COMPARATIVE LABOR LAW DOSSIER
SUCCESSION AND TRANSFER OF BUSINESSES IN THE UNITED STATES

Thomas C. Kohler
Concurrent Professor of Law and Philosophy
Boston College Law School (Newton, MA, U.S.A.)

1.a. Does the legal system of the United States establish a specific regulation regarding the rights of workers affected by a transfer of businesses? If so, is this rule the result of a supranational agreement?

United States law makes no special provisions for employees affected by the transfer of a business. Since employees are considered to be hired on an at-will basis, unless otherwise specifically agreed, they can be discharged at any time and for any reason that does not contravene a positive enactment of law.

One statute, the Workers' Adjustment and Retraining Notification Act (WARN Act), 29 U.S. Code § 2101, provides that employers with more than 100 employees must give notice 60 days in advance of plant closings or mass layoffs. This, of course, does not necessarily include a transfer of a business, unless, as a result, closings or layoffs will occur. General information about the statute and its requirements can be found at the U.S. Department of Labor website: http://www.dol.gov/compliance/laws/comp-warn.htm

2. What are the situations that determine the situation of «transfer of businesses»? How does the legal system in your country regulate the phenomenon of a transfer of business established in a collective bargaining agreement? And how does it regulate the situation of transfer of business derived from a transfer of a group of workers?

There is no special legal provision that describes the "transfer of business" in American labor and employment law. The transfer of a business whose employees are covered by a collective bargaining agreement in the United States raises the problem known as "successorship," *i.e.*, what duties or responsibilities does a successor employer have to employees who were covered by the terms of a collective bargaining agreement between their bargaining representative (union) and the "predecessor" employer? As the U.S. Supreme Court has stated:

> "*The question whether [an employer] is a "successor" is simply not meaningful in the abstract...* [T]*he real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative? The answer to this inquiry requires analysis of the interests of the new employer and the employees and the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of successor which is applicable in every legal contest.*" (*Howard Johnson Co. v. Detroit Local Joint Executive Board,* 417 U.S. 249, 262, note 9 (1974)).

The Supreme Court in *Howard Johnson* also has made clear that "*where the successor corporation is the 'alter ego' of the predecessor, where it is 'merely a disguised continuance of the old employer*'" courts will have "*little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor*." (417 U.S. 249 at 259, note 5)

I will outline the law under the National Labor Relations Act, as interpreted by some key U.S. Supreme Court holdings. I will then address some special problems that arise in arbitration of "work preservation" and "successor and assign" clauses in collective bargaining agreements.

2.1. Successorship and the NLRA

The question in successorship cases is whether any duty exists on the part of the successor employer (a) to recognize the union that represented the predecessor's employees and (b) whether and to what extent, if any, the successor employer is bound by the terms of the collective bargaining agreement between the predecessor employer and the union that represented its employees. With the above-mentioned principles in mind, an outline of the law:

1. Firstly, a "successor" employer is under no legal obligation under the National Labor Relations Act to hire any of the predecessor's employees. As long as the successor does not discriminate, on the basis of anti-union animus, in the hiring process, the successor is free (a) to set the terms and conditions which it will offer employment and (b) to select those whom it wishes as employees. The successor has "the right not to hire any" of the predecessor's employees. See, *Howard Johnson*, 417 U.S. at 262.

As the Supreme Court stated in its decision in its *Howard Johnson* opinion, quoting from its earlier decision in *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972), "*nothing in the federal labor laws 'requires that an employer ... who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be assumed by the employer*." 406 U.S. at 280, n.5. … *Burns* emphasized that "[a] *potential employer may be willing to take over a moribund business only if he can make 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 those changes impossible and may discourage and inhibit the transfer of capital*." (406 U.S. at 287-288).

These principles exemplify the preference for capital mobility over employment stability that characterizes American employment law generally.

2. Any duty of a successor employer to recognize and to bargain with the union that represented the predecessor's employees only occurs if and at such time when the successor hires, as a majority of its workforce, the employees of the predecessor. The duty to recognize and to bargain with the union that represented the further conditioned by the following considerations:

(a) The predecessor's employees must continue to comprise "a unit appropriate for bargaining," *i.e.,* they must continue to share a "community of interest" in the new employer's organizational structure. In other words, if the successor's "operational structure and practices" so significantly differ from those of the predecessor, or the work performed by the predecessor's employees no longer is of the same sort and performed under similar conditions, the bargaining unit may no longer be appropriate, and no duty to bargain will attach.

(b) There will be no duty to recognize and bargain if the employer has a good faith, reasonable doubt as to the union's continued representative status among the predecessor's employee complement.

3. The successor employer's duty to recognize the union and to bargain with it becomes perfected only when the successor employer hires as a majority of its workforce the predecessor's employees. As previously mentioned, this does not mean that the successor necessarily is bound by the collective bargaining agreement between the union and the predecessor. As the Supreme Court explained in its *Burns Int'l Security Services* opinion, "*although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective-*

bargaining contract negotiated by their predecessors but not agreed to or assumed by them."

This rule reflects, in part, the principle of "free collective bargaining" central to the American scheme of collective labor law, which forbids the state from imposing terms on the parties. Under § 8 (d) of the NLRA, the duty to bargain "in good faith" that binds both the parties "*does not compel either party to agree to a proposal or require the making of a concession*." The NLRA forbids an employer to make unilateral changes in "mandatory terms or working conditions" without first bargaining to impasse with the union. However, as the Supreme Court explained in *Burns,* "[i]*t is difficult to understand how [a successor employer] could be said to have changed unilaterally any pre-existing term or condition of employment ... when it had no previous relationship whatsoever to the bargaining unit…*" (406 U.S. at 294).

4. To summarize: a successor employer generally is free to set the initial terms of employment, and to hire whomever it chooses, as long as it does not discriminate on the basis of anti-union animus against employing the predecessor's employees. It has no duty to hire any of the predecessor's employees. The duty to recognize and bargain with the union representing the predecessor's employees only attaches, as explained above, at such time when those employees constitute the majority of the successor employer's workforce.

Nevertheless, the Supreme Court has explained that "[a]*lthough a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employer before he fixes the terms. In other situations, however, it may not be clear until the successor has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of employees in the unit as required by § 9 (a) of the Act*."

For an example of the application of the "perfectly clear" successor rule, see *Dupont Dow Elastomers, LLC v. NLRB,* 296 F.3d 495 (6th Cir. 2005).

5. The Question of what constitutes a "representative complement" of employees under *Burns.*

As just mentioned, in *Burns,* the Supreme Court stated that whether a successor employer has a duty to bargain with the union that represented the predecessor's

employees "*may not be clear until the successor has hired his full complement of employees.*" How might it be determined that a successor has hired such a "complement of employees," and through so doing, has triggered the duty to recognize and bargain with the union that represented the predecessor's employees?

This situation was treated in the Supreme Court's opinion in *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27 (1987). There, Sterlingwale Corp. had operated a textile dyeing and finishing plant in Fall River, Massachusetts for over 30 years. As long as Sterlingwale Corp. had been in existence, its employees were represented by a union.

Sterlingwale experienced a business decline and it ceased operations in the late summer of 1982. A former Sterlingwale company officer and the president of one of Sterlingwale's major customers formed the Fall River Dyeing & Finishing Corp. and Fall River acquired the plant, real property and equipment owned by Sterlingwale.

In September of 1982, Fall River began operating out of Sterlingwale's former facilities and it began to hire employees. Fall River advertised for workers and supervisors in a local newspaper, and one of the organizer's of Fall River also personally made contact with several prospective supervisors. Fall River hired 12 supervisors, of whom 8 had been prior Sterlingwale supervisors, and 3 had been Sterlingwale production workers.

Fall River planned initially to hire one full shift of workers –55 to 60 employees– and then planned to "*see how business would be*" after hiring them. If business permitted, Fall River hoped to expand to two shifts. The first shift of employees spent 4 to 6 weeks in start-up operations, and another month in experimental production.

In mid-October of 1982, the union that had represented the former Sterlingwale employees requested that Fall River recognize it as the collective bargaining representative of the Fall River production workers, and to begin bargaining with it. Fall River refused this request as legally groundless. At that time, 18 of Fall River's 21 employees were former employees of Sterlingwale.

By November of 1982, Fall River had employees in a complete range of positions and was engaged in production and in handling orders. By mid-January 1983, Fall River had an entire shift of workers employed. Of this shift of 55 employees, 33 had been employees of Sterlingwale. By mid-April, Fall River had 2 shifts of employees. For the first time, ex-Sterlingwale employees were a minority, but barely: 52 to 53 of 107 employees.

The union filed an unfair labor practice charge with the National Labor Relations Board, alleging that Fall River unlawfully refused to recognize the union and to bargain with it. The NLRB concluded that Fall River was a successor to Sterlingwale, and that the employees worked under the same conditions, on the same machines, doing the same type of work under the supervision of largely the same supervisors and that the production processes were unchanged. The NLRB held that Fall River, as the successor employer, had a duty to bargain that perfected in mid-January, when it employed a "representative complement" of employees.

The Supreme Court examined its holding in *Burns* and upheld the NLRB's interpretation and application of it in this case. The Court held:

(a) That the NLRB was justified in applying its "*continuing presumption of majority support*" doctrine on the facts of this case. According to Board doctrine, approved by the Supreme Court, a union enjoys an irrebuttable presumption of majority support for a year, after which it enjoys a continuing (but rebuttable) presumption of majority support thereafter. This presumption is intended to stabilize the bargaining relationship and to promote industrial peace. The Court found that the "*rationale behind the presumptions is particularly pertinent in the successorship situation... During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it... Accordingly, during this unsettling transition period, the union needs the presumption of majority status to which it is entitled to safeguard its members' rights and to develop the relationship with the successor.*"

    The Court also noted that, "*to a substantial extent the applicability of Burns rests in the hands of the successor. If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation*" under the NLRA is activated.

    Construing its *Burns* decision, the Court held "*that a successor's obligation to bargain is not limited to a situation where the union in question has been recently certified. Where, as here, the union has a rebuttable presumption of majority status, this status continues despite the change in employers.*"

(b) The Court then proceeded to apply the 3 rules that govern the determination of successorship. These are:

(i) Substantial continuity of the business: factors include whether the business of the predecessor and successor are substantially the same; whether employees perform the same type of work under the same or similar conditions and with substantially the same supervision; whether the production processes remain similar, the successor produces the same sort of product, and has the same sort of customers.

The Court also noted that the hiatus between Sterlingwale's closure and Fall River's start-up was not decisive. The Court indicated that a hiatus was only one factor in determining substantial continuity and relevant only where there are other indicia of discontinuity. Where other factors indicate continuity, and the hiatus is part of a normal business start-up, the "totality of the circumstances" will present a successorship situation.

(ii) Substantial and representative complement rule: the factors here are whether the job classifications designated for the operation were filled or substantially filled; the size of the complement on the date and the time expected to elapse before a substantially larger complement would be hired; and the relative certainty of the employer's expected expansion.

(iii) The "continuing demand" rule: a union's demand to represent employees, made prematurely and rejected by the employer, remains in effect until the time the employer has engaged a "substantial and representative complement."

2.1. "Successor and Assign" Clauses and Successorship Issues:

In American labor law, disputes over the interpretation and application of the terms of a collective bargaining agreement typically are resolved through binding arbitration, a process whose procedures and limits are determined by the parties themselves. Federal labor law has been construed by the Supreme Court to permit courts to order the specific performance of the promise to arbitrate. In other words, parties can be enjoined against their refusal to arbitrate, and a strike over an arbitrable grievance can be enjoined. Such orders are frequently referred to as "injunctions in aid of arbitration," *i.e.,* the injunction is issued to assist in preserving arbitration as an institutional process.

A collective bargaining agreement may contain "work preservation" and/or "successors and assigns" language. Work preservation language seeks to prevent an employer from assigning work done by the represented employees to workers outside the unit or the company (*e.g.*, by "outsourcing"). Successor and assign language state that the collective bargaining agreement between the employer and a union will bind all

"successors and assigns" or may require the predecessor employer to require a successor to take the terms of the bargaining agreement as part of any sale or assign of the company.

In the *Howard Johnson Co.* case, the predecessor employer (the Grissom family) owned a restaurant and hotel, which they operated as a francisee of Howard Johnson, then a well-known chain. The Grissom's had a collective agreement with the union that represented the employees at the hotel and restaurant. Grissom sold the business's chattel property and leased its real property to Howard Johnson Co,, which assumed direct operation of the hotel and restaurant.

Howard Johnson Co. disclaimed the collective bargaining agreement, discharged the Grissom's employees, and hired a new complement, which included very few of the Grissom's former employees. The union representing those employees sought an injunction against Howard Johnson which would have required it to arbitrate the effect of the "successor and assigns" language in the collective agreement made between the Grissom's and the union.

Relying in part on the *Burns* case discussed above, the Court reversed a lower court's decision granting such an order. Among other things, the Court expressed surprise that the union did not seek to enjoin the sale by Grissom's and seek an order requiring Grissom to arbitrate the effect of the successors and assigns language. The Court also noted that Howard Johnson could not be bound by either the collective agreement or the arbitration language in it, since they were not a "successor" employer under *Burns.* Distinguishing a prior case involving somewhat similar facts, the Court also noted that the Grissom corporation remained in existence, and the remedy here was to arbitrate the dispute with it.

Although it goes beyond the bounds of the questions posed here, one might note that, generally speaking, "successor and assigns" language has proved rather difficult to enforce.

3. Is the dismissal which its sole cause is the transfer of the business considered null/void (in the sense that the only effect is the worker's reinstatement)?

Generally speaking, no. See answer Q2 above.

4. Does the legal regulation allow the transferee to modify the labor conditions of the workers affected by the transfer when these labor conditions are regulated in a collective bargaining agreement?

Yes: see answer Q2 above.

5. Does the legal regulation allow the modification of the labor conditions of the workers affected by the transfer when they are not regulated in a collective bargaining agreement?

As explained in answer Q1, since there is no general regulation restricting transfers, the answer is no.

6. What is the regulation regarding pension commitments that the workers affected by the transfer had with the transferor?

Pension or other obligations that fall within the scope of the Employee Retirement income and Security Act of (ERISA) 1974, 29 U.S.C. Ch. 18, will be regulated by the terms of this statute. For general information, see: http://www.dol.gov/dol/topic/health-plans/erisa.htm. This is a very complex statute, and space limits further explication here.

In the case of a bankruptcy where employees are represented for the purposes of collective bargaining, see generally Q10 below.

7. Is the transferee liable for the labor debts (wages, Social Security...) that the workers affected by the transfer had with the transferor?

Generally speaking, a successor corporation assumes all liabilities of the predecessor; these can, of course, be negotiated over by the parties as part of a sale.

8. If among the workers affected by the transfer are workers' representatives, do they maintain their representative status in the company of the transferee?

See answer Q2 above.

9. Does the legal regulation include information and consultation rights in favor of the workers affected by the transfer and/or their legal representatives in the company of the transferee and/or the transferor? What are the consequences of a breach of these information and consultation obligations?

Unless the employees are represented for the purposes of collective bargaining, they have no consultation rights. They may be required to receive notice under the WARN Act: see Q1 above.

In the collective bargaining context, it can depend on the language of the collective agreement, as well as the nature of the transaction. There would generally be at least a right to bargain the effects of a decision, but this is fact driven and cannot be answered easily in the abstract.

10. Is there a special regulation if the transfer of the business takes place in a context of a bankruptcy proceeding?

Very broadly speaking, unpaid wages or obligations to employees are considered unsecured liabilities and are given no preference.

The rejection of a labor agreement as an executory contract is governed by the provisions of 11 U.S.C. § 1113, which requires a debtor in possession or a bankruptcy trustee to maintain the collective agreement in effect while conferring, subject to the duty of good faith, concerning the modification of its terms. Any modification or the complete rejection of the collective agreement must be "*necessary to permit the reorganization of the debtor*"; must be fair and equitable to all the parties; must be communicated to the union before filing an application with the bankruptcy court seeking rejection of the collective agreement.

The bankruptcy court must rule on applications for modification within a short period, and may permit "interim changes" to the terms of the agreement by the debtor in possession or the trustee if such changes are "*essential to the continuation of the debtor's business, or in order to avoid irreparable damages to the estate*."

The courts have held that 11 U.S.C. § 1113 does apply to retiree benefits, and that its procedures must be followed before a debtor in possession or a trustee may alter or reject retiree benefits paid subject to the terms of a collective agreement.

Empirical studies have shown that in the majority of cases, bankrupt companies are able to shed their obligations in bankruptcy proceedings.