson*, and only the Court or Congress may overrule its precedent,[165] not the

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[161] *AmeriSteel*, 267 F.3d at 272, n. 3.
[162] *Id.* at 281 (Becker, C.J., dissenting).
[163] *Id.* at 265.
[164] *Id.* at 280.
[165] Agostini v. Felton, 521 U.S. 203, 235 (1997) (" [*S*]*tare decisis* does not prevent [the United States Supreme Court] from overruling a previous decision[.]" "[I]f a precedent of [the United States Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the United States Supreme Court] the prerogative of overruling its own decisions.")

Court of Appeals.[166] Therefore, *AmeriSteel* arrives at a proper conclusion in not imposing a duty to arbitrate, but does so using flawed reasoning.

On the other hand, *Meridian* properly recognizes *Wiley*'s continued vitality, but erroneously applies and interprets its holding. *Meridian* "confuses the circumstances in which a 'successor employer' has a duty to recognize and bargain with a labor union, with much more limited circumstances in which that employer is bound to arbitrate with a union under a [CBA] to which it has not agreed."[167] In *Meridian*, the court held that the successor employer is obligated to arbitrate after simply meeting the "substantial continuity" test, which is the same standard applied in imposing a duty to bargain with an incumbent union.[168] This interpretation would render the duty to bargain valueless because unions would have no interest in negotiating a new CBA, when an obligation to arbitrate, which would hold the successor to substantive terms of the old CBA, is imposed. Consequently, all successor employers who hire the bulk of a predecessor's employees would have a duty to arbitrate the extent to which they are bound by the prior CBA.[169]

In forming a proper solution to the question of when successor employers should be obligated to arbitrate, the courts should first look to long-established standards, where successors have been held to the terms of the CBA.[170] In doing so, a bright-line rule should be formed, which categorizes the various scenarios in which a duty to arbitrate will be found. A bright-line rule would, to a large degree, remove the confusion of the lower courts in applying the successorship doctrine. Under such a rule, a duty to arbitrate should be found when the successor employer: (1) implicitly or expressly assumes the CBA, (2) is an alter ego of the

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[166] State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).
[167] *Meridian*, 583 F.3d at 78–79 (Livingston, J., dissenting).
[168] *Id.* at 79.
[169] *Id.* at 80.
[170] *Id.* at 84.

predecessor, (3) merges with the predecessor employer, in a scenario where "substantial continuity" exists *and* the predecessor ceases to exist, or (4) satisfies both the "substantial continuity" test *and* another successor liability basis strongly favors and supports a reasonable expectation for imposing liability (*e.g.*, supporting state law).[171]

Under the first two scenarios, the assumption of the CBA and the alter ego doctrine, the circuits widely agree that a successor employer adopts the former CBA, and, thus, a duty to arbitrate must naturally follow, along with all other obligations of the former CBA.[172] The last two categories of the bright-line rule, however, are not as established as the former categories, and have never been a primary basis for imposing the entirety of the CBA on a successor employer. Historically, however, such factors have been considered to be important circumstances in finding a duty to arbitrate.[173]

Absent a finding of an alter ego successorship or assumption of the contract, the centerpiece of the analysis of when a successor can be bound to arbitrate is a finding of "substantial continuity of identity of the business enterprise."[174] In *Wiley*, once the Court concluded that "substantial continuity" existed, it looked to other factors, such as common law successor liability rules, to support a duty to arbitrate.[175] Furthermore, in *Howard Johnson* nowhere does the Court state that "substantial continuity" is the sole basis for finding a duty to arbitrate.[176] Thus, the successorship doctrine treats "substantial continuity" as a "necessary *but not sufficient* condition for concluding that a successor employer is bound to arbitrate under a

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[171] *Id.* at 84; *Burns*, 406 U.S. at 286 ("[The] narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation.")
[172] *Meridian*, 583 F.3d at 79.
[173] *Wiley*, 376 U.S. at 557.
[174] *AmeriSteel* 267 F.3d at 280, n.1 (Becker, C.J., dissenting).
[175] *Wiley*, 376 U.S. at 550.
[176] *Howard Johnson*, 417 U.S. at 256.

predecessor's CBA."[177] As previously mentioned, in analyzing "substantial continuity of identity of business enterprise" the *Fall River* factors must be satisfied, and, as noted in *Howard Johnson*, a particular emphasis is placed on the "continuity of work force."[178]

In the merger context, so long as "substantial continuity" is satisfied and the predecessor employer completely disappears, a successor employer will have a duty to arbitrate. It is equally significant that the predecessor ceases to exist after the merger because, in the absence of the former employer, the union loses the party against whom they can bring employment disputes. The survival of the predecessor employer is key to protecting the interests of the workers because the union will have a "realistic remedy to enforce their contractual obligations" against the surviving former employer.[179] Thus, merger, in this context, would erase the former employer and the workers' ability to resolve disputes; therefore the successor employer should retain a duty to arbitrate, so that the workers' rightful expectations are preserved.

Finally, a duty to arbitrate should also be found also when both "substantial continuity" is met and common law successor liability rules exist, which support a reasonable expectation that the successor employer would be liable for the contract.[180] In *Wiley*, the Court emphasized that the state law background rule supporting liability for the successor employers under predecessor contracts was important to the result.[181] Such background successor liability rules, when sufficiently strong, can create a reasonable expectation of continuing liability; thus support exists for the central "substantial continuity" factor, in finding a duty to arbitrate. Each of the cases of the Trilogy refers to the state law background as support to "substantial continuity," demonstrating the Court has used this factor as a partial explanation in finding a duty to arbitrate

[177] *Meridian*, 583 F.3d at 83 (Livingston, J., dissenting) (original emphasis).
[178] *Howard Johnson*, 417 U.S. at 263.
[179] *Id.* at 257; *Meridian*, 583 F.3d at 71.
[180] *Meridian*, 583 F.3d 81 (Livingston, J., dissenting).
[181] *Wiley*, 376 U.S. at 547–548.

and, also, does not consider "substantial continuity" to be an exclusive factor in determining when a duty to arbitrate exists.[182]

Chief Judge Becker, dissenting in *AmeriSteel*, offered an alternate reconciliation of the Trilogy, suggesting a "sliding scale" approach for determining what can be imposed on successors.[183] He proposed that by using the Successorship Trilogy as a guide, burdens, ranging from no obligations to the imposition of an entire CBA, should be imposed on successors based on the corresponding strength of the successor relationship.[184] The dissent seems to base the "sliding scale" test mainly on the presence of a merger or sale of assets, not as much on continuity of work force, thus ignoring the central consideration in imputing a duty to arbitrate identified in *Howard Johnson*.[185] A "sliding scale" approach fails for multiple reasons. First, such a test is exceedingly imprecise, and especially in an unsettled area.[186] Second, due to its malleability, a sliding scale can be easily abused and used as an excuse for pushing forward various policy agendas by either pro-labor union or pro-employer courts. Third, there are only three tiers in the sliding scale (*i.e.*, a duty to bargain, a duty to arbitrate, and an adoption of the terms of the predecessor's CBA); thus, the sliding scale ignores the standards for each of these obligations already established by the Supreme Court.

By imposing a duty to arbitrate on successor employers solely based on the "substantial continuity" factor, *Meridian* complicates an already widely recognized problem in successorship.[187] A finding of "substantial continuity" already imposes a duty to bargain on a successor; however, by *Meridian*'s holding, such a finding now imposes, not only a duty to

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[182] *See Id..*; *Burns*, 406 U.S. at 301–302; *Howard Johnson*, 417 U.S. at 263–264.
[183] *AmeriSteel*, 267 F.3d at 285 (Becker, C.J., dissenting).
[184] *Id.*
[185] *Id.*; *Howard Johnson*, 417 U.S. at 263–265.
[186] I.e., the successorship doctrine.
[187] McLeod, *supra*, at 285.

bargain, but also a duty to arbitrate. Imposing a duty to arbitrate in this context has a dangerous effect on the transactions by which a successor takes control of another business. An employer can become a successor and potentially become exposed to obligations, via a variety of transactions, such as a partial sale or total sale of assets, a lease, a subcontract, a competitive bidding process, a leveraged buyout, a stock purchase, or even a bankruptcy sale.[188] Thus, according to *Meridian*, in a multitude of common and frequent transactions, the heavier burden to arbitrate could now attach to a new employer, so long as "substantial continuity" is fulfilled. Even under the lesser burden to bargain, a trend of "union-avoidance" has previously been recognized in successor employer transactions.[189] Thus, by imposing a harsher duty to arbitrate on successors, *Meridian* exacerbates this risk, and, in turn, hurts the same labor unions and workers it attempts to protect in imposing a duty to arbitrate on successor employers.[190]

Successor employers "have no legal obligation to hire the old unionized employees or to even give them preference in hiring – even if the entity plans to continue doing the exact same work."[191] So long as the successor hires a minority of the old unionized employees or less, the successor will not be bound by the CBA, nor will it even be compelled to recognize or bargain with the union at all.[192] In effect, *Meridian* "[increases] the incentives for would-be successor employers to simply fire the unionized employees and start over[.]"[193] Such an outcome "is hardly a manifest victory for the cause of organized labor[,]" since it effectively devastates the very industrial peace and employee interests that the court lauded as an overriding policy concern in all successorship circumstances.[194]

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[188] *Id.* at 291.
[189] *Id.* at 296–297.
[190] *Meridian*, 583 F.3d at 86 (Livingston, J., dissenting).
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*

Further, the NLRA's antidiscrimination provision, Section 8(a)(3), which was designed to protect unionized workers from anti-union behavior, has been largely ineffective.[195] While "a new employer cannot refuse to rehire the old employees solely because they are in a union . . . employers will often be able to find ample business reasons to justify refusing to rehire old employees."[196] A mass non-hiring of predecessor union employees is typically not taken as sufficient in finding a discriminatory dismissal.[197] Instead, there must be direct and substantial evidence of anti-union sentiment by the successor employer, and this kind of evidence is seldom available from sophisticated employers.[198] Thus, although perhaps suspicious, a successor employer has the right to refuse to hire an experienced, unionized work force, in favor of unskilled employees without violating Section 8(a)(3).[199] Not only will such behavior displace skilled laborers causing industrial strife, strikes, and increased unemployment, but also will result in social turmoil and additional expenses for the employer.[200]

Even in avoidance of the lesser duty to bargain, successor employers have gone to great lengths by incurring added expenses and devising strategies to avoid hiring predecessor employees.[201] When skilled laborers have been dismissed in favor of a largely inexperienced work force, so that successor liability is avoided, a greater number of laborers are needed to do the jobs of former employees, resulting in lower productivity and greater inefficiency.[202] For example, at a meatpacking plant, where union workers were replaced by inexperienced laborers, the substitutes were 90% slower and turned out to be so incompetent that the meat had to be

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[195] McLeod, *supra*, at 297–298.
[196] *Meridian*, 583 F.3d at 86 (Livingston, J., dissenting).
[197] *Id.*
[198] *Id.*
[199] *Id* at 298.
[200] *Id.* at 297–299.
[201] *Id.* at 299.
[202] *Id.*

destroyed.[203] Such problems can also result in unnecessary expenses for the successor in defending a garden-variety of tort claims, such as product liability and workplace injuries, increased training expenses of inexperienced workers, and recruiting expenses in finding substitute employees. Thus, *Meridian*, creates a greater incentive for anti-union hiring behavior, so that "substantial continuity" is not apparent, and all union obligations associated with a CBA, to which the new employer was not a party, can be avoided.

Moreover, a duty to arbitrate could deter employers from even venturing into a successor transaction. The imposition of a duty to arbitrate may discourage and inhibit the transfer of capital.[204] Corporations may be reluctant to acquire other businesses if they believe they might be saddled with the other corporation's CBA.[205] Additionally, by imposing a duty to arbitrate, under the same standard used to find a duty to bargain, the obligations found in arbitration may not correspond to the relative economic strength of the parties.[206] Instead, when "substantial continuity" is satisfied, it is best to balance the bargaining advantage between employers and unions by the economic powers of the parties.[207] Labor policy is ill-served by binding parties to terms that do not correspond to the economic strengths of the parties.[208] For example, by imposing a duty to arbitrate, a union may be forced to retain terms that were made to a smaller employer, that are customized to those particular circumstances, and which it would not want imposed if a larger or more financially robust firm should acquire the business.[209] Under such a scenario, a duty to bargain would better serve both parties rather than a duty to arbitrate. Therefore, unwanted consequences likely will result from the imposition of *Meridian*'s

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[203] *Id.*
[204] *See Burns*, 406 U.S. at 288.
[205] *AmeriSteel*, 267 F.3d at 270 (Becker, C.J., dissenting).
[206] *Id.*
[207] *Id.*
[208] *Burns*, 406 U.S. at 288.
[209] *Id.*

erroneous holding, which imposes a harsher duty to arbitrate under the same standard as a duty to bargain.

VI. CONCLUSION

The successorship doctrine has long proven itself to be difficult to navigate, causing courts to confuse successor obligations, standards used to impose requirements, and national labor policy responsibilities. Therefore, unless the Supreme Court revisits this unclear area of law, the lower courts should adopt a bright-line rule, which firmly establishes when a duty to arbitrate should be imposed on successors. A bright-line rule eliminates subjective, and sometimes biased, pro-labor union or pro-employer interpretations of the Successorship Trilogy, which have further deepened the rift between the courts in applying a duty to arbitrate. Just as the Court set forth a factor-based test in imposing a duty to bargain, the same methodology should be applied to the duty to arbitrate, so that confusion can similarly be resolved. A bright-line rule serves to create and enforce expectations of both labor unions and successor employers, where the parties will then enter certain transactions with the understanding of the unavoidable duties and liabilities that come with the territory. Thus, unionized workers' interests will be preserved when changes present themselves in innocuous employer transitions, and successor employers will be fairly held to anticipated duties and liabilities. In turn, a great deal of the "union avoidance" gamesmanship, naturally resulting from *Meridian*, will be stopped dead in its tracks, so that successors can continue to enjoy a symbiotic relationship with labor unions, where the employer gets the benefit of a highly-productive and skilled labor force and the work force can fairly bargain the terms of such employment.

In effect, the toils and trials of the workingman would not be solved in their entirety; however, an unnecessary hemorrhaging of secured union jobs can be avoided, thus preserving

another day and avoiding another dilemma in "the working, the working, just the working life."[210]

[210] BRUCE SPRINGSTEEN, *Factory, on* DARKNESS ON THE EDGE OF TOWN (Columbia Records 1978).